U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 December 2009

CASE NO.: 2009-LDA-00283

OWCP NO.: 02-165515

FRED BUSSE,
Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL,
Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
c/o AIG WORLD SOURCE,
Carrier

APPEARANCES:

Dennis F. Nalick, Esq.;
Gisevius & Nalick
On behalf of Claimant

Jerry R. McKenney, Esq.,
Ledge, Farrow, Kimmitt, McGrath, & Brown, L.L.P.,
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq*., and its extension, the Defense Base Act (DBA), 42 U.S.C. § 1651 *et. seq.*, brought by Fred Busse, (Claimant), against Service Employers International, (Employer), and Insurance Company of the State of Pennsylvania c/o AIG World Source, (Carrier). The issues raised by the parties could not be resolved administratively, and the matter

was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on July 31, 2009, in Covington, Louisiana.

At the hearing, all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced sixteen (16) exhibits, which were admitted, including: Employer's Employment/Medical/Personnel/Wage Documents; Transcribed Statement of Claimant; Prior Deposition of Claimant, dated March 31, 2008; Medical Records of Dr. Richard Howard; Medical Records of Des Peres Hospital; Medical Payment Records of CIGNA; Medical Reports of Dr. Michael Gutwein; Medical Reports of Dr. Tom Reinsel; Pleadings filed by Employer/Carrier; Pleadings filed by Claimant; Decision and Order of 2008-LDA-0087; Department of Labor Records; Correspondence from Claimant's Counsel to Counsel for Employer/Carrier; Correspondence from Employer/Carrier's Counsel to Counsel for Claimant; Statement of Thad Larson; and Curriculum Vitae of Jacquelyn Vega Belez.

At the hearing and post-hearing, Employer introduced thirty-four (34) exhibits, which were admitted, including: DOL Forms and Filings; Claimant's Wage Data; Excerpts from Claimant's Personnel File; Claimant's Responses to Requests for Admissions; Claimant's Job Site Medicals; Additional DOL Forms and Filings; Medical Records of Infectious Diseases, P.C.; Prior Deposition of Claimant, dated March 31, 2008; Deposition of Dr. Suresh Nellore, dated April 24, 2008; Additional Excerpts from Claimant's Personnel File; Medical Records of Orthopedic Specialists; Recorded Statement of Claimant, dated August 13, 2007; Medical Records of Hadi Clinic; Claimant's Pre-Employment Physical; Additional Job Site Medicals; Claimant's Responses to Interrogatories and Requests for Production; Prior Deposition of Claimant, dated June 16, 2009; Transcript of Trial, dated June 6, 2008; Medical Report of Dr. Tom Reinsel; Curriculum Vitae of Dr. Tom Reinsel; Vocational Rehabilitation Assessment Report of Wallace Stanfill; Curriculum Vitae of Wallace Stanfill; Medical Records of Des Peres Hospital; Medical Records of Audrain Medical Center; Employment Records of Butler Transportation; Employment Records of Robinson Solutions; Military Records of the National Personnel Records Center; Missouri Department of Labor and Industrial Relations Records; Medical Records of Phelps County Regional Medical Center; Medical Records of Sturgis Regional Hospital; Medical Records of Dr. C. Douglas Meadows; Medical Records of Industrial Medicine, Inc.; Social Security Administration Earnings Records; and Social Security Administration Disability Records.[1]

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, the undersigned makes the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

[1] The undersigned notes he will not summarize exhibits pertaining to Claimant's prior claims. The undersigned further notes Claimant has been deposed twice prior to his hearing, and provided lengthy testimony while at hearing. In lieu of repetitious or non-relevant summary of testimony, the undersigned shall only summarize the portions of Claimant's prior depositions and hearing testimony he finds to be pertinent to the instant matter. References to the exhibits are as follows: Trial Transcript – Tr. ___, p.___; Claimant's Exhibit - CX-___, p.___; Employer's Exhibit - EX-___, p.___; ALJ Exhibit – ALJX-___.

At the commencement of the hearing the parties stipulated and the undersigned finds:

1. An Employer/Employee relationship existed at the time of Claimant's accident.

2. Notices of controversion were filed on January 17, 2008, and March 31, 2009.

3. An informal conference was held on December 3, 2008.

II. ISSUES

1. Causation

2. Nature and Extent

3. Medical Benefits

4. Interest, Penalties, and Attorney's Fees[2]

III. STATEMENT OF THE CASE

A. Facts of the Case

Claimant is a forty-four year old male who was injured while working for Employer in Iraq. During a recovery mission, the vehicle Claimant was driving struck a large IED hole in the roadway, causing Claimant to hit his head on the top of the cabin of the vehicle. Claimant notified his supervisor, Thad Larson, about the injury, but continued his mission after the incident. Claimant did not miss any work due to this injury and did not feel extreme effects from this injury until weeks later.

Upon recommendation of Employer's medic, Claimant sought medical attention at the Hadi Clinic in Kuwait. At the Hadi Clinic, it was determined, via MRI, that Claimant had suffered a herniated disc in the C5-C6 vertebral area of his cervical spine. Based on this injury, along with his contraction of leishmaniasis, Claimant was sent back to the United States for treatment. Claimant received minimal medical treatment for his neck injury, choosing to concentrate on the more serious leishmaniasis disease first. Upon healing from leishmaniasis, Claimant sought treatment for his neck, but received no medical authorization for treatment from Carrier.

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[2] Stipulations and Issues were entered into evidence as ALJX-1. On October 10, 2008, in his Decision and Order Awarding Benefits (2008-LDA-00087), the undersigned reached a decision regarding Claimant's average weekly wage while employed by Employer. In his Decision and Order, the undersigned held:

> In the year prior to his injury, Claimant earned an average weekly wage of $1,916.73 per week. Claimant's compensation rate should be 66.67% of that average weekly wage, or $1,277.82 per week. However, based on maximum and minimum compensation rates for 2007, the year in which Claimant was injured, Claimant's maximum compensation rate is $1,114.44 per week.

Claimant and Employer/Carrier do not dispute the finding of Claimant's average weekly wage to be $1,916.73, and Claimant's compensation rate to be $1,114.44 per week, based on the national maximum compensation rate as found by the United States Department of Labor for the year of Claimant's injury. As such, for the calculation of Claimant's compensation benefits in this matter, the average weekly wage of $ 1,916.73 will be used.

Claimant filed workers' compensation claims under the Act for his leishmaniasis and neck injuries. A previous Decision and Order by the undersigned addressed his leishmaniasis claim. Claimant has not worked since he was returned to the United States, and has not received medical treatment for his neck injury since August 2007. Claimant underwent a medical examination by Dr. Thomas Reinsel in December 2008.

B. Testimony, Recorded Statement, and Prior Depositions of Claimant[3]

Claimant served as a United States Army Reservist for eighteen (18) years. (Tr. 12, 21). During an accident involving his convoy in September 2004, Claimant injured his right shoulder and developed bicep tendinitis. Claimant was diagnosed with a torn bicep three months later, which was repaired at the military hospital and Claimant was placed on medical leave. Claimant returned to active duty after that injury, and was honorably discharged in June of 2005.

After working a series of occupations and finishing his service in the military, Claimant applied for employment with Employer. According to Claimant, it took several months between the start of his application process and the first day of his actual work with Employer. (Tr. 31). Claimant spent two (2) weeks in Houston, Texas for processing with Employer before being deployed to Iraq on January 3, 2007. (Tr. 32, 36). During this processing period, Claimant went through orientation with Employer, and was given a pre-deployment physical. Claimant was officially deployed to Iraq as a HETT operator. (Tr. 32).

