

U.S. Department of Labor

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Issue Date: 13 November 2012

Case No.: 2011-LHC-01595

OWCP No.: 04-037271

In the Matter of

DAVID RIDDLE,
Claimant,

v.

**HARSCO CORPORATION/
ACE AMERICAN INSURANCE COMPANY,**
Employer/Carrier, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest.

Appearances:

Bernard J. Sevel, Esq., Arnold, Sevel & Gay, P.A., Towson, MD
For Claimant.

Mary G. Weidner, Esq., Humphreys, McLaughlin & McAleer, LLC, Baltimore, MD
For Employer/Carrier.

Before: Pamela J. Lakes
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et. seq.*, ("the Act"), brought by David Riddle ("Claimant") against Harsco Corporation ("Employer"), as insured by Ace American Insurance Company ("Carrier"). The Director of the Office of Workers' Compensation Programs in the U.S. Department of Labor ("Director") is not directly involved in this case, as no claim has been filed for special fund relief under Section 8(f) of the Act, 33 U.S.C. § 908(f).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments made by the parties. Where

pertinent, I have made credibility determinations concerning the evidence. As Claimant is a resident of Maryland, and he filed this claim for compensation with the District Director in Baltimore, Maryland, the law of the U.S. Court of Appeals for the Fourth Circuit applies.

PROCEDURAL HISTORY

This claim arises out of an injury Claimant sustained to his left knee on December 24, 2004 while working at Sparrows Point Terminal in the Port of Baltimore. (ALJ 1, 2).¹ On June 3, 2011, this case was referred for a formal hearing, along with Claimant's and Employer's Pre-Hearing Statements, Form LS-18.

On February 9, 2012 a hearing was held before the undersigned administrative law judge in Washington, D.C. Claimant's Exhibits 1 through 14 were admitted, as were Employer's Exhibits 1 through 12. (Tr. 7-13). Claimant and Employer also submitted pretrial statements, which I admitted as ALJ 1 and ALJ 2. (Tr. 14). At the hearing, I noted that the record was closed but I allowed the parties until May 30, 2012 to simultaneously file post-hearing briefs. (Tr. 192). This deadline was subject to extension by stipulation.

On March 1, 2012, Claimant filed a Motion to Reopen the Record for the limited purpose of submitting Claimant's answer to Employer's Interrogatory No. 25. In the interrogatory, Claimant was asked to relay his efforts to follow up on certain job leads. As this issue was raised at the hearing and Claimant was unable to refresh his memory given that he is illiterate and could not read the interrogatory, Claimant's counsel requested that it be admitted post-hearing. On March 29, 2012, I issued an order reopening the record for this limited purpose and admitting this exhibit as ALJ 3.

On June 15, 2012, Claimant timely filed his post-hearing brief, as extended by stipulation. Claimant submitted an addendum to its brief on June 29, 2012, and Employer submitted its post-hearing brief on July 3, 2012. This case is now ready for a decision.

ISSUES

The following issues were referred for a hearing (as set forth in the LS-18 forms):

- (1) Nature and extent of disability;
- (2) Date of maximum medical improvement;
- (3) Wage loss; and
- (4) Lack of cooperation with vocational rehabilitation.²

¹ In this decision, "ALJ" refers to Administrative Law Judge exhibits, "CX" refers to Claimant's Exhibits, "EX" refers to Employer's exhibits, and "Tr." refers to the transcript of the hearing before me.

² The latter two issues are subsumed in the issue of nature and extent of Claimant's disability, and I will not consider them separately.

STIPULATIONS

The following stipulations were agreed to by Claimant and Employer at the hearing and in separate prehearing submissions:

- (1) The Longshore and Harbor Workers' Compensation Act applies to this claim.
- (2) Claimant injured his left knee on December 24, 2004.
- (3) An employer/employee relationship existed at the time of the injury.
- (4) The injury arose out of and in the course of Claimant's employment.
- (5) Employer was timely notified of the injury.
- (6) Claimant is entitled to compensation and medical benefits.
- (7) Claimant has reached maximum medical improvement.³
- (8) Claimant has been paid temporary total disability benefits from December 25, 2004 and continuing until present.
- (9) Claimant's average weekly wage was \$1,406.72 with a compensation rate of \$937.81.⁴

(ALJ 1, 2; Tr. 14).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTS

Claimant's Testimony

Claimant was 59 years old at the time of the hearing and testified that he had worked in heavy equipment for approximately 30 years. (Tr. 23). He injured his left knee on December 24, 2004 while working for Employer at the Sparrows Point Terminal in Baltimore, Maryland. (Tr. 23, ALJ 1). Claimant had been working for Employer for approximately six months. (Tr. 23). He testified that his career has always involved heavy labor; he previously did construction work and was also a brick layer's helper. (Tr. 24).

³ Although the parties agree that Claimant has reached maximum medical improvement ("MMI"), they dispute the date. Claimant asserts that he reached MMI on August 6, 2009, whereas Employer argues that he reached MMI on January 14, 2009. (ALJ 1, 2).

⁴ Although the hearing transcript reads that the parties stipulated to an average weekly wage of \$1,046, both pre-hearing statements list Claimant's average weekly wage as \$1,406. Accordingly, it appears the figure in the transcript is a typo, particularly as the compensation rate was correctly calculated based on \$1,406.72. (Tr. 14).

