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Issue Date: 27 February 2015

In the Matter of:
DALE D. SHERMAN
Claimant,

v.
MANTECH INTERNATIONAL
Employer,
and

ZURICH AMERICAN INSURANCE COMPANY
Carrier.

CASE NO.: **2013-LDA-00160**
OWCP NO.: **02-233147**

Brian Karsen, Esquire
For Claimant
Robert Bamdas, Esquire
For Employer

DECISION AND ORDER

This case arises from a claim for compensation under the Defense Base Act extension to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et. seq., hereinafter referred to as the "LHWCA" or the "Act" and the implementing regulations, 20 C.F.R. parts 701 and 702. See 33 U.S.C. § 905(a). This claim involves controverted claimed cardio and pulmonary conditions. Claimant also filed a hearing loss claim, which was bifurcated from this claim and settled, and I approved settlement.

A hearing was held in Washington, D.C. on August 14, 2014. Mr. Sherman, the Claimant, testified. I admitted joint exhibits ("JX") 1-JX 24, JX 26 and JX 29. I also admitted stipulations as administrative law judge exhibit ("ALJ") 1. The record remained open for submission of the deposition transcript of an expert witness. The transcript was filed on September 5, 2014, and I hereby admit it as JX 30. In a telephone conference, the parties jointly requested a deadline of December 1, 2014 for the submission of briefs, and December 8, 2014 for submission of rebuttal briefs. The Claimant submitted a brief and reply brief. The Employer did not submit a brief.

ISSUES

1. Whether the Claimant suffered a compensable cardiac injury due to exposure to harsh and stressful working conditions in Afghanistan.
2. Whether Claimant's injury arose from his employment with Mantech International, Inc.
3. If compensable, the parties have stipulated that, by agreement, Claimant would be entitled to temporary total disability from July 13, 2012 through March 7, 2013.
4. Thereafter, Claimant secured alternative employment. I must adjudicate Claimant's retained earning capacity and award temporary partial compensation benefits from March 8, 2013 to July 10, 2013. Claimant was placed at maximum medical

improvement on July 10, 2013, so compensation would be reclassified to permanent partial disability as of July 11, 2013. In this regard, the rate at which permanent partial disability would be paid needs to be addressed as Claimant's employment changed.

5. If compensable, medical benefits are to be awarded pursuant to Section 7, along with reimbursements and attorney's fees and costs.
6. Whether Claimant has exercised diligence in seeking alternative employment.
7. Whether Claimant is entitled to penalties, attorney fees or interest.

STIPULATIONS

At hearing, the parties submitted and I find:

1. Jurisdiction and the Defense Base Act apply;
2. The injury occurred in Afghanistan;
3. Employer/Employee relationship existed;
4. Employer was timely notified of the injury;
5. The claim was timely filed;
6. Notice of Controversion was timely filed;
7. The average weekly wage is $3,029.59 (and compensation rate is $1,295.20);
8. Maximum medical improvement was reached July 10, 2013;
9. The Claimant has not returned to his usual job but is engaged in alternative employment;
10. If compensable, Claimant was/is disabled as follows:
    a. Temporary total benefits from July 13, 2012 to March 7, 2013;
    b. Temporary partial from March 8, 2013 to July 10, 2013;
    c. Permanent partial from July 11, 2013 to present.

TESTIMONY AND RELEVANT FACTS

Dale Sherman, now aged 72, worked as a MRAP mechanic for the Employer in Afghanistan, a job that required significant physical exertion, including working seven days per week, 12 hours per day in extreme conditions. Additionally, the job was mentally stressful for Claimant due to repeated insurgent attacks, the launching of missiles close to his living quarters, and dealing with extremely unsanitary living conditions on a remote forward operating base. Claimant was able to perform the essential functions of his job for approximately one year without any symptoms or medical issues.

On or about August 6, 2010, Claimant began working for Employer as a heavy duty vehicle mechanic in which he was responsible for repairing and servicing armor plated vehicles on behalf of the U.S. military in Afghanistan. In May 2011, Claimant returned home for a brief vacation [R & R] following an approximate eight (8) month assignment in Afghanistan on behalf of Employer. During this time and while off duty, Mr. Sherman suffered a heart attack and was admitted to Central Florida Regional Hospital on an urgent basis. Claimant was diagnosed with an acute myocardial infarction involving the inferior wall. An ECG showed inferior hypokinesis

and an ejection fraction of 55%. He underwent cardiac catheterization and had stenting of a complete obstruction of the right coronary artery.