As a HETT operator, Claimant operated heavy equipment transport vehicles and wreckers for Employer. (Tr. 32, 35). This equipment was designed to haul tanks and other vehicles. Claimant previously experienced handling these vehicles during his time in the military and was provided training in their operation by Employer. (Tr. 33). He operated these vehicles on missions in which supply or vehicle recovery was needed. (Tr. 36-37). His unit consisted of eight (8) to ten (10) people working two (2) different shifts of twelve (12) hours each for seven (7) days a week. (Tr. 38). However, Claimant explained he would be consistently found to go on mission as needed, regardless if his shift was over. (Tr. 38). Claimant found his job with Employer very fulfilling, and enjoyed the camaraderie formed during the missions he went on for Employer. (Tr. 36).

In July 2007, Claimant participated in a mission to recover tankers being used to steal oil. (Tr. 42; EX-17, pp. 11-12). During this mission, his convoy was forced to travel off from the normal supply route into the middle of the desert. While in the convoy, Claimant operated a normal civilian wrecker with air ride seats, a vehicle that was not his normal vehicle of operation. (Tr. 46).[4] He found this vehicle to be more dangerous than his normal HETT vehicles. (Tr. 46). During this mission, Claimant was wearing a helmet and his seat belt. (Tr. 44, 48; EX-

[3] Claimant was deposed on two (2) different occasions: March 31, 2008, and June 16, 2009. (CX-3; EX-8, 17). Claimant also provided a recorded statement to a representative of Carrier on August 13, 2007. (CX-2). In lieu of a repetitious summary of Claimant's depositions and recorded statement, the undersigned will cite Claimant's testimony to both the trial transcript and corresponding exhibits, and shall only summarize relevant portions of Claimant's depositions and recorded statement which are lacking or are contradictive of Claimant's testimony at hearing.

At the beginning of his testimony, Claimant covered numerous years of work history and the circumstances surrounding his injuries during his work history. The undersigned will not repetitiously summarize Claimant's testimony regarding his prior work history and prior work-related injuries. (Tr. 11-31).

It should also be noted that all exhibits and testimony dealing solely with Claimant's prior claim under the Act for leishmaniasis shall not be summarized in this Decision and Order.

[4] At his June 16, 2009 deposition, Claimant described this vehicle as a civilian model rotator. (EX-17, pp. 11-12).

17, p. 14). The helmet weighed approximately seven (7) to fifteen (15) pounds. (EX-17, p. 14). Claimant testified he inspected the seatbelt on his vehicle in a pre-trip inspection before the mission. (Tr. 55; CX-3, pp. 20-21; EX-8, pp. 20-21). He further testified the seatbelt in the vehicle was working prior to his accident. (Tr. 61).

After recovering the tankers and returning to the military supply road, Claimant's vehicle struck an IED hole. (Tr. 50-51; EX-17, p. 14). The impact caused Claimant to bounce off of his seat, striking his head on the top of the truck cabin and injuring his neck. (Tr. 41; CX-3, pp. 19-20; EX-8, pp. 19-20). At the time of the incident, Claimant was riding alone in the vehicle. (EX-17, p. 14). While it was normal for a vehicle to strike IED holes and for operators to be bounced around the cabin, Claimant explained he had never hit his head before in such a forceful fashion. (Tr. 60). Claimant further explained he was unable to dodge the IED hole, and had no choice but to hit it due to its size and rate of speed. (Tr. 59).[5] Claimant testified to the impact "ringing his bell."

Following his injury, Claimant was taken off of his vehicle and placed in a lead vehicle due to a fellow employee's inability to control the vehicle. (Tr. 56).[6] During this transition, Claimant informed his supervisor, Thad Larson ("Larson"), that he had hit his head. (Tr. 64). Claimant was unable to see a medic during the mission, but informed Larson he was able to complete the mission. (Tr. 65). Claimant testified Larson explained they would take care of the paperwork and incident report when they got back to their home base. (Tr. 65). Claimant believe he drove a total of ten (10) hours with a break of approximately six (6) to eight (8) hours between the drive time before he returned back to home base. (Tr. 54-55). Claimant never filled out an accident report for the incident in question. (Tr. 66). Claimant joked about the incident with his supervisor following their return to the home base. (EX-17, p. 19).

Claimant testified he believed the air ride seats in the vehicle he was driving caused his injury. (Tr. 61). He explained the seats and vehicles being used were not created to withstand the abuse of those harsh roadways. (Tr. 62; CX-3, pp. 20-21; EX-8, pp. 20-21).

Three weeks after hitting his head, Claimant began to have shoulder problems from an unrelated incident. (Tr. 77).[7] After experiencing shoulder problems, and upon recommendation of Employer's medic, Claimant visited the Hadi Clinic in Kuwait. Claimant saw a physician at this hospital, and told the physician that he had recently hurt his neck but never paid too much attention to the injury. Claimant was given an MRI, which revealed an injury to his neck in the C5-C6 vertebral region. (Tr. 66, 71; EX-17, p. 23). Claimant believes he was told he suffered a herniation of the C5-C6 region. (Tr. 69). Claimant was given medication while at the Hadi Clinic, but did not remember if the medication was for his neck or his shoulder. (EX-17, p. 24). Due to his various injuries, Claimant was sent back to the United States for treatment.[8]

[5] At his June 16, 2009 deposition, Claimant stated the IED hole was approximately three (3) feet deep and four (4) to six (6) feet wide. He further stated he was driving at a rate of approximately thirty-five (35) to fifty (50) miles an hour. (EX-17, p. 16).

[6] At his June 16, 2009 deposition, Claimant stated he was driving the "new vehicle" when he hit his head. (EX-17, pp. 14-15). He admits to being placed in the new vehicle after a fellow co-worker could not handle it. This difference in testimony does not seem to contradict Claimant's description of the accident, and will be treated as harmless error.

[7] In his August 13, 2007 recorded statement, Claimant explained it took Employer two (2) weeks to get him medical attention after his shoulder injury. (CX-2, p. 7).

[8] In his August 13, 2007 recorded statement, Claimant stated a medic had told him that he had a vertebra pushing in his neck against his spinal cord. (CX-2, p. 3). He also stated a medic with Employer thought it would be best for him to see a doctor in the United States to rule out any form of paralysis with his neck. (CX-2, p. 7).

Upon reaching the United States, Claimant saw Dr. Richard Howard, an orthopedic surgeon at Des Peres Hospital. (Tr. 72). Claimant also saw Drs. Michael Chabot and Sidney Bennett for his neck injury. (Tr. 73). Claimant was given an epidural by Dr. Bennett. (Tr. 73; EX-17, p. 29).[9] He believed he received pain relief from this epidural. Claimant testified the doctors also wanted him to receive more injections and physical therapy, but due to his leishmaniasis, his neck treatment had to be postponed. (Tr. 73; EX-17, p. 29). Claimant received no further treatment for his neck after the epidural. Claimant testified to being seen by Dr. Thomas Reinsel, who allegedly recommended that Claimant be returned to his primary doctors for medical care for his neck. (EX-17, p. 28).

Claimant testified he attempted to see his doctors to get completely cleared to return to work in Iraq. (Tr. 74). He was allegedly informed to contact Carrier and have Carrier contact his doctors before they would provide any further treatment for his neck. (Tr. 74; EX-17, p. 41). He admitted no doctor had informed him he could not return to work due to his neck injury. (EX-17, pp. 38-39). Claimant did not believe he had been released by Dr. Howard to return to work. (EX-17, p. 40).

Regarding his neck pain, Claimant testified the pain has gotten much worse and more frequent than from his initial injury. (Tr. 76). He described the pain as an aching pain which began at the center part of his neck and extended to below and in between his shoulder blades. (Tr. 80; EX-17, p. 30). Claimant also incurred headaches twice to three (3) times a month. (EX-17, p. 31). Claimant believed he had a high tolerance for pain, but the pain in his neck had kept him from working. (Tr. 85-86). Claimant stated he had two (2) bad days a week due to his pain, and rated his pain a four (4) out of a possible ten (10) on these bad days. (Tr. 87). Claimant suffers from tingling in his arms once or twice a week due to overexertion. (EX-17, p. 33).