Claimant testified that he was sent to Oakwood Elementary Handicap School in the third grade because he was told that he could not keep up in his regular school. (Tr. 25). He testified that he dropped out of this school shortly thereafter and his mother then sent him to the adolescent unit at Crownsville State Hospital, where he lived until he was 16 years old. (Tr. 25-26). At that point, Claimant went to work with his brother-in-law as a brick layer's helper. (Tr. 26). He never received any formal education after the third grade. *Id.*

Claimant stated that he is unable to read or write; however, he can recognize stop signs by their shape and color. (Tr. 32-33). Although he is able to sign his name, he testified that he would not be able to write a letter or grocery list. (Tr. 33). He stated that although he can read simple, two-letter words such as "it," he could not read an entire sentence. *Id.* However, he can recognize letters. (Tr. 34).

Prior to his injury, Claimant found his way to work by doing a dry run with his wife or a friend; he received his work assignment on Friday or Saturday, and his employer would write the directions down so someone could show him. (Tr. 26-27, 54). Because Claimant is unable to read street signs, his wife would pick out landmarks for him. (Tr. 27). However, for the majority of his 30-year career, Claimant would ride with another operator to work; it was only when he got his new job at Sparrows Point that he began to drive regularly, as he lived only five minutes away. (Tr. 58). He stated that he received his driver's license by taking an oral exam and that it took him eight attempts. (Tr. 56).

In 2006 and 2007, Claimant worked with a vocational expert, Mr. Klitzner, who was initially retained by Employer but testified on Claimant's behalf. (Tr. 80). Claimant saw Mr. Klitzner a few times between December 2006 and April 2007; however, he then stopped working with Mr. Klitzner because he needed another knee surgery. (Tr. 47; CX 4). Claimant testified that Mr. Klitzner encouraged him to attend literacy programs. (Tr. 43). Claimant stated that his wife works for a company that helps seniors and she knew of a program where seniors help others learn how to read. *Id.* Claimant attended about four sessions but he stated that "nothing took." (Tr. 43-44). In 2009, Claimant then began working with Ms. Byers, a vocational expert who testified on behalf of Employer. (Tr. 44). He testified that he attended literacy classes at the library as she suggested; however, the first two classes focused on how to get your high school diploma. (Tr. 42). Although subsequent classes focused on literacy, Claimant stated that the volunteers often did not show up, and he became frustrated because he had trouble following the lessons. *Id.*

Between 2007, when Claimant stopped working with Mr. Klitzner, and 2009, when he began working with Ms. Byers, Claimant did not attend any literacy programs, as he was in very poor health. (Tr. 44). Claimant has had four cardiac surgeries since his accident in 2004, two of which he had after he stopped working with Mr. Klitzner. (Tr. 45-48). While working with Ms. Byers, Claimant also had to stop meeting with her because he had surgery in August 2010 to remove a tumor in his throat. (Tr. 48; EX 10). Claimant testified that the tumor returned about a year later and he had another throat surgery. (Tr. 48-49). Claimant stated that his cardiologist has not put any limitations on his physical activities, however, due to his knee; his doctor limits him to lifting no more than 15 pounds. (Tr. 61).

Claimant testified that he has received job leads from Ms. Byers; however he has not filled out any applications since his last surgery in 2010, which was on his hip. (Tr. 50). During the hearing, Claimant had trouble recalling which jobs he had applied to and which he had not. *Id.* He testified that he has not applied to the recent leads she sent in 2010 or January 2011 because they were all jobs that he could not do from a physical standpoint or because of his illiteracy. (Tr. 50-51). Claimant stated he was not aware that his doctor had approved of some of the job leads from a physical standpoint. (Tr. 52-53).

With respect to the prior job leads Ms. Byers sent, Claimant testified that he would not be able to work as a valet because he cannot drive a manual transmission. (Tr. 38). Furthermore, he stated that he would have trouble getting into some of the smaller cars, as he has difficulty bending his knee. *Id.* Claimant could not remember if he applied to the positions as a shuttle car driver for the elderly, but he believed he had to read street signs for these positions. (Tr. 39). In addition, he testified that he would not be able to work as a courtesy driver in Silver Spring because that is too far from his home, and he would experience too much pain in driving there. *Id.* He also testified he would not be able to handle delivery positions due to his illiteracy. (Tr. 40). He stated that some employers would not give him an application after he divulged that he could not read or write. (Tr. 41).

Claimant used a cane at the hearing and testified that he uses it at all times to help with his balance except when he is in his house. (Tr. 29). He testified that he can only walk about half a block before he experiences significant pain and numbness in his leg, and he needs to alternate between sitting and standing so that his leg does not hurt and become numb. (Tr. 36-37). Claimant stated that his left leg does not have enough power to push the clutch in on a manual transmission. (Tr. 28). He testified that he drives a truck because it is higher off the ground and has a bar that he can use to pull himself into the vehicle. (Tr. 27). He needs help getting into his wife's car because it is too low to the ground, and it is painful for him to bend and hold his weight; he needs to roll to get out of her car. (Tr. 28). Claimant stated that he is physically able to drive short distances, but within 5 to 15 minutes, his foot starts to swell up and the pain in his knee becomes very bad. (Tr. 27, 37).

Claimant testified that on a typical day, it takes him about 45 minutes to get up and straighten out his knee, as it is very cramped. (Tr. 31-32). He stated that he sits on a chair while showering and that he feels constant pain. (Tr. 32).