In July 2012, Claimant sought medical care for chest pain, dizziness, difficulty breathing, and left arm pain which resulted in his emergency medical evacuation by the Employer. Upon his return to the U.S., Claimant underwent cardiac catheterization and, ultimately, emergency bypass surgery. Following surgery and during his recovery, Claimant was advised that he had underlying coronary artery disease which was compromised due to the harsh and stressful working conditions he experienced while working in Afghanistan.

On June 7, 2011, "upon patient's insistence," Claimant was cleared to return to work by his treating cardiologist with the recommendation that he continue taking his heart medications and follow up with a doctor in Afghanistan.

Claimant's underlying coronary artery disease became symptomatic in July 2012 due to physical exertion and mental stress while working. Both Claimant's treating physician and the Employer/Carrier's retained expert physician opined that increased demands on the heart brought on by physical exertion and stress can cause an asymptomatic individual with underlying and pre-existing coronary artery disease to become symptomatic and suffer symptoms and injury such as Claimant did. Further, both physicians agreed that it was appropriate for Claimant to be sent home in July 2012 for further medical treatment due to these symptoms. Quite simply, the Employer/Carrier's denial of Claimant's claim, particularly in light of the uncontroverted evidence, reveals a basic lack of knowledge and understanding of the law.

Mr. Sherman was born in West Virginia on March 17, 1941 and currently resides in Geneva, Florida. TR. at 14-15. Claimant graduated from high school and was drafted into the Army, where he worked primarily as a tank mechanic during his service from 1964 to 1967. Id. at 15. Upon his discharge, Claimant worked in numerous occupations, including construction and truck driving, which became his primary employment around 1968 to 1970. Claimant also performed mechanical work related to maintenance and upkeep of his tractor-trailer. Id. at 16. Claimant's nephew was working for the Employer, and discussed with him the possibility of going to work overseas. Claimant contacted ManTech about employment options and completed testing for the company, following which he was offered a position as a MRAP mechanic. Id. at 17.

Prior to deployment, Employer required Claimant to be medially cleared. He completed a physical before receiving a battery of shots. Id. at 18. Claimant was sent to Virginia for in-processing and later to Texas for MRAP training. Id. at 18-19. He was next sent to Fort Benning for another crash training course and underwent another complete physical following completion of same. Id. at 19.

After completion of a physical examination in Fort Benning, Claimant was advised that he could not be cleared to deploy to Afghanistan without additional clearance from his doctor due to a prior cancer diagnosis. Id. Claimant returned to Florida and underwent MRIs, CAT scans and blood tests to confirm that he was cancer-free. Id. at 20. Claimant was sent to Texas again for more training and yet another physical. Id.

After undergoing four separate physical examinations, Employer approved deployment. Id. Claimant deployed to Afghanistan in October 2010 and was stationed at Bagram Airfield. Id. at 20-21. Claimant worked the night shift seven days per week, 12 hours per day. Id. 21.

Claimant returned home in 2011 for vacation, when he suffered a heart attack. Id.; JX 13 at 3. After undergoing surgery, which included the insertion of a stent, Claimant was physically cleared and returned to work for the Employer at Bagram Airfield in Afghanistan. Id. at 22.

In January 2012 the Employer was looking to fill positions in other locations and Claimant volunteered to go to Camp Edinburg in southern Afghanistan to assist the Marine Corps. Id. at 22-23. Camp Edinburg did not have bathrooms. Baths were taken with bottled water. Individuals urinated into pipes dug into the desert floor and feces was put into plastic bags and burned. Id. at 23. Claimant slept in a tent with a plywood floor with poor air conditioning. Id. at 24. Camp Edinburg came under attack up to five times per week, including bullets "zizzing" through the tops of the tents. Id. at 24-25. Attacks included mortars and sniper fire. JX. 21, p. 25. Additionally, SAM missiles were launched without warning up to a half dozen times per day. TR. at 24. Claimant described "unbelievable noise" from the missiles being launched. JX. 21, at 26. There were no bunkers and if incoming bombs got real bad, they would climb into the MRAPs for protection. TR. at 25. There were only two non-military personnel on the FOB, which included Claimant and his co-worker from the Employer. JX. 21 at 29. Claimant maintains that this was a stressful environment. TR. at 25.