Claimant testified he wanted to return to work in Iraq. (Tr. 85). He was unaware of any employer that would have hired him for day to day employment with his on-going neck injury. (Tr. 87). He further testified he was unable to work a consistent five (5) day work week because of his neck. (Tr. 88). He confirmed the presence of mood swings due to his neck pain, which further inhibited his ability to work with others and acquire employment. (Tr. 89-91). Claimant cannot repeatedly lift things due to his neck pain and believes he is limited in his daily activities, although he believed there was nothing that he could not do because of his neck pain. (Tr. 91). He was unaware of what exactly he could do based on his neck pain. (Tr. 92). Claimant did not apply or consider applying to any jobs since 2007. (EX-17, p. 38).

Claimant admitted to having three (3) prior compensation claims from injuries during his work history, along with two (2) lawsuits stemming from accidents involving injury and two (2) claims under the Act. (Tr. 97). Claimant further admitted to seeking chiropractic treatment during his time in the military, including treatment on his neck, and using this treatment for not only relief, but also to avoid working from time to time. (Tr. 98). He also admitted to calling Carrier and complaining about Linda Webb, believing she had a personal agenda against him. (Tr. 104-105). He once called a hotline for Carrier and left a message, stating he would "come after them." (Tr. 107). Claimant explained he meant he was going to go after "them" through

[9] In his August 13, 2007 recorded statement, Claimant explained the epidural was given to him on August 4, or August 5, 2007. (CX-2, p. 11).

Congress. (Tr. 107). He believed the officers of Carrier, if they were falsely not paying a legitimate claim, should be charged with a crime. (Tr. 106). He also stated he would like to see the CEO of Carrier to go to jail. (Tr. 112).

Claimant did not read the labor market survey provided to him by Employer/Carrier. (Tr. 109). He admitted to looking to find jobs overseas, but believed no employer overseas would hire him with an injury. (Tr. 109). He made this assumption based on the policies of Employer. (Tr. 110). Claimant has not tried to get a work release from any doctor that has treated him. (Tr. 110). Claimant believed he could perform the jobs on the Labor Market Survey if the employers would allow him to come and go to work based on his physical ability. (Tr. 112).

Claimant is able to drive a vehicle and look in all mirrors in the vehicle. (EX-17, p. 36). He further can look up and down without restriction in his neck.

C. Transcribed Statement of Thad Larson

On July 9, 2009, Larson provided a recorded statement to the Counsel for Claimant. (CX-16). Larson was a recovery foreman in charge of the recovery team for Employer stationed at Al Asad in Iraq. (CX-16, p. 2). Larson recalled the mission in which Claimant was injured. (CX-16, p. 4). He admitted Claimant told him he had struck his head on the top of his truck's cabin after hitting an IED hole. (CX-16, p. 6). He further admitted Claimant advised him he could continue work, and Larson placed him in control of a vehicle to replace a fellow co-worker. Larson explained to Claimant that all paperwork would be completed when they returned back to Al Asad. (CX-16, p. 6-8). He further advised Claimant that he could see a medic when they were at home base. Larson confirmed Claimant's accident happened before Claimant was asked to switch trucks. (CX-16, p. 8). Larson also confirmed he believed Claimant could have completed the mission after his initial injury. (CX-16, p. 8).

Larson explained paperwork would not normally be filled out during a mission unless some major injury was involved. (CX-16, p. 6). He further explained Brian King, his supervisor, would normally be involved in major medical paperwork. (CX-16, p. 7).

Larson never stated he actually completed any incident report for Claimant's injury. He further had no idea about Claimant's injury after Larson left Al Asad in July 2007. (CX-16, p. 7).

D. Medical Records of Hadi Clinic

Claimant was admitted into the Hadi Clinic in Kuwait on July 21, 2007, complaining of neck and shoulder pain. (EX-13, p. 2). An MRI was performed by Dr. Yahya Slaiman, evidencing a posterior right para central protrusion of Claimant's C5 and C6 disc, effacing the thecal sac, and compressing moderately on Claimant's spinal cord, with narrowing in the right corresponding neural foramina. (EX-13, p. 2).

E. Medical Records of Des Peres Hospital[10]

[10] The medicals submitted as evidence show Claimant saw Dr. Howard and his associates for both his neck and shoulder injuries. Dr. Howard appears to have treated Claimant primarily for his shoulder injury, and relied upon his two associates, Dr. Chabot, and Dr. Bennett, to treat Claimant's neck. Claimant admitted at hearing he was unsure of which doctor performed treatment on his neck.

Claimant presented to Dr. Michael C. Chabot with neck pain and radiation of the pain to his right shoulder. (CX-4, p. 2; EX-23, p. 1; EX-49, p. 1). Claimant admitted he did not immediately seek medical attention for his neck pain, but the pain worsened over a few weeks, requiring Claimant to seek treatment at the Hadi Clinic in Kuwait. A viewing of Claimant's MRI films from Kuwait provided no evidence of fracture and showed a normal spine alignment. (CX-5, p. 4; EX-23, p. 2). Upon examination, Claimant provided a normal cervical range of motion, but had some pain in his left inferior aspect of his neck during a Spurling's test.

Dr. Chabot opined Claimant suffered from neck pain, radiculopathy, and a herniated nucleus pulposis at the C5-C6 vertebral area. (CX-5, p. 4; EX-23, p. 2). Dr. Chabot planned to treat Claimant's injury conservatively, and requested an epidural. (CX-5, p. 3; EX-23, p. 5).

Claimant received an epidural from Dr. Sidney J. Bennett on August 6, 2007. (CX-4, p. 2; EX-49, p. 1). According to her records, Claimant tolerated the procedure well. No further medical treatment was provided to Claimant in regards to his neck injury.

F. Second Medical Opinion of Dr. Thomas Reinsel[11]

Dr. Thomas Reinsel performed a second medical opinion on Claimant at the request of Employer/Carrier. (CX-8, p. 1; EX-19, p. 1). Dr. Reinsel noted Claimant's chief complaint was pain in the posterior aspect of his neck, traveling to the left suprascapular area. (CX-8, p. 1; EX-19, p. 1). Claimant believed the neck pain did not worsen for approximately four (4) months after the incident in question. (CX-8, p. 1; EX-19, p. 1). Dr. Reinsel noted no significant upper extremity pain, although Claimant stated his pain would gradually increase while performing activities lasting more than two (2) hours. Claimant also stated sleeping wrong caused greater pain, and he rated his worse pain level to be a four and a half (4.5) out of ten (10). (CX-8, p. 1; EX-19, p. 1). Claimant explained the only thing he took for his pain was general painkillers.

When asked about his daily activities, Claimant stated there was nothing that he did not do because of his pain. (CX-8, p. 2; EX-19, p. 2). Claimant further explained he would limit his daily activities due to the fear of hurting himself. (CX-8, p. 2; EX-19, p. 2).

Upon examination, Dr. Reinsel noted no acute distress. (CX-8, p. 2; EX-19, p. 2). He further noted slight tenderness to palpitation in the C-6 area and pain in Claimant's shoulders. Dr. Reinsel found Claimant to have normal range of motion in his neck for flexion, extension, and rotation. (CX-8, p. 2; EX-19, p. 2). Claimant's range of motion caused no further indication of pain.

Dr. Reinsel assessed Claimant with chronic mechanical neck pain with a HNP at the C5-C6 level right per Claimant's 2007 MRI. (CX-8, p. 3; EX-19, p. 3). Dr. Reinsel found it somewhat surprising that Claimant's symptoms had not dramatically improved in the year and a half since his initial injury. (CX-8, p. 3; EX-19, p. 3). He expected some exaggeration from

[11] Claimant also underwent a second medical opinion with Dr. Michael B. Gutwein. (CX-7). This medical opinion dealt primarily with Claimant's leishmaniasis claim. Claimant did state during the examination that he had injured his neck and this injury was keeping him from work. However, Claimant also stated he took no pain medication for his neck injury. (CX-7, p. 1). Dr. Gutwein noted no swelling or tenderness to Claimant's spine during examination. (CX-7, p. 3).