Testimony/Reports of Martin Klitzner

Martin Klitzner, a vocational consultant, testified as an expert witness on behalf of Claimant. He stated that his work ranges from helping those with developmental disabilities to those with workers' compensation claims. (Tr. 75). Mr. Klitzner has been working in rehabilitation since 1972 and has a master's degree in Rehabilitation Counseling. (Tr. 76). I found him to be qualified as an expert witness. (Tr. 79).

In late 2006/early 2007, Employer's insurance carrier requested Mr. Klitzner's services. (Tr. 80). When Mr. Klitzner met with Claimant, he deemed him to be illiterate; he stated that he

was unable to evaluate Claimant's reading and math skills because Claimant did not have the base level of literacy necessary to take a career placement test. *Id.* Based on his meetings with Claimant, he believed him to be totally unemployable. (Tr. 82).

Mr. Klitzner stated that his vocational efforts with Claimant were impeded due to Claimant's health issues. (Tr. 101). He noted in a February 2007 report that Claimant had been hospitalized for pneumonia, and on March 26, 2007, Mr. Klitzner wrote that Claimant was still recuperating so he was not able to do any job searches with him. (CX 4). Mr. Klitzner conceded that although he worked with Claimant from December 2006 through April 2007, due to Claimant's illnesses, he was only able to work with him for December and January. (Tr. 102). He stopped working with Claimant in April 25, 2007 because of Claimant's upcoming knee replacement surgery. (CX 4).

Mr. Klitzner conceded that he had questioned Claimant's motivation to return to work from the time he started working with him. (Tr. 110). Moreover, he testified that it was his understanding that Claimant had not divulged to his previous employers that he could not read or write, while in court Claimant testified that he would tell new employers that he lacked those skills. (Tr. 109). Mr. Klitzner conceded that now telling potential employers that he could not read and write would underscore Claimant's motivation in returning to work. (Tr. 110). Nonetheless, Mr. Klitzner testified that it was not Claimant's lack of motivation that he felt kept him from working but rather his physical limitations, illiteracy, and lack of transferable skills. (Tr. 111, CX 4).

Based on his initial work with Claimant, Mr. Klitzner produced vocational status reports on the following dates: December 31, 2006; January 24, 2007; February 28, 2007; March 26, 2007; and April 25, 2007. (CX 4). In the initial report, Mr. Klitzner noted it was virtually impossible to find Claimant a job due to his physical limitations and his illiteracy. *Id.* Subsequent reports note that Claimant's "prognosis for return to work is poor" or his "work and rehabilitation potential is very guarded." *Id.* In the reports, Mr. Klitzner cited Claimant's age over 50, complete illiteracy, lack of transferable skills, physical limitations, and unrelated medical problems. *Id.* In the first report, Mr. Klitzner noted that Claimant also had questionable motivation to work; however, in his second report, he noted that Claimant had strong motivation. *Id.* In his final report dated April 25, 2007, Mr. Klitzner wrote that the case was being closed because Claimant was scheduled to undergo a total knee replacement. *Id.* With respect to Claimant's participation in the rehabilitation process, Mr. Klitzner wrote, "lack of follow through on job leads or does so in an unenthusiastic manner." *Id.*

On December 17, 2010, Mr. Klitzner produced another report at Claimant's request, which he based on his review of Claimant's medical records and a December 9, 2010 interview with Claimant. (CX 2). Mr. Klitzner continued to believe that it would be virtually impossible for Claimant to find work due to his illiteracy and light duty physical limitations with additional limitations on standing and walking. *Id.* He elaborated that the following factors would inhibit Claimant from finding a job: he is limited to sedentary work; he has no transferable skills, as he previously worked in heavy equipment; he has not worked in six years; he is fifty-seven; he cannot read or write; and his vocational testing from September 2006 revealed that he is below first grade level in his reading and math skills. *Id.*

Testimony/Reports of Barbara Byers

Barbara Byers, a vocational expert and president of Atlantic Vocational Services, testified as an expert witness on behalf of Employer. (Tr. 112). Ms. Byers has a master's degree in Rehabilitation Counseling and is certified by the Department of Labor as a rehab counselor. (Tr. 113). Based on her credentials, I found Ms. Byers qualified to testify as an expert witness. (Tr. 115).

Ms. Byers testified that she received a referral in August 2009 requesting that she complete a vocational evaluation and a labor market survey for Claimant. (Tr. 115). She stated that once she completed the evaluation, she identified jobs in Claimant's area for which he would be qualified based on his age, work experience, and physical limitations. *Id.* She stated that she also checked with each employer to ensure that a high school diploma was not required and that the respective job did not require any significant reading or writing. *Id.* Notes reflect that Ms. Byers conducted an initial vocational evaluation of Claimant on September 17, 2009. (EX 7). Ms. Byers testified that based on her testing, Claimant scored 62 in reading, which is well below average; however, he was able to read simple words such as "finger," "animal," "straight," "doubt," and "horizon." (Tr. 116). Furthermore, she noted that he was able to sound out some words and get close to the spelling even though he mispronounced them horribly. *Id.* She felt this indicated some ability to improve his reading skills with one-on-one attention. *Id.* In addition, Claimant scored a 76⁵ on the math portion, which is below average but much better than his reading score. (Tr. 117). She testified that he was able to do basic arithmetic problems with multiplication, division, and some fractions. *Id.*

In addition, Ms. Byers administered a general IQ test, which was non-verbal. *Id.* Claimant scored 83, which she testified is below average but reveals some intelligence, which led her to believe that he could benefit from some literacy training. *Id.* Ms. Byers testified she has been a vocational evaluator for almost 40 years and has never been unable to test someone due to illiteracy. (Tr. 118).