Claimant began working the day shift at Camp Edinburg. Id. at 23. His job there was to support the Marines and whatever they needed he did for them. Id. This included upgrading the turrets on the MRAPs, which required Claimant to work outside as the MRAPs are about 14 feet high and did not fit under the tents. Id. at 25-26. They were able to work only 15 to 20 minutes at a time because of the heat, which could reach 125 to 130 degrees. Id. at 26.

Claimant began to experience certain physical symptoms, which he thought was heat stroke. Id. at 26, 27. His co-worker started doing more of the work to take some strain from Claimant. Id. at 26. There was no doctor at Camp Edinburg and no available medical care – he had to be choppered in and out to obtain medical assistance. Id. at 27. Around the end of June or beginning of July, Camp Edinburg was closed. Id. at 26.

Claimant and his co-worker were re-deployed to Camp Leatherneck. Id. at 27. Claimant was having trouble working in the garage due to the heat. Id. at 28. While there, Claimant's co-worker insisted he go see a doctor due to the physical symptoms he was continuing to experience. Id. at 27. Upon visiting the doctor, Claimant was advised he had an enlarged heart and needed to get back to the U.S. Id. at 28; JX. 21, at 77.

Claimant relayed this information to his supervisor and was told he would speak with the doctor directly. TR. at 29. Claimant's supervisor spoke with the doctor and then instructed Claimant to return to his barracks to pack because he was being placed on a medical flight out of the camp as soon as possible and going on emergency medical leave. Id. at 29; JX. 21, at 75-76.

Claimant returned to the U.S. on a Monday and by Friday was in the hospital undergoing double bypass heart surgery, performed by Dr. Bitar. TR. at 29, 14. Claimant returned home and saw his cardiologist, Dr. Bitar, who advised the Claimant of another blocked coronary artery. He underwent a repeat cardiac catheterization and was found to have severe stenosis of the left anterior descending coronary artery. The doctors tried to stent a severely obstructed mid-left anterior artery but failed. Claimant developed an acute dissection of the left anterior descending artery and went into shock with major ST elevation. The area where the prior stent was placed in 2011 was patent, and there was a 30% stenosis of the circumflex coronary artery. Accordingly, the Claimant underwent emergency coronary artery bypass surgery on July 21, 2012. JX 13, at 3. Claimant has continued treatment with Dr. Bitar subsequent to the surgery. TR. at 30. Claimant is treated for breathing issues, shortness of breath and a very low energy level. Id. Presently, Dr. Bitar wants to implant a defibrillator due to a risk of congestive heart failure. Id. Dr. Bitar has advised Claimant that he should stop working. Id. at 31.

Claimant, however, has not stopped working. Id. at 31. In fact, he initially returned to work driving a tractor-trailer hauling plants from Sanford, Florida to Homestead, Florida and back approximately two times per week. Id. at 32. These runs paid at the most $350 each after paying for fuel, license, wear and tear, etc. Id. at 38-39. Claimant continued to work in this capacity from approximately March 2013 through September 2013. Id. 32-33. He underwent a stress test at that time that revealed he had lost use of another 10% of his heart capacity. TR. at 33. Unfortunately, Claimant was not capable of continuing to work in this capacity due to the physical toll it took on him, in part because of the required maintenance of the truck, and he sold the tractor-trailer. Id. at 33-34.

Claimant then secured a part-time job working for a feed company. Id. at 33. He drives a tractor-trailer to Tallahassee and back. Id. at 34. He does not have to load or unload the vehicle. Id. He also does not work consecutive days. Id. at 36. He is currently making between $400 to $500 per week. Id. at 38.

As of the hearing, Claimant had a commercial driver's license that was up for renewal in September 2014. Id. at 34. Renewing the CDL requires passing a Department of Transportation physical. Id. at 35. Claimant expressed concerns about passing the DOT physical, and advised he did not believe that he would not pass it if he had the defibrillator implanted. Id. at 35. Claimant intends to keep working, despite his doctor's recommendations, but it is becoming harder and harder to do so. Id. at 35. He also expressed concern about putting other people's lives in jeopardy by continuing to drive a tractor-trailer with his diminished heart function. Id. at 36.