Claimant with respect to his injury, and found it somewhat surprising that Claimant had not done any kind of work for a year and a half. (CX-8, p. 3; EX-19, p. 3). Dr. Reinsel found it unusual for Claimant to sustain an injury and not have any significant symptoms for weeks or months after the injury.

Dr. Reinsel opined Claimant was not at maximum medical improvement at the time, although he admitted it would be difficult to predict when Claimant would reach that date. (CX-8, p. 3; EX-19, p. 3). Dr. Reinsel found extended medical treatment not necessary for this type of injury, and opined Claimant might improve after some physical therapy sessions. Dr. Reinsel did not consider Claimant a candidate for surgery. (CX-8, p. 3; EX-19, p. 3). Dr. Reinsel was skeptical to Claimant's assertions that he was very sedentary in his activities, and believed Claimant should have been able to do significant amounts of his past employment. (CX-8, p. 3; EX-19, p. 3).

Dr. Reinsel found several medical treatment options to be appropriate: physical therapy twice a week for three (3) to four (4) weeks; x-rays and a possible MRI of Claimant's cervical spine; possible epidural injections; and over-the-counter medication, including ibuprofen and possibly Neurotin. (CX-8, p. 3; EX-19, p. 3). Dr. Reinsel provided no working restrictions to Claimant, and did not provide a disability rating.

G. Vocational Evidence of Wallace Stanfill

Mr. Wallace Stanfill provided a vocational evaluation and labor market survey of Claimant at the request of Employer/Carrier. (EX-21). Mr. Stanfill noted Claimant's past work history varied from heavy duty to light duty in nature, and from skilled to semi-skilled types of employment. (EX-21, p. 6). Claimant was found to work principally as a truck driver, but was also found to have worked as a mechanic and a carpenter. (EX-21, p. 6). Provided with Dr. Reinsel's medical opinion and all available medicals, Mr. Stanfill opined Claimant would have been considered readily employable at his prior various occupations as of June 2008, if not earlier. (EX-21, p. 7).

Mr. Stanfill also provided a labor market survey of Claimant, consisting of eleven (11) employers and positions for which Claimant could acquire employment as of July 9, 2009. (EX-21, p. 8). The labor market survey was conducted around Claimant's home in Laddonia, Missouri, as well as for various overseas positions, given Claimant's past military and work history. (EX-21, p. 8). The employment opportunities found for Claimant, along with their location and hourly wage rate, are detailed below:

Position	Location	Weekly Rate
Heavy Truck Driver	Afghanistan	$800.00[12]
Heavy Equipment Mechanic	Iraq	$750.00 - $850.00

[12] Regarding the overseas employment opportunities, the weekly wage was found by dividing the monthly salary by four (4) weeks. These figures do not represent any overtime compensation.

Tire Repairer/Mechanic	Iraq	$650.00 - $750.00
Truck Driver/Tractor Trailer	Iraq	$750.00 - $850.00
Bulk Solo Driver	St. Louis, Missouri[13]	$801.78 - $989.28[14]
Tanker Truck Driver	Moberly, Missouri	N/A
Shuttle Driver	Columbia, Missouri	$440.00[15]
Groundskeeper	Columbia, Missouri	$406.40
Sandwich Maker	Mexico, Missouri	$217.50[16]
Cashier	Mexico, Missouri	$282.00
Security Guard	Wright City, Missouri	$360.00

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends he suffered a disability due to his neck injury, and is owed disability benefits from the date of injury to present and continuing, based on Employer/Carrier's failure to show the presence of suitable alternative employment and the medical evidence providing Claimant has not reached maximum medical improvement. Claimant further contends he is owed reasonable and necessary medical benefits casually related to his neck injury. Claimant also requests interest and attorney's fees.

Employer/Carrier contend Claimant has not suffered a disabling injury and can return to work. Employer/Carrier further contend Claimant's compensation claim should be barred by both issue preclusion and the failure to timely notify Employer of his injury. In the alternative, Employer/Carrier contend suitable alternative employment has been shown, and based on the presence of this employment and the lack of disability for Claimant, no compensation benefits are warranted. Employer/Carrier argue against the award of any medical benefits under Section 7 of the Act unless those provided pursuant to the recommendation of Dr. Reinsel.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter, the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana*

[13] This position would service the Laddonia, Missouri area.
[14] Stateside occupations giving only an annual salary were divided by fifty-six (56) to provide a weekly rate.
[15] Stateside occupations giving only an hourly rate had weekly rates calculated using forty (40) hours a week.
[16] This occupation involved part-time work only, and the weekly rate was based on the available thirty (30) hours of work.

Insurance Guaranty Ass'n v. Bunol, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence, based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

The undersigned finds Claimant to be credible with respect to his description of the accident and injury, and the medical treatment he has received since his injury. The undersigned finds Claimant credible based on his description of his pain and pain level, but cannot provide Claimant with credibility regarding his inability to do activities. Claimant's testimony regarding this inability is rebutted by Dr. Reinsel's documented concerns about exaggeration with Claimant with regards to his injury and his ability to do daily activities. Further, the undersigned finds Claimant incredible in his reasoning for not seeking employment and his assumptions as to his ability to be hired by prospective employers.

C. Issue Preclusion

The concept of collateral estoppel, or *issue preclusion*, states essentially that a final judgment precludes re-litigation of the same issue of fact or law, so long as: the issue was actually litigated, determined and necessary to the judgment in a prior adjudication; and the circumstances of the particular case do not suggest any reason why it would be unfair to invoke the doctrine. *See Blonder-Tongue Laboratories, Inc., v. University of Illinois Foundation*, 402 U.S. 313, 328-329, 91 S.Ct. 1434, 1442-43 (1971); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326, 75 S.Ct. 865, 867 (1955). Collateral estoppel will bar re-litigation of an issue previously decided if the party against whom the decision is asserted had "a full and fair opportunity" to litigate that issue in the earlier case. *Allen v. McCurry*, 449 U.S. 90, 94-95, 101 S.Ct. 411, 414-415, 66 L.Ed.2d 308 (1980). Collateral estoppel bars re-litigation of issues "actually and necessarily" litigated. *Combs v. Richardson*, 838 F.2d 112, 115 (4th Cir. 1988); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991); *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994).

On October 10, 2008, the undersigned issued a Decision and Order in Claimant's claim for compensation relating to his leishmaniasis, 2008-LDA-00087. In the Decision and Order, the undersigned awarded benefits, stating:

> 1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period of October 23, 2007 to April 1, 2008 based on Claimant's average weekly wage of $1,916.73.
>
> 2. Employer shall pay to Claimant $4,442.63 in out of pocket medical expenses as a result of his work-related injury on July 15, 2007 pursuant to Section 7(a).

> 3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.
>
> 4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. Section 1961.
>
> 5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

Employer/Carrier argue Claimant raised the issue of neck pain and/or injury to his neck in this previous case. However, the undersigned finds the issue of Claimant's neck injury is not precluded, as Claimant did not have a "full and fair opportunity" to litigate his neck injury at the previous hearing. Claimant's neck injury was not actually litigated in the prior claim, and compensation with regards to his neck injury was not necessarily determined in Claimant's prior claim for benefits. In fact, the undersigned's Decision and Order addressed specifically Claimant's leishmaniasis as his disabling injury, and does not render any judgment regarding Claimant's neck injury. The undersigned finds no reason to hold Claimant's neck injury was merged by consent with his prior leishmaniasis claim. Without a "full and fair opportunity" for Claimant to litigate his claim for benefits resulting from his neck injury, collateral estoppel cannot apply. As such, the undersigned finds Claimant's claim for benefits due to his neck injury not barred by issue preclusion.