On December 18, 2009, Ms. Byers produced a labor market survey report. (EX 8). She noted that she relied on the *Dictionary of Occupational Titles* and the *Occupational Outlook Handbook* and that she reviewed Claimant's medical records from Dr. York, Dr. Waldman, and Baltimore Washington Hospital. *Id.* She noted in her report that Claimant uses a cane and a knee brace and that he reported that he can sit for 30 minutes, stand for 30 minutes, and walk half a block. *Id.* She also wrote that Claimant has difficulty bending his knee and can only drive for about 30 minutes. *Id.* In addition, she noted that he avoids stairs and ladders and walking on uneven ground. *Id.* She reported that a functional capacity evaluation done on August 7, 2006 found Claimant functioning in the light to medium physical demand range, however, during her testimony, she clarified that she limited her labor market survey to jobs that had light physical restrictions. (EX 8, Tr. 119). Ms. Byers attached to the report a list of 6 jobs for which she felt

⁵ Although the trial transcript notes that he scored a 36 on the math portion, Ms. Byer's report reflects that he scored a 76, which makes sense in the context of the testimony, given that Ms. Byer testified he did better on the math portion.

Claimant was qualified. (EX 8). Ms. Byers sent these job leads to Claimant in October through December 2009. *Id.*

On December 18, 2009, Ms. Byers also sent these jobs leads to Dr. Waldman, who had treated Claimant previously, asking whether the six positions she identified were within Claimant's physical capabilities. (EX 9). Dr. Waldman disapproved of the parking valet position but approved of four others: K-Mart greeter, parking lot cashier for Landmark Parking, courtesy driver for MileOne, and street sweeper for Anchor Staffing.⁶

Ms. Byers testified that when she met with Mr. Riddle in July 2010, he told her he had not applied for any of the job leads she sent him. (Tr. 122). She stated that she contacted all of the employers and many did not respond, so she relied on what Claimant told her regarding his diligence in applying to the positions. *Id.* She said that when she met with Claimant, he told her he did not apply to any of the jobs she sent him because he thought they all required a high school diploma; however, none of them did. (Tr. 132). She testified that Claimant informed her he talked to one company about a street sweeper position but that he could not read the map. *Id.* According to Ms. Byers, it was not necessary to read a map for that position. *Id.*

At their July 2010 meeting, Ms. Byers stated that she gave Claimant job applications and instructed him on how to fill them out. (Tr. 133). She stated that she also talked to him about his tests results and gave him information on several different literacy programs and encouraged him to follow up. (Tr. 133, EX 10). However, because Claimant was scheduled to have surgery on August 20, 2010, they left their next meeting open. *Id.*

Employer's exhibits reflect that Ms. Byers sent Claimant a draft resume and 10 additional job leads in August through September of 2010. (EX 3, 4, 10). In a vocational rehabilitation report dated September 29, 2010, she noted that Mr. Riddle had not responded to her calls or letters asking that he call her on her toll free number so that she could discuss with him his resume and progress. (EX 3). In a subsequent report dated November 16, 2010, she noted that Claimant still had not responded to her letters. (EX 2).

On January 24, 2011, Ms. Byers produced an updated labor market survey listing all of the positions she had identified for Mr. Riddle since her last survey from December 18, 2009, which included nine additional positions she identified in November 2010 through January 2011. (EX 11). On February 3, 2012, Ms. Byers produced another labor market survey identifying seven available positions between January and February 2012, which she also sent to Claimant. (EX 12). It is unclear from the record whether Ms. Byers sent any of these 16 positions to Dr. Waldman for approval.

Ms. Byers testified that by telling employers that he cannot read and write, Claimant is not putting his best foot forward. (Tr. 141). However, she testified that in finding jobs, particularly delivery positions, she did not consider whether Claimant would have two hands free or would be using a cane. (Tr. 156-57). She clarified that the only medical restrictions she

⁶ Although Ms. Byers also identified a position as a car shuttle driver for System One Services, it is not clear from the record whether Dr. Waldman approved of this position or not. (EX 7, 9).

considered when searching for positions was light manual labor and no prolonged standing or walking. (Tr. 158).

Medical Records

Dr. James York: Included in the record are treatment records from Dr. York, whom Claimant visited from December 2004 through April 2008. (CX 10, 12, 13). Claimant first visited Dr. York on December 30, 2004, about a week after his injury. (CX 12). X-rays taken the day of Claimant's injury revealed that he had a left patella avulsion fracture and a possible quadriceps/patellar tendon rupture. *Id.* Dr. York performed a debridement and repair of the tendon on February 4, 2005. (CX 13). Claimant's range of motion was good in March and April of 2005; however, in May, he began to experience tenderness and increased pain. (CX 12). It was later found that Claimant had a torn medial and lateral meniscus and probable chondromalacia, so on November 2, 2005, Dr. York conducted an arthroscopy and debridement. (CX 12, CX 13).