Jay Bitar, M.D.

Dr. Bitar is a specialist in adult cardiology. JX. 8, at 2. He is board certified in internal medicine since 1986 and cardiology since 1989. Id. at 20. Dr. Bitar attended medical school in Damascus, Syria, graduating in 1981. Id. at 19. Following a cardiology internship in Detroit, Michigan, he completed an interventional cardiology fellowship in 1989. Id. at 20. He is licensed to practice medicine in Michigan, Florida, Illinois and Indiana. Id. at 20.

Dr. Bitar initially evaluated Claimant in January 2012. Claimant came to see him to establish care as his prior physician was no longer on his insurance plan. Id. at. 3. Claimant was doing fairly well at that time and did not have angina. Id. Dr. Bitar started Claimant on medication for high cholesterol and referred him for a stress test. Id. The results of the stress test were normal (negative), with no ischemia, indicating Claimant's heart was getting adequate blood flow. Id. at 3-4.

Dr. Bitar next saw Claimant in July 2012 for symptoms suggestive of angina which had begun while he was working in Afghanistan. Id at 4. His symptoms included chest pain, shortness of breath and swelling of the ankles. Id. at 11. Claimant reported his working environment in Afghanistan was noisy, quite stressful, and quite physically and mentally demanding. Id. at 10. Given Claimant's history of a prior heart attack, Dr. Bitar proceeded directly with cardiac catheterization. Id. at 4. Dr. Bitar attempted to insert a stent into a new blocked artery; however, due to complications, an emergency bypass surgery was undertaken. Id. at 4. Dr. Bitar explained that Claimant's 2011 heart attack was located in the right coronary artery, while the procedure in July 2012 addressed a new problem in the left anterior descending artery. Id. at. 4.

Dr. Bitar advised that Claimant suffers from coronary artery stenosis, or coronary artery disease, which led to cardiomyopathy. Id. at 5. Claimant's condition is also suggestive of acute coronary syndrome, which is when the disease in the coronary artery becomes unstable and progresses quickly, leading to reduced blood flow to the heart and the development of physical symptoms, such as those experienced by Claimant. Id. at 5-6.

Dr. Bitar testified that there are standard, well-known risk factors described in the medical and cardiology fields that can accelerate coronary artery disease, such as hypertension, high cholesterol and being male. Id. at 6. There are additional risk factors which are less well understood, which include stress and certain environmental factors. Id. at 6. Physical and mental stress will put more stress on the heart and can aggravate or accelerate the onset of physical symptoms in someone suffering from coronary artery disease. Id. at 6. According to the report, stress is difficult to quantitate. Id. However, medical literature supports that stress accelerates disease of the heart. Id. at 9.

In Dr. Bitar's medical opinion, Claimant's work environment, including working 84 hours or more in a combat zone on a forward operating military base in extreme weather conditions, caused stress that accelerated his coronary artery disease. Id. at 6. Further, the stress and exertion associated with Claimant's work in a combat zone accelerated the process of the coronary artery disease – contributing to making it progress faster. Id. at 7. Dr. Bitar opined that the unusual stress probably made Claimant's blood pressure much higher than usual, causing a plaque rupture leading to acute coronary syndrome. Id. Claimant's employment environment accelerated his underlying coronary artery disease to the point that it became symptomatic in July 2012 while working in Afghanistan. Id. Claimant is also more prone to have accelerated process of his heart disease than a normal person with no history of heart trouble. Id.

Dr. Bitar continued to see Claimant on approximately a monthly basis following his emergency surgery. Id. at 4. Claimant did not progress as well as Dr. Bitar was hoping and

experienced recurrent episodes of congestive heart failure. Id. at 4-5. Claimant's continuing symptoms included dyspnea on exertion, ankle edema and paroxysmal nocturnal dyspnea. Id. at. 5. Claimant reached a medical plateau in his recovery in July 2013. Id. at 5.