D. Notice of Injury

Section 12(a) of the LHWCA provides that notice of an injury or death for which compensation is payable must be given within 30 days after injury or death, or within 30 days after the employee or beneficiary is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury or death and the employment. 33 U.S.C. § 12(a). While it is the claimant's burden to establish timely notice, the Fifth Circuit has held that Section 20(b) provides the claimant with a presumption that notice was timely given. *Avondale Shipyards v. Vinson*, 623 F.2d 1117 (5th Cir. 1980); *United Brands Co. v. Melson*, 594 F.2d 1068, 1072 (5th Cir. 1979), *aff'g* 6 BRBS 503 (1977). The Board has also adopted this stance, finding that in the absence of substantial evidence to the contrary, it is presumed under Section 20(b) that the employer has been given sufficient notice pursuant to Section 12. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

Failure to provide timely notice as required by Section 12(a) bars the claim, unless excused under Section 12(d). Under Section 12(d), failure to provide timely written notice will not bar the claim if the claimant shows either that the employer had knowledge of the injury during the filing period (Section 12(d)(1)) or that the employer was not prejudiced by the failure to give timely notice (Section 12(d)(2)). *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS

32, 34 (1989). The Board and circuit courts generally require that the employer have knowledge not only of the fact of the claimant's injury, but also of the work-relatedness of that injury. *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991).

Prejudice is established where the employer demonstrates that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972, 8 BRBS 161 (5th Cir. 1978), *rev'g* 2 BRBS 272 (1975); *White v. Sealand Terminal Corp.*, 13 BRBS 1021 (1981). The employer bears the burden of proving, by substantial evidence, that it has been unable to effectively investigate some aspect of the claim by reason of the claimant's failure to provide timely notice as required by Section 12. *Strachan Shipping Co.*, 571 F.2d at 972. The allegation of difficulty in investigating is not sufficient to establish prejudice. *Williams v. Nicole Enters.*, 21 BRBS 164 (1988).

In this case, the undersigned finds Claimant's failure to provide a timely notice of injury is excused under Section 12(d). Claimant did not file an LS-203 for his neck injury until June 6, 2008. However, Claimant was aware of this injury by the July 21, 2007 MRI at the Hadi Clinic. No injury report was filed, although Claimant allegedly alerted his immediate supervisor. This supervisor took no actions to follow up the incident with an injury report, and Claimant himself did not initiate an investigation into the claims procedure. Rather, Claimant merely joked about the incident afterwards, which appears to have been commonplace among his peers when they often suffered similar accidents. Claimant did not file within the thirty (30) days required by the Act. Thus, Claimant did not timely notify Employer of his injury.

While Claimant did not timely notify Employer of his injury, failure to provide timely written notice will not bar a claim under the Act if Claimant can show Employer was not prejudiced by the failure to give timely notice of his claim. Employer has not demonstrated that it was prejudiced by Claimant's untimely notice. Employer has not provided substantial evidence to show it was not unable to effectively investigate Claimant's compensation claim for his neck injury. Regardless of the lack of knowledge, Employer still had requisite time to completely investigate Claimant's neck injury, including acquisition of all medical records, and ability to conduct vocational testing by Mr. Stanfill. In fact, a representative of Carrier, Mr. Ray Harris, took a statement from Claimant on August 13, 2007. In this statement, Claimant refers to two separate incidents of injury, including one incident where he injured his neck. Medical records from Employer refer to Claimant's MRI at the Hadi clinic on July 21, 2007. Further, Employer/Carrier first took Claimant's deposition on March 31, 2008, in which Claimant again referred to his separate neck injury. By June 2008, Employer should have been well aware of Claimant's neck injury in such a fashion to allow for a fair and complete investigation into the claim's merits.

Employer has provided no explanation of how Claimant's untimely notice of the claim has acted to prejudice them in this matter. Employer's failure to timely controvert the instant claim, acquire complete medical records and second medical opinions, authorize appropriate treatment, and conduct an adequate and complete vocational assessment was not caused, nor the fault of, Claimant's untimely notice of his claim. As such, Claimant's untimely notice is excused, and will not result in a bar of this instant claim under Section 12(a).

E. Causation

Under the Act, Claimant has the burden of establishing the *prima facie* case of a compensable injury. The claimant must establish a *prima facie* case by proving that he suffered some harm or pain, and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). *See U.S. Industries/Federal Sheet Metal v. Director, OWCP* (Riley), 455 U.S. 608, 14 BRBS 631, 633 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). It is the claimant's burden to establish each element of his *prima facie* case by affirmative proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). In *U.S. Industries*, the United States Supreme Court stated, "[a] *prima facie* 'claim for compensation,' to which this statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries,* 455 U.S. at 615, 14 BRBS at 633.

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(*quoting Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991).

Section 2(2) of the Act defines injury as an accidental injury or death arising out of and in the course of employment. 33 U.S.C. § 902(2)(2003). In order to show the first element of harm or injury, a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C. Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer). A claimant's uncontradicted, credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990) (finding a causal link despite the

lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

For an injury to be compensable under the Act, it must have "arose out of" and occurred "in the course of employment." 33 U.S.C. 902(2). These are separate elements that must both be proven. "Arising out of" refers to the activity in which the claimant was engaged when the injury occurred. "Course of employment" refers to the time, the place and the circumstances surrounding the injury. *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593, 595 (1081). The general rule as established by the Board is that an injury occurs in the course and scope of employment if it occurs within the time and space boundaries of employment and in the course of an activity the purpose of which is related to the employment. *Alston v. Safeway Stores*, 19 BRBS 86, 88 (1986), *citing Wilson v. WMATA*, 16 BRBS 73 (1984); *Willis v. Titan Contractors*, 20 BRBS 11 (1987). The Board further defined their position in *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997), holding that the employee's action would be found within the "scope of employment" if it was of some benefit to the employer. However, the Act does not require that the employee, at the time of injury, be engaged in activity of benefit to the employer. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951).

In a Defense Base Act case, all a Claimant has to prove is that the "obligations or conditions" of his employment created a "zone of special danger" out of which the injury or death arose. *Kalama Services, Inc., v. Director, OWCP*, 354 F.3d 1085, 1091) (9th Cir. 2003). In "zone of special danger" cases, the Court in *O'Leary v. Brown –Pacific-Maxon* 340 U.S. 504-507 (1951), held that an employee need not establish a causal relationship between the nature of his employment and the accident that occasioned his injury. Neither was it necessary that an employee be engaged at the time of injury in activity of benefit to his employer. Rather all that was required for compensability is that the obligations or conditions of employment create the "zone of special danger" out of which the injury arose. Further, an employer can be said to create a zone of special danger simply by employing an employee in a foreign country, as long as the employment is related to a federal contractual obligation. *Harris v. England Air Force Base*, 23 BRBS 175, 179 (1990).

In establishing that an injury occurred in the course and scope of his employment, a claimant is entitled to rely on the presumption provided by Section 20(a) of the Act. *Willis*, 20 BRBS at 12; *Mulvaney*, 14 BRBS at 595; *Wilson*, 16 BRBS at 75. Section 20 provides that "[i]n

any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. 920(a). Once a *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of his employment. *Hunter*, 227 F.3d at 287.

Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp*., 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based on a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003) (the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (the hurdle is far lower than a ruling out standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), aff'd mem., 722 F.2d 747 (9th Cir. 1983) (the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp*., 29 BRBS 18, 20 (1995). In such cases, the administrative law judge must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d) (2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial

evidence to the contrary. 33 U.S.C. 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries*, *supra*; *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

In this case, Claimant provided *prima facie* evidence establishing a Section 20(a) presumption of an injury to the human frame, arising out of the course and scope of his employment. The undersigned has previously credited Claimant's testimony regarding his accident and neck injury. Claimant has shown that he suffered a harm to his human frame, as evidenced by the MRI findings of the Hadi Clinic. Claimant's uncontested testimony provided it was commonplace for truck drivers to bounce around and strike portions of their body with the truck's cabin. Claimant further testified to hitting his head on the top of cabin before, but never in such a way to cause as much pain as he was feeling.