Although Claimant showed gradual improvement after the arthroscopy, he continued to experience pain, and as Hyalgan injections did not provide any lasting relief, Dr. York suggested a possible knee replacement in June 2006. (CX 12). Dr. York then performed a total knee replacement of Claimant's left knee on September 10, 2007. (CX 12, CX 13). The records reflect that Claimant experienced unrelated health issues after his surgery, including respiratory arrest and pneumonia. (CX 12).

By November 2007, Claimant was showing motion loss in his leg and relative muscle weakness. *Id.* During a January 4, 2008 visit with Dr. York, Claimant reported that he felt as though his knee had become dislocated during a recent physical therapy session. *Id.* He also attributed this to a recent incident in which he stumbled getting out of bed and landed awkwardly. *Id.* It was determined that Claimant injured his MCL [medial collateral ligament], and as of his last visit with Dr. York on April 4, 2008, his injury had begun to heal. *Id.* Dr. York suggested that, for the rest of his life, Claimant would have to wear a brace at times. *Id.*

A functional capacity evaluation was conducted by Dr. York on August 7, 2006. (CX 10). At that time, Dr. York found that Claimant had a decreased active range of motion in his left knee; his left knee extension was -10 degrees through 100 degrees, whereas his right knee extension was 0 degrees through 140 degrees. *Id.* Dr. York also noted tenderness and that Claimant was only able to complete 720 feet of a 1/2 mile walking test. *Id.* He opined that Claimant was able to perform 8 hours of work in a light physical demand category with restrictions. *Id.* Dr. York reported that Claimant could tolerate standing for 20 minutes but then must sit down to get the weight off his leg. *Id.* Dr. York also noted that Claimant did not tolerate prolonged walking well and that he was unable to fully squat but could partially stoop approximately halfway to the ground. *Id.* He also noted that Claimant was unable to bear weight on his left knee and could not crawl. *Id.* According to Dr. York, Claimant could kneel briefly on his right knee for one minute and 21 seconds. *Id.* He also found that Claimant had balance deficits and was safe only on level surfaces, using his cane; he recommended that Claimant not climb or work at heights. *Id.* He opined that Claimant could not resume his previous work as a heavy equipment operator, even with additional therapeutic intervention. *Id.*

Accordingly, Dr. York approved Claimant for light physical demand work with no climbing or kneeling and restrictions on prolonged walking or standing. *Id.*

Dr. Barry Waldman: Claimant visited Dr. Waldman on September 26, 2008 for the purposes of an Independent Medical Evaluation. (CX 7). Dr. Waldman's examination revealed that Claimant had a full range of motion in his left knee but pain with full extension and a slight extension lag. *Id.* He did not detect any MCL or LCL [lateral collateral ligament] instability. *Id.* Dr. Waldman did not believe that Claimant had reached maximum medical improvement. *Id.* He restricted Claimant to walking no more than one half mile per day and prohibited him from lifting, crawling, bending, stooping, or walking on uneven ground. *Id.*

On December 3, 2008, Dr. Waldman saw Claimant again, this time for treatment purposes, and he noted that Claimant experienced severe pain in his left knee to essentially any range of motion. *Id.* Approximately one month later, Dr. Waldman noted that Claimant had no complaints of severe pain with any range of motion but did have some instability in flexion. *Id.*

On March 9, 2009, Dr. Waldman performed a left knee revision arthroplasty. (CX 8). Subsequent reports reflect that Claimant's range of motion became more constrained: on June 11, 2009 and July 9, 2009, Dr. Waldman reported that Claimant's range of motion in his left knee was 20 degrees to 90 degrees. (CX 7). On August 6, 2009, Dr. Waldman then opined that Claimant had reached maximum medical improvement. *Id.* He noted that Claimant continued to complain of pain and that he had fallen on his knee recently; however, he found he was able to bend his knee from 0 to 135 degrees with some guarding. *Id.*

Dr. Waldman's medical records also reflect that Claimant visited him on February 25, 2011 as a follow-up to a recent total hip replacement. *Id.* The record reflects that Claimant experienced no pain to range of motion of the knee. *Id.*

Dr. Larry Becker: Dr. Becker, an associate of Dr. Waldman, examined Claimant on January 4, 2010 as part of an Independent Medical Evaluation.⁷ (CX 6; EX 1). He noted that Claimant had been in constant pain since he had a total knee replacement in 2009. *Id.* He reported that Claimant limped and was unable to sit or stand for long periods of time due to the pain in his knee. *Id.* In addition, he reported that Claimant lived in constant pain and that he wore a knee support when he drove. *Id.* He also noted that Claimant had a half-inch of atrophy in his left thigh, limited range of motion in his left knee, and significant tenderness. *Id.* Whereas Claimant had a range of motion of 0 to 135 degrees in his right leg, in his left, his range of motion was -45 to 90 degrees. *Id.* Dr. Becker felt that Claimant should be tested to determine if he had a possible infection or loosening, but if it was determined that there was neither, he opined that Claimant had reached maximum medical improvement. *Id.* He believed that the need for treatment and subsequent complications were related to Claimant's injury in December 2004. *Id.* Using the Sixth Edition of the AMA Guides, Dr. Becker opined that Claimant had a 50% permanent impairment to his left knee based on his pain, weakness, atrophy, loss of endurance, and loss of function. *Id.* He wrote that Claimant was capable of returning to a sedentary job but would not be able to perform a job that required him to be on his feet for any period of time. *Id.*