Dr. Bitar testified that there are many activities that Claimant should not perform, including strenuous activity, such as working in extreme weather conditions, lifting anything more than 20 pounds, going up and down stairs, and working for extended hours. JX. 8, p. 5. Dr. Bitar advised that Claimant will not be cleared to return to work in his former position in Afghanistan. Id. at 7. Claimant "has compromised his heart muscle function to the point that it would not be safe for him to expose himself to extreme work, extreme mental stress or extreme weather conditions." Id. at 12.

Michael Nocero, M.D

Dr. Nocero is a specialist in cardiovascular disease. JX. 10, at. 5. He examined Claimant on May 29, 2013 after being retained by the Employer/Carrier. Id. at 6. Claimant continued to be symptomatic at the time of the examination. Id. at 31. Claimant reported that he worked long hours as a heavy-duty mechanic on a military base in Afghanistan where it was hot, humid and the environment very noisy, as well as unsanitary. Id. at 7. Dr. Nocero detailed Claimant's history of a 2011 heart attack and surgery, where it was found he had a total obstruction of the right coronary artery. Id. at 7-8. Dr. Nocero further outlined Claimant's subsequent episode when he was sent back to the U.S. due to an enlarged heart and chest pain, ultimately undergoing surgery where it was found he had a severe stenosis of the middle artery (the anterior descending). Id. at 8.

Dr. Nocero stated that hot temperatures can increase blood pressure. Id. at 24. Dr. Nocero also advised that the only way for a doctor to opine that Claimant's blood vessels were constricted would be to evaluate his symptoms: whether, upon his return to Afghanistan, he started having ongoing chest pain, episodes of shortness of breath, and other symptoms that would make a clinical cardiologist suspect a progression of coronary artery disease. Id. at 23.

Dr. Nocero testified that Claimant was a high-risk individual for developing coronary artery disease. Id. at 26. In his opinion, work and environmental stress are not factors in developing coronary artery disease. Id. at 26-27. An individual with underlying coronary artery disease may experience symptoms such as chest pain, shortness of breath, easy fatigue-ability, and lightheadedness or dizziness. Id. at 27. A more severe symptom may be left arm pain. Id. at 27-28. Dr. Nocero testified that increased demands on the heart could cause an asymptomatic individual with coronary artery disease to become symptomatic and exhibit some of these symptoms. Id. at 28. Increased demands on the heart could be brought on by physical exertion and stress. Id. at 28.

Dr. Nocero related that Claimant's job required him to work: 1) as a heavy vehicle mechanic, 2) in a combat zone in Afghanistan, 3) seven days per week and 12-plus hours per day, 4) in July in the middle of the desert, 5) with fear of incoming mortar and rocket attacks, and 6) with the loud sounds of outgoing missiles. Dr. Nocero opined that these factors could increase demands on the heart. Id. 29. Dr. Nocero testified that temperature changes, heat, and

physical exertion in an individual with coronary artery disease will affect that individual and sometimes cause symptoms. Id. at 35.

Dr. Nocero confirmed that Claimant, in fact, became symptomatic as he experienced chest pain, dizziness, shortness of breath and left arm pain while working in Afghanistan. Id. at 29-30. Dr. Nocero advised it was medically appropriate for Claimant to be sent home in July 2012 for further evaluation due to these symptoms. Id. at 30. Dr. Nocero agreed that all of the care rendered by Dr. Bitar to Claimant was medically necessary and appropriate. Id. at 31.

Dr. Nocero opined that Claimant is not able to go back to work in any capacity. Id. at 25. When advised that Claimant was actually working driving a truck, Dr. Nocero advised that he would let him do this, but that it would depend on how well he does and that he would modify his recommendations depending on the development of symptoms. Id. at 26. Dr. Nocero would restrict Claimant from returning to work in a war zone in Afghanistan and from working seven days a week, 12 hours per day. Id. at 31. Dr. Nocero would not even let Claimant work as a mechanic here in the U.S. Id. at 33. These restrictions would date back to July 2012 when Claimant first presented with symptoms. Id. at 32-33.

James Sullivan, Claimant's Vocational Specialist

Mr. Sullivan is a certified rehabilitation counselor since 1992 and certified vocational evaluator since 1991. He is also a Department of Labor, Office of Workers' Compensation Programs, certified vocational rehabilitation counselor, a designation he has held since 2007. JX. 25, at 6. His previous work was in a university setting as a career planning and placement specialist. Id. 5. Mr. Sullivan has a bachelor's degree in psychology and a master's degree in counseling with an emphasis on career development. Id. While retained in this case, Mr. Sullivan does work for both claimants and employer/carriers, even having current pending cases wherein he was retained by the defense firm in this matter. Id. at 6-7.