For Defense Base Act cases, Claimant need only show his obligations of employment exposed him to a "zone of special danger." Claimant's job duties required him to perform his employment in Iraq, a foreign country with a hostile environment. Claimant has shown his employment missions required him to traverse dangerous roads, exposing him to the unnatural state of these roads, including exposure to IED holes. The conditions of the roadways upon which Claimant traveled could have caused his injury. The obligations of Claimant's employment created a "zone of special danger" out of which the injury to Claimant arose.

Employer/Carrier has failed to provide any evidence that Claimant's injury was not work-related or could not be caused by Claimant's employment duties. While Claimant has suffered a litany of injuries in his past working history, there is no evidence he specifically suffered a neck injury. Claimant testified to incurring no prior neck injuries, and Claimant passed Employer's pre-deployment physical without any remarks regarding the condition of his neck. While Claimant could have possibly been suffering from a degenerative condition prior to his deployment, there is simply no evidence to prove this assumption. No medical evidence disputes Claimant suffered a neck injury during his employment in Iraq for Employer. Thus, there is not substantial evidence to rebut the Section 20(a) presumption in this case. It is presumed that Claimant's injury occurred during the course and scope of his employment.

F. Nature and Extent of Injury

Disability is defined under the Act as the "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery

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

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

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

A claimant's ability to perform daily activities is usually not enough to show the claimant has an ability to work. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Further, it is possible for a claimant to be totally disabled, even if he or she is physically capable of performing certain work, if he or she is unable to secure the particular kind of usual and former employment. *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 12 (5th Cir. 1994).

In this case, Claimant has suffered a minimal, yet total, disability with regards to his neck injury. Claimant has been unable to return to his usual employment since July 15, 2007. While employed in Iraq, Claimant suffered two injuries, a neck injury and leishmaniasis. Originally, Claimant did not lose any time from work for his neck injury. From July 15, 2007, to April 1, 2008, Claimant was unable to return to work due to his leishmaniasis. On April 1, 2008, Claimant reached maximum medical improvement for his leishmaniasis, and could return to work on that date from his first disability. However, since April 1, 2008, Claimant has been unable to return to his usual employment due to his neck injury. He has not been released to work, and has been unable to acquire the necessary medical treatment to result in a work release back to his former employment. No evidence provided by Employer/Carrier shows Claimant is able to return to his former occupation without some form of medical treatment and release. Thus, as Claimant has been unable to return to his former occupation, he suffered a total disability due to his neck on April 1, 2008.

As of December 30, 2008, Dr. Reinsel, who performed the only medical evaluation of Claimant in this case, opined Claimant was not at maximum medical improvement. Claimant received no medical treatment for his neck injury after August 6, 2007. While Dr. Reinsel opined

Claimant could perform several aspects of his former employment, Claimant has been unable to acquire such former employment due to his inability to obtain a work release or obtain medical treatment to place him at maximum medical improvement. Dr. Reinsel opined Claimant needed medical treatment prior to being placed at maximum medical improvement. Until such time Claimant receives this medical treatment, he remains disabled. Based on Claimant's inability to return to his usual employment, and the lack of evidence proving the contrary, Claimant suffered a total disability.

As Claimant has been unable to return to his usual employment, Claimant was totally disabled due to his neck injury on April 1, 2008. To classify the nature and extent of these benefits, the undersigned must first determine Claimant's date, if any, of maximum medical improvement.

i. Maximum Medical Improvement

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235, n. 5 (1985); *Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989)*. The date of maximum medical improvement is a question of fact based upon the medical evidence of record. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). An employee reaches maximum medical improvement when his condition becomes stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Limited*, 14 BRBS 395, 401 (1981). A claimant's condition can be deemed permanent even though an employee may require surgery in the future. *Morales v. General Dynamics Corp.*, 10 BRBS 915, 918 (1979). A claimant's condition may also be considered permanent when the claimant is not receiving medical treatment. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982).

Where the medical evidence indicates that the injured worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for an ALJ to find that maximum medical improvement has been reached. *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986). Similarly, where the treating physician stated that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it was reasonable for the ALJ to conclude that the claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986).

A date of permanency may not be based, however, on the mere speculation of a physician. Therefore, a physician's statement to the effect that he "supposed" that he could project a disability rating was rejected as too speculative to support a rating of permanent disability. *Steig v. Lockheed Shipbuilding & Constr. Co.*, 3 BRBS 439, 441 (1976).

The Board has held that where no physician concludes that a claimant's condition has reached maximum medical improvement and further surgery is anticipated, permanency is not demonstrated. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983). The mere possibility of future surgery, by itself, however, does not preclude a finding that a condition is permanent.

Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986). In fact, a physician's opinion that a condition will progress and ultimately require surgery, but also giving a percentage disability rating, will support a finding that maximum medical improvement has been reached, if the disability will be lengthy, indefinite in duration, and lack a normal healing period. *Morales v. General Dynamics Corp*., 16 BRBS 293, 296 (1984). If there is any doubt as to whether the employee has recovered, such doubt should be resolved in favor of the claimant's entitlement to benefits. *Fabijanski v. Maher Terminals*, 3 BRBS 421, 424 (1976).

In this matter, the sparse medical evidence provides Claimant has not reached maximum medical improvement. Dr. Reinsel provided the only medical evaluation in this matter, and stated that as of December 30, 2008, Claimant was not at maximum medical improvement. While Dr. Reinsel did provide Claimant needed only minimal medical treatment to reach maximum medical improvement, no medical treatment has since been provided to Claimant since Dr. Reinsel's evaluation. While Claimant can most likely perform most of the aspects entailed in his former occupation, the weight of the medical evidence provided suggests Claimant's condition will improve with further medical treatment. It is not Claimant's burden to prove he is not at maximum medical improvement, and the failure of Employer/Carrier to authorize the minimal treatment necessary for Claimant's injury, especially those procedures suggested by Dr. Reinsel, allows Claimant's injury to continue to be temporary at this present time. The weight of the medical evidence provides Claimant has not yet reached maximum medical improvement, and Claimant's disability remains temporary in nature until such time he reaches maximum medical improvement.[17]

As the undersigned has found Claimant suffers from a temporary disability, he must now determine the extent of Claimant's disability, whether the disability be total or partial. Thus, the undersigned must address the presence of suitable alternative employment.

ii. Suitable Alternative Employment

Claimant has established an inability to return to her former employment and thus has made a *prima facie* showing that she is totally disabled. Therefore, the burden shifts to employer to show suitable alternative employment. The Fifth Circuit has developed a two-part test by which an employer can meet its burden of showing suitable alternative employment:

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

[17] Dr. Reinsel did not provide Claimant with any disability rating or permanent restrictions. The medical evidence is absent of any indication that Claimant will suffer a permanent disability once he reaches maximum medical improvement. Further, once Claimant reaches maximum medical improvement, the weight of the medical evidence provided suggests he will be able to return to his former employment, and he will suffer no further loss of wage-earning capacity. As such, once Claimant reaches maximum medical improvement, his disability will cease. Thus, no disability benefits will be necessary following Claimant reaching maximum medical improvement.

New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042 (5th Cir. 1981). The employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." *P & M Crane Co. v. Hayes*, 930 F.2d 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).

A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). To establish suitable alternative employment, the employer must show the existence of realistically available job opportunities within the geographical area where the claimant 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. *Turner*, 661 F.2d at 1038.

The Fifth Circuit has held that an employer is not required to become an employment agency for an injured claimant. Thus, the Fifth Circuit does not strictly follow the notion that an employer must provide Claimant with specific job openings. Rather, "an employer does not need to prove evidence of … specific job openings… an employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community." *Avondale Shipyards v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for special skills which the claimant possesses and there are few qualified workers in the local community. *P & M Crane Co.,* 930 F.2d at 424, 430.

A claimant's active interest in finding employment is irrelevant and cannot be used by an employer to satisfy their burden of showing suitable alternative employment. *Jensen v. Weeks Marine, Inc.,* 33 BRBS 97 (1999).