⁷ Dr. Becker's report notes that Claimant first saw him on July 20, 2005 when he injured his quadriceps tendon. (CX 6; EX 1). He was not seen in the office again until 2008, when he was seen by Dr. Waldman. *Id.*

Other Evidence

Department of Labor Forms and Filings: The Memorandum of Informal Conference indicates that Claimant injured his left knee on December 24, 2004 when he was descending a ladder that broke, causing him to fall. (CX 1). At the time of the conference, Employer was paying compensation and stipulated that Claimant's Average Weekly Wage was \$1,406. *Id.* The memorandum indicates that Dr. Becker, who examined Claimant on behalf of Employer, opined that Claimant had reached maximum medical improvement with a 50% permanent partial impairment to his left knee. *Id.* Dr. Waldman also examined Claimant on behalf of Employer and determined that Claimant had reached maximum medical improvement and suffered a 53% permanent partial disability. *Id.* The Director determined that Claimant was permanently and totally disabled. *Id.* The memorandum was issued on May 10, 2011. *Id.* The case was referred for a hearing the following month.

DISCUSSION

Nature and Extent of Claimant's Disability

Employer concedes that Claimant is not physically capable of performing his previous job in heavy manual labor. *See* Employer and Insurer's Post-Hearing Brief at 6. Once a claimant demonstrates that he is unable to perform his previous job due to a work-related injury, he has established a *prima facie* case of total disability and the burden shifts to his employer to prove the availability of suitable alternative employment. *See, e.g., Lentz v. Cottman Co.*, 852 F.2d 129 (4th Cir. 1988). To do so, an employer must show that there is a range of jobs available in the claimant's geographic area which he is reasonably capable of performing and which he could realistically and likely secure given his age, education, and vocational background if he diligently pursued the opportunity. *Id.* at 131. If the employer establishes the existence of such employment, the employee's disability is treated as partial, not total, unless the claimant can rebut by showing that he diligently tried yet was unable to secure employment. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988).

Employer asserts that it has established suitable alternative employment because Ms. Byers performed labor market surveys in which she identified 32 positions suitable for Claimant. On the other hand, Claimant asserts that he would be unable to secure employment within his physical capabilities and points to Mr. Klitzner's testimony to that effect. Both vocational experts are well qualified, and I reject Claimant's argument that Ms. Byers' lack of Maryland state certification in any way undermines her qualifications. However, after considering all of the evidence, I find Mr. Klitzner's conclusions are more supported by the record and that no suitable jobs for which Claimant could realistically compete have been identified by Ms. Byers.

The positions identified by Ms. Byers fall into the following general categories: parking lot attendant, shuttle driver, flower delivery person, parking cashier, street sweeper, valet, van driver, and store greeter. Based on the record, it appears that Dr. Waldman only considered whether Claimant was physically capable of performing the following positions: K-Mart greeter, parking lot cashier for Landmark Parking, courtesy driver for MileOne, street sweeper for

Anchor Staffing, and valet. (EX 9). Dr. Waldman did not approve of the parking valet position; accordingly, I will not consider any of the valet positions identified by Ms. Byers.

Although Dr. Waldman opined that Claimant was physically capable of performing the work of a greeter, parking lot cashier, and courtesy driver, I find that Claimant is not reasonably capable of performing or securing these positions due to his illiteracy and poor math skills. In that regard, an employer has failed to identify suitable alternative employment when it has identified positions that a claimant is physically able to perform but are unsuitable due to other factors. *See Ceres Marines Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7 (CRT) (5th Cir. 2001) (affirming finding of no suitable alternative employment when illiterate worker who was eligible for consideration had limited math skills, advanced age, and an employment history that consisted entirely of heavy manual labor, making the identified employment unsuitable).

With respect to the greeter position, Claimant would not only welcome customers to the store, but also provide directions to different departments and check customers' receipts as they exited to make sure they paid for all the items in their cart. (EX 9). As Claimant is unable to read, he would not be capable of performing this latter task. Although Ms. Byers asserted that Claimant could simply compare the number of items on the receipt against the number of items in the cart, (Tr. 124), this method would not prevent against theft, which is the primary purpose of the greeter position.

Ms. Byers suggested that Claimant should hide his inability to read and write from potential employers, stating "he can't get [a job] if he presents himself as—in a negative way when he first walks in the door." (Tr. 154). However, I disagree that Employer can establish suitable alternative employment by presenting positions that Claimant could realistically secure only if he hid from the employer characteristics that would prevent him from performing the job successfully. Accordingly, I do not find the greeter position an example of suitable alternative employment.

I also find that Claimant would be incapable of performing and/or securing the job of a parking cashier given his limited math skills. Ms. Byers testified that Claimant can do basic math, and she emphasized that the computer would tell him how much change to give. However, it is possible, if not likely, that there would be times when a customer would decide to pay Claimant with change after he rang up how much is owed, in which case he would have to do the math in his head to determine how much he now owed the customer. Furthermore, the job description notes that Claimant would have to complete a cash report at the end of the night. (EX 9). Although Ms. Byers testified that Claimant is capable of doing some simple multiplication and division, I find that it would be difficult for him to perform these tasks given that he scored below average in math on his aptitude test. Furthermore, an employer would be unlikely to entrust a person with such limited skills with responsibility over significant amounts of cash.