Mr. Sullivan was retained in this matter to provide an assessment of Claimant's capacity to return to work, as well as an assessment of the report and labor market survey of the Employer/Carrier's vocational specialist. Id. at 7. Mr. Sullivan's vocational assessment included reviewing medical records to determine Claimant's residual physical capabilities, interviewing Claimant regarding his education and vocational history, and performing a transferable skills analysis to identify what types of occupations his experience translates to within his residual physical capabilities. Id. at 8. Mr. Sullivan also reviewed the deposition transcripts of Drs. Bitar and Nocero. Mr. Sullivan interviewed Claimant on January 17, 2014 and again on July 28, 2014. Id. at 10.

Mr. Sullivan testified that Claimant's physical limitations, as outlined by the doctors, are vocationally significant in that they prevent him from returning to the work he was doing overseas, as well as limit his capacity to work as a truck driver. Id. at 11-12. Mr. Sullivan testified that Claimant would not pass a physical and would not be deployable overseas based on his current physical condition. Id. at 13-14. Mr. Sullivan also testified that Claimant would not pass a Department of Transportation physical based on his current symptoms. Id. at 16. Accordingly, Mr. Sullivan testified that Claimant is unlikely to be able to continue working in

his current capacity as a truck driver when his commercial driver's license expires in September 2014. Id. at 18.

Mr. Sullivan reviewed the Employer/Carrier's labor market survey and concluded that none of the 6 positions identified represented appropriate alternate employment for Claimant based on his skills, vocational experience and physical limitations imposed by the doctors. Id. at 11-13. Mr. Sullivan further opined that based on Claimant's residual physical capabilities, work history, and current stamina, his current part-time job earning $400 per week is an appropriate position for him and represents his retained earning capacity. Id. 19.

Shaun Aulita, Vocational Specialist

Ms. Aulita worked as a claims adjuster for 20 years, including positions as a supervisor and manager. JX. 22, at 6. She has been doing vocational work for only three years and is not OWCP-certified. Id. at 25. During her brief vocational career, Ms. Aulita has been retained almost exclusively by the defense. Ms. Aulita testified that only once in three years has she been retained by a Claimant's attorney under the Longshore Act. Id. at 25.

Ms. Aulita conducted a vocational assessment of Claimant and prepared a labor market survey. Id. at 7-8. Ms. Aulita described Claimant as "very honest and forthcoming in the interview and very pleasant", as well as "very cooperative" in the interview. Id. at 9-10. Claimant struck her as an individual who wanted to work and to look for other potential employment opportunities. Id. at 9, 27. Ms. Aulita commented that Claimant was not a candidate for many jobs due to his limited typing skills and non-proficiency in Microsoft Office. Id. at 12.

Ms. Aulita reviewed medical records as a part of her vocational evaluation, including the records of Drs. Bitar and Nocero. Id. at 1, 5. Ms. Aulita indicated in her report that "There are no specific limitations of work abilities in information resources noted, other than the full duty release following Claimant's first cardiac surgery with stent. There is a note that Claimant should not work in extreme heat or cold." Id. at 8. Ms. Aulita testified that, per the medical opinion and records of Dr. Nocero, Claimant is not able to return to the work he was doing in Afghanistan. Id. at 32.

The Employer/Carrier did not provide Ms. Aulita with the deposition transcripts of Drs. Nocero or Bitar and she did not know these were completed prior to her being retained. Id. at 33-34. Ms. Aulita does not know why the Employer/Carrier did not provide her with this evidence, either before completion of her labor market survey or any time thereafter. Id. at 73. However, Ms. Aulita acknowledged that the Employer/Carrier's referral letter to her indicated there was physician testimony. Id. at 34. There is no indication Ms. Aulita requested the referenced physician testimony. Additionally, she did not conduct any follow up to clarify any specific restrictions assigned by Dr. Nocero. Id.

Ms. Aulita was not aware Dr. Nocero testified that Claimant was not able to return to work in any capacity. Id. at 34-35. Ms. Aulita was also not aware that Dr. Bitar testified that Claimant should