On the date of a showing of suitable alternative employment, a claimant's disability becomes a partial disability. *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). Nevertheless, an employer is not prevented from attempting to establish the existence of suitable alternative employment as of the date an injured employee reaches maximum medical improvement or from retroactively establishing that suitable alternative employment existed on the date of maximum medical improvement. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Rinaldi*, 25 BRBS 128; *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

If the employer has established suitable alternate employment, the employee can nevertheless establish total disability if he demonstrates that he diligently tried and was unable to secure employment. *Turner*, 661 F.2d at 1042-43; *P & M Crane Co.* 930 F.2d at 430. The claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. *Turner*, 661 F.2d at 1043, 14 BRBS at 165. However, the claimant need not diligently search for employment under the employer first meets its burden of showing suitable alternative employment. *Piunti v. I.T.O. Corp. of Baltimore*, 23 BRBS 267 (1990). If an employee does not meet this burden, then

at most, his disability is partial. 33 U.S.C. § 903(c); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Regarding Claimant's available labor market, in at least one case, *Patterson v. Omniplex World Services*, 36 BRBS 149, 153 (2003), the Board has included overseas employment as an extension of a claimant's labor market in which he could acquire employment. The Board held:

> [t]he fact that claimant has extensive overseas employment both pre-and post-injury, is clearly germane to the determination of the relevant labor market. Consequently, we hold, based on the unique facts in this case, that the relevant labor market for purposes of establishing the availability of suitable alternative employment includes both the [claimant's local community] as well as overseas locations where jobs similar to those claimant has performed are available which are suitable given claimant's post-injury restrictions.

Id. at 153. *See also L.N. v. KBR Government Operations*, 41 BRBS 1394 (A.L.J. 2008).

Here, Employer/Carrier established suitable alternative employment on July 9, 2009, through the labor market survey of Wallace Stanfill. Addressing the contents of the labor market survey first, the undersigned finds a total of seven (7) of the jobs found in Mr. Stanfill's labor market survey to constitute suitable alternative employment. Claimant's past work history shows a willingness to travel and to work in the trucking industry. Thus, the trucking position out of St. Louis, which would service the Laddonia, Missouri area, is suitable to Claimant given the circumstances of this case. Further, the two jobs in Mexico, Missouri, are within thirty (30) miles from Claimant's residence, and are a suitable distance from that residence to qualify as suitable alternative employment. With regards to the overseas positions, it must be noted Claimant testified to a lengthy history in the Army Reserves, during which time he would take various tours all over the world. Claimant further testified to his enjoyment of his occupation with Employer in Iraq, and testified to his willingness to stay in Iraq long after his one-year contract was up. Claimant also testified to his contacting of overseas employers during the formal hearing. From Claimant's work history and testimony, one can reasonably assume Claimant would not be opposed to returning to overseas for work. Thus, due to the unique circumstances in this case, those available overseas positions for which Claimant would qualify must be considered as suitable, regardless of their obvious lengthy distance away. None of these seven (7) employment opportunities would require Claimant to move his residence. Claimant would further qualify for employment with all seven (7) positions. All other positions identified on the labor market survey do not qualify as suitable alternative employment. The undersigned thus finds Mr. Stanfill's labor market survey provided seven (7) occupations that could qualify as suitable alternative employment for Claimant.

Regarding the date in which suitable alternative employment was shown by Employer/Carrier, the undersigned finds suitable alternative employment for Claimant was not shown until July 9, 2009. Although Dr. Reinsel, as late as December 30, 2008, believed Claimant could perform several aspects of his former job, and Mr. Stanfill listed several jobs in which

Claimant could have performed on June 6, 2008, the vocational evidence does not show the general availability of jobs to conform to Fifth Circuit precedence until July 9, 2009. Those jobs shown on Mr. Stanfill's labor market survey, were not signified to be available as of June 6, 2008. Rather, it appears those jobs found in the survey were found to be available specifically in July 2009. As such, the undersigned can only find that Employer/Carrier established the presence of suitable alternative employment on July 9, 2009, the date of Mr. Stanfill's labor market survey. Thus, temporary total benefits for Claimant must continue until that date, as not retroactive showing of suitable alternative employment has been provided to the undersigned.

As Employer/Carrier has established the availability of suitable alternative employment on July 9, 2009, the burden now shifts to Claimant to show, despite a diligent effort to search, she was unable to secure any alternative employment on that date.

Claimant has testified he has not worked since July 2007. He has further not attempted to acquire any employment. Dr. Reinsel believed Claimant was exaggerating his ability to do certain daily activities, and Claimant testified he did not search for employment because he did not think anyone would hire him with his neck. Claimant further provided the meritless excuse of having mood swings due to pain that affects his people skills for his lack of a job search. Claimant's justification for failing to search for employment is based purely on assumption and exaggeration of the activities he can and cannot perform. As such, the undersigned finds Claimant has failed to diligently search for employment, and has failed to meet his burden regarding his ability to work. However, while Claimant showed no effort to find alternative employment since his final day of employment with Employer, his burden to diligently search for alternative employment under the Act does not begin until Employer/Carrier carries its burden to provide a showing of the availability of suitable alternative employment. As Employer/Carrier took a lengthy period before carrying its burden, Claimant is allowed temporary total benefits under the Act until such time Employer/Carrier carries its burden, regardless of a complete lack of effort or desire to find alternative employment.

As the undersigned has found Claimant is not at maximum medical improvement and Employer/Carrier has shown suitable alternative employment, the undersigned finds Claimant was temporarily totally disabled due to his neck injury from April 1, 2008, to July 9, 2009. Due to the presence of suitable alternative employment and the lack of Claimant reaching maximum medical improvement, Claimant became temporarily partially disabled on July 9, 2009. As such, the undersigned shall calculate her benefits under Section 8(e) of the Act for the period of July 9, 2009, through present and continuing until the date of Claimant's maximum medical improvement. On the date of maximum medical improvement, Claimant will be owed no further compensation benefits due to a lack of permanent disability being shown by the medical evidence.

Section 8(e) of the LHWCA provides:

> Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning

> capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

33 U.S.C. § 8(e).

A claimant who is temporarily and partially disabled is entitled to the measure of benefits under Section 8(e) for the limited period of five years. Wages and time lost after the five-year period may not be considered in determining the amount of lost wage-earning capacity.

Section 8(h) of the Act provides that the wage-earning capacity of an injured employee in cases of partial disability under Section 8(c) (21) shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. § 908(h). If Claimant's current wages do not provide a fair and reasonable representation of his wage-earning capacity, Claimant's wage-earning capacity can be fixed to such an amount that is reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future**.** *Id.*

Section 8(h) mandates a two-part analysis in order to determine the claimant's post-injury wage-earning capacity. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). The first inquiry requires the judge to determine whether the claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796, 16 BRBS 56, 64 (CRT) (D.C. Cir. 1984). If the actual wages are unrepresentative of the claimant's wage-earning capacity, the second inquiry requires that the judge arrive at a dollar amount which fairly and reasonably represents the claimant's wage-earning capacity. *Id.* at 796-97, 16 BRBS at 64. If the claimant's actual wages are representative of his wage-earning capacity, the second inquiry need not be made. *Devillier*, 10 BRBS at 660.

The party that contends that the claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *See Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir**.** 1990); *Misho v. Dillingham Marine & Mfg.*, 17 BRBS 188, 190 (1985); *Spencer v. Baker Agric. Co.*, 16 BRBS 205, 208 (1984); *Burch v. Superior Oil Co.*, 15 BRBS 423, 427 (1983); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 693 (1980). The Fifth Circuit permits an ALJ to average the hourly wages of jobs found to be suitable employment for a claimant in order to calculate wage-earning capacity. The court reasoned that averaging ensures that the post-injury wage earning capacity reflects each job that is available. *See Avondale Industries v. Pulliam*, 137 F.3d 326 (5th Cir. 1998). The Fifth Circuit has also determined that an administrative law judge must consider the claimant's physical condition, age, education, industrial history, the number of hours/weeks actually worked per week/year, and availability of employment which he can perform after the injury. *Abbott v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122 (5th Cir.1994). The Board has held that the loss of overtime is a factor in determining the claimant's loss of wage-earning capacity. *See Everett v. Newport News*

Shipbuilding & Dry Dock Co., 23 BRBS 316, 320 (1989); *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110, 112 (1989).