The courtesy driver position Ms. Byers identified and Dr. Waldman approved would involve driving patrons to their office, home, etc. while their cars are being fixed. Ms. Byers testified that Claimant would be capable of performing these positions because most of these cars have GPS systems that would read directions to him orally. (Tr. 128) She asserted that Claimant

could fill in the street name by matching the letters of the alphabet. (Tr. 128-29). However, I find that it would be difficult for him to follow the oral directions of the GPS without the ability to read street signs. Although GPS's often given directions numerically, instructing a driver to turn in a certain number of feet, it would be difficult for Claimant to confirm he was going the right way without the ability to read street signs. Although a GPS will recalculate if one turns the wrong way, customers would likely lose patience with a courtesy driver if he continued to get lost or took an excessive amount of time typing in their addresses. Furthermore, Ms. Byers could not confirm that all of the cars for these positions have a GPS built in, and without one, Claimant certainly could not follow the customers' directions. Moreover, it is extremely unlikely that Claimant could secure such a position if his employer was aware that he cannot read. In addition, Claimant testified that his foot begins to swell up after 15 minutes in the car.

Claimant would also have difficulty with a delivery position for the same reasons as those cited above. Furthermore, Claimant's counsel pointed out that it would be difficult for Claimant to know which package to deliver if he were making multiple stops, for he would have trouble reading the label. In addition, it would be difficult for Claimant to walk with larger deliveries while using his cane; Ms. Byers conceded that she did not consider whether Claimant would have two hands free in identifying the delivery position. (Tr. 156-57). Between Claimant's potential physical difficulties and his difficulty finding the correct locations and delivering the right packages, it is not likely that Claimant could secure or perform this position.

With respect to the street sweeper position, Ms. Byers conceded that Mr. Riddle might have to get off the equipment to move some larger pieces of debris. (Tr. 129-30). As with the delivery position, it would be difficult for Claimant to move large pieces of debris while relying upon his cane, and his doctors have made it clear that he has difficulty bending down to the ground. Furthermore, although Ms. Byers testified that Claimant would not need to read a map for this position, (Tr. 132), she admitted that she did not know how Claimant would get to where he is supposed to do the sweeping. (Tr. 169). As with the aforementioned positions, Claimant's inability to read street signs would preclude him from securing this position.

The shuttle driver position identified by Ms. Byers would involve driving cars to a warehouse as they come off a ship, checking their tire pressure, and adding gas. (Tr. 121). As Claimant has difficulty bending over, he would not be reasonably capable of performing this position. While it might be possible for him to do one car, Ms. Byers testified that the job is very repetitive; when you finish one car, someone drives you back and you start again. *Id.* Given Claimant's physical condition, he would not be able to repeatedly kneel.⁸

The paratransit driver position would also require Claimant to bend over, as he would have to help secure wheelchairs with a buckle. (Tr. 144). Furthermore, Claimant may have to push a wheelchair on occasion, which would be difficult for him, if not impossible, as he uses a cane. It is unlikely that Claimant, who is disabled himself, could reasonably secure a position helping the disabled and elderly. Although Ms. Byers testified that there was no medical indication that Claimant could not drive a stick shift, Dr. Waldman felt that Claimant could not perform the work of a valet, presumably for this reason. (EX 9). Furthermore, Claimant testified

⁸ Although Ms. Byers submitted this position for Dr. Waldman's approval, it does not appear with his responses, and accordingly, it is not clear whether he felt Claimant was physically capable of performing this position. (EX 8, 9).

he is unable to do so because his foot and leg do not have enough power to push in the clutch. (Tr. 28). Claimant testified that his foot starts to swell and the pain in his knee becomes bad within a short period of driving an automatic car, in which case he is not even using his left foot. (Tr. 27, 37). Based on his testimony, I do not see how it would be feasible for Claimant to drive vans with a manual transmission, which would require him to repeatedly push in the clutch. Moreover, as with any of the driver positions—shuttle driver, van driver, courtesy driver, etc.—Claimant’s illiteracy would also pose a problem. With respect to another position Ms. Byers identified in which he would transport railroad personnel, Claimant would not be able to change a tire, which is specified in the description, given that he cannot bend for prolonged periods of time.

Ms. Byers also identified many lot attendant positions, which would involve driving cars, cleaning off windshields, and doing some light cleaning. (Tr. 144-45). The labor market survey conducted by Ms. Byers gives the following description: “driving, some walking around lot, light cleaning of vehicle.” (EX 11). Mr. Klitzner testified that the job description for the position with Dollar Rent-A-Car noted that the person hired would also have to add air and fluid, wash the car, and put in gas. (Tr. 179). He also testified that the position with Heritage Hyundai would require putting down mats and protective plastic. *Id.* Given Claimant’s inability to drive a stick shift and his difficulty kneeling and stooping, I find that he would not be reasonably capable of handling this position from a physical standpoint. In addition, I find it unlikely that an employer would hire someone who is incapable of driving stick shift, as many of these positions required candidates to be able to do this. (EX 12).

As a final matter, I note that Ms. Byers essentially conceded that it would be difficult for Claimant to obtain employment if he were to notify a potential employer of his inability to read and write. While it is true that an employee should not be permitted to sabotage his efforts to obtain employment, it is not realistic to require an employee to misrepresent his abilities to a potential employer by concealing the fact that he lacks such basic skills.