In the present matter, vocational evidence has shown that Claimant could have acquired suitable alternative employment on July 9, 2009, with an average weekly wage rate between $217.50 and $989.28.[18] Following Fifth Circuit precedence, the undersigned can average the weekly wages of jobs found to be suitable employment for a claimant in order to calculate post-injury wage-earning capacity. Averaging the seven (7) jobs found to be suitable alternative employment in July 9, 2009, provides Claimant with a post-injury wage-earning capacity of $635.00 a week. It has been previously held that Claimant had an average weekly wage of $1,916.73 at the time of injury. The parties do not dispute this average weekly wage finding. Thus, Claimant has a difference between his average weekly wage before his accident and his post-injury wage-earning capacity of $1,281.73.

In calculating temporary partial benefits under Section 8(e), Claimant must receive two-thirds of the difference between her average weekly wage before her accident and her post-injury wage-earning capacity for the duration of her temporary disability (the showing of maximum medical improvement), not to exclude five (5) years. Thus, the undersigned finds Claimant is entitled to $854.49 in weekly temporary partial disability benefits from July 9, 2009, to present and continuing, until the date of maximum medical improvement, not to exceed July 9, 2014. Employer is entitled to a credit for all compensation benefits previously paid. Once Claimant reaches the date of maximum medical improvement, no further compensation shall be owed by Employer/Carrier.

E. Medical Benefits

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). The test of whether medical treatment is necessary is whether the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). In order for medical care to be compensable, it must be appropriate for the injury, and the administrative law judge has the authority to determine the reasonableness and necessity of a procedure refused by employer. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). A claimant establishes a *prima facie* case that medical treatment is reasonable and necessary when a qualified physician indicates that such medical treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984).

[18]The respective weekly wages that Claimant could acquire in the seven occupations constituting suitable alternative employment in Mr. Stanfill's labor market survey are: $895.53 (the average of the weekly wage scale for the bulk solo driver position out of St. Louis, Missouri); $850.00; $800.00; $750.00; $650.00; $282.00; and $217.50.

The employer must raise the reasonableness and necessity of treatment before the judge. *Salusky v. Army Air Force Exch. Serv.*, 3 BRBS 22 (1975). The judge is required to make specific findings of fact regarding an employer's claim that a particular expense is non-compensable. *Monrote v. Britton*, 237 F.2d 756 (D.C. Cir. 1956). An administrative law judge may deny a medical expense he finds unnecessary, *Scott v. C & C Lumber, Inc.*, 9 BRBS 815 (1978); *See generally Weikert*, 36 BRBS 38. Elaborate and costly medical procedures not recognized in the medical community or found rational by a substantial group of other physicians can be found to be not necessary or reasonable medical treatment. *Pascaretti v. General Dynamics Land Systems*, 37 BRBS 477 (ALJ 2003). An employer is only liable for the reasonable value of medical services. See 20 C.F.R. § 702.413; *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, 518 (1978); *Potenza v. United Terminals, Inc.*, 1 BRBS 150 (1974), aff'd, 524 F.2d 1136, 3 BRBS 51 (2nd Cir. 1975). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

Section 7(d) of the Act sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by a claimant by requiring a claimant to request his employer's authorization for medical services performed by any physician. *Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981) (Miller, J., dissenting), *rev'd* on other grounds, 682 F.2d 968 (D.C.Cir.1982). When an employer refuses a claimant's request for authorization, the claimant is released from the obligation of continuing to seek approval for subsequent treatments, and thereafter need only establish that subsequent treatment was necessary for his injury in order to be entitled to such treatment at employer's expense. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

As Claimant has suffered a disability casually related to his employment, he is entitled to reasonable and necessary medical treatment for his neck injury. Specifically, Claimant is entitled to treatment with his previous doctors, Drs. Howard, Chabot, and Bennett, and is entitled to the specific treatment options provided by Dr. Reinsel.

F. Penalties and Interest

Section 14(e) of the Act provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. §914(e) (2002). *See also National Steel & Shipbuilding Co. v. Bonner*, 600 F. 2d 1288, 1294 (9th Cir. 1997); *Garner v. Olin Corp.*, 11 BRBS 502 (1979).

Assessment of a Section 14(e) penalty ceases whenever the employer complies with the requirements of Section 14(d) and files its notice of controversion. *Oho v. Castle and Cooke Terminals, Ltd.*, 9 BRBS 989 (1979)(Miller dissenting); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 169 (1989). If the employer fails to file a notice of controversion, the Section 14(e) penalty runs until the date of the informal conference. *Grbic v. Northeast Stevedoring Co.*, 13 BRBS 282 (1980)(Miller dissenting). Even when the employer voluntarily pays compensation, the Section 14(e) penalty is applicable to the difference between the amount voluntarily paid and the amount determined to be due. *Alston v. United Brands Co.*, 5 BRBS 600 (1977).

An employer, however, is not required to file a notice of controversion until a dispute arises over the amount of compensation due. *Mckee v. D.E. Foster Co.*, 14 BRBS 513 (1981). When an employer files a notice of controversion and an additional controversy subsequently develops for which the employer suspends payments, the employer should file an additional notice of controversion. *See Harrison v. Todd Pacific Shipyards*, 21 BRBS 399 (1998) (stating that an employer is relieved of filing a second notice of controversion after the informal hearing). The language of Section 14(e) is mandatory, and any stipulation agreeing to waive the "additional compensation" is presumably invalid under Section 15(b) of the Act. 33 U.S.C. §915(b); *Nulty v. Halter Marine Fabricators, Inc.*, 1 BRBS 437 (1975). However, case law provides a Section 14(e) penalty cannot be placed on past due medical benefits. *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 169 (1989)(stating the plain language of Section 14 limits its application to installments of compensation benefits, which does not include medical benefits).

In this case, Claimant filed his LS-203 on June 6, 2008. Benefits were payable, or a controversion should have been filed by Employer by June 20, 2008. Employer filed its notice of controversion on March 31, 2009. Prior to this controversion, Employer/Carrier had not paid any compensation benefits. In fact, Employer/Carrier stopped paying all benefits on April 1, 2008. As such, Employer/Carrier is assessed a mandatory penalty under Section 14(e), to be determined by the District Director, for the periods of time benefits were owed between June 21, 2008, and March 31, 2009.

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

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

As Claimant is owed past compensation benefits, he is also owed interest on all past due benefits. The amount of interest owed is to be calculated by the district director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

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

1. Employer shall pay Claimant compensation for temporary total disability from April 1, 2008, to July 9, 2009, using Claimant's compensation rate of $1,114.44 per week, based on the national maximum compensation rate as found by the United States Department of Labor for the year of Claimant's injury, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay Claimant compensation for temporary partial disability from July 9, 2009, to present and continuing until the date of Claimant's maximum medical improvement, but not to exceed a period five (5) years, based on two-thirds the difference between Claimant's average weekly wage of $1,916.73, and Claimant's post-injury wage-earning capacity of $635.00, or $1,281.73, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

3. Employer shall pay all reasonable, appropriate, and necessary medical expenses casually related to Claimant's compensable neck injury, pursuant to the provisions of Section 7 of the Act. 33 U.S.C. § 907.

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

5. Employer shall pay a mandatory penalty on any sums due between June 21, 2008, and March 31, 2009, at a rate determined by the District Director, pursuant to Section 14(e) of the Act. 33 U.S.C. § 914(e).

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

7. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

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CLEMENT J. KENNINGTON
Administrative Law Judge