Based on the aforementioned discussion, I find that Employer has failed to prove the availability of suitable alternative employment, as it has not identified work in Claimant’s area which he is reasonably capable of performing or could realistically secure without hiding his illiteracy or below-average math skills. Accordingly, I find that Claimant is totally disabled, and I need not consider whether he diligently tried to secure employment.⁹

Date Claimant Reached Maximum Medical Improvement

The parties agree that Claimant has reached maximum medical improvement (“MMI”); accordingly, his disability is permanent in nature. Nonetheless, the parties dispute when he reached MMI. Employer argues that Claimant reached MMI on January 14, 2009, whereas Claimant points to August 6, 2009 as the date his disability became permanent. (ALJ 1, 2). The date that a claimant’s disability reaches permanency is determined by medical evidence. *See, e.g., SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57 (5th Cir. 1996); *see also Ballesteros v. Willamette W. Corp.*, 20 BRBS 186 (1988).

⁹ As Employer has failed to prove suitable alternative employment, I need not determine Claimant’s wage earning capacity.

It is unclear how Employer selected January 14, 2009 as the date of MMI. In his last report dated April 3, 2008, Dr. York reported that claimant's MCL injury was healing, and he predicted that Claimant would probably reach MMI in about six months. (CX 12). However, Dr. Waldman performed a left knee revision arthroplasty on March 9, 2009, and on August 6, 2009, he opined that Claimant had reached MMI. (CX 7, 8). On January 4, 2010, Dr. Becker then performed an Independent Medical Evaluation and noted that Claimant had been in constant pain since his revision knee replacement in 2009. (CX 6). He wrote that Claimant should be tested to determine if there was a possible infection or loosening in his knee, but absent this, he opined that Claimant had reached maximum medical improvement. *Id.* No further medical records appear indicating whether Claimant had an infection or loosening.

Based on these medical opinions, I find that Claimant reached MMI on August 6, 2009, for the physician that performed the arthroplasty felt that he had reached permanency on that date, and there are no medical records indicating a later infection or loosening. *C.f. Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 236 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989), *rev'd on other grounds*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (en banc) (finding that the administrative law judge should not have relied on a subsequent medical report, since two doctors had established that the claimant's condition stabilized to its maximum point at an earlier date). Accordingly, Claimant is entitled to permanent total disability benefits after August 6, 2009.

Attorney's Fee, Costs, and Interest

As Claimant has substantially prevailed on the disputed issues, reasonable and necessary attorney's fees are awarded. 33 U.S.C. § 928; 20 C.F.R. §§ 702.131—702.135. Costs may also be awarded, including witness fees and expenses for transcripts. 33 U.S.C. § 928(d). Claimant's attorney shall have 30 days to submit a fee petition and bill of costs, after which the Employer's attorney shall have 30 days to file any objections. The issue of attorneys' fees and costs will be addressed in a supplemental decision and order.

Although the Act does not specifically provide for interest to be paid on past due disability benefits, courts have upheld interest awards as consistent with the Congressional purpose of making claimants whole for their injuries. *See, e.g., Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), *cert. denied*, 406 U.S. 958 (1972); *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). Interest under the Act is mandatory and cannot be waived. *Altmbarek v. L-3 Communications*, BRB No. 10-0425, -- BRBS -- (Ben. Rev. Bd. Dec. 23, 2010). In *Santos v. General Dynamics Corporation*, 22 BRBS 226 (1989), the Board dictated that interest, when allowable, should be calculated on a simple rather than a compound basis. *Id.* at 228 (citing *Stovall v. Ill. Cent. Gulf. R.R. Co.*, 722 F.2d 190 (5th Cir. 1984)). The appropriate interest rate is that employed by the United States District Courts under 28 U.S.C. § 1961, which is periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). This Order incorporates that statute by reference and provides for its specific administration by the District Director.

CONCLUSION

Based on the foregoing findings of fact, conclusions of law, and all evidence of record, I find that Claimant was temporarily totally disabled on December 24, 2004 and became permanently totally disabled as of August 6, 2009. In cases of both permanent and temporary total disability, a claimant shall receive 66 2/3 per centum of his average weekly wage during the continuance of his disability. 33 U.S.C. §§ 908(a)-(b). The parties stipulated that Claimant's average weekly wage was \$1,406.72 (ALJ 1, 2). Based on this figure, Claimant's compensation should be \$937.81, or 66 2/3 per centum of \$1,406.72. Accordingly,

ORDER

IT IS HEREBY ORDERED that Claimant's claim against Employer, Harsco Corporation, and its Carrier, Ace American Insurance Company, for disability benefits is **GRANTED** to the extent set forth above;

IT IS FURTHER ORDERED that Employer/Carrier shall pay Claimant (1) temporary total disability benefits based on an average weekly wage of \$1,406.72 and a corresponding compensation rate of \$937.81 from December 24, 2004 to August 6, 2009 and (2) permanent total disability benefits of \$937.81 per week from August 7, 2009 and continuing, with interest on accrued benefits, as set forth above, *provided*, that pursuant to 33 U.S.C. §914(j), Employer/Carrier shall receive a credit for payments previously made;

IT IS FURTHER ORDERED that the District Director is authorized to make and adjust any calculations necessary to implement this Order; and

IT IS FURTHER ORDERED that Claimant's attorney shall file a fully supported and itemized petition for attorney's fees and costs within thirty (30) days of the service of this Decision and Order, and that Employer/Carrier shall file any objections within thirty (30) days of service of Claimant's petition.

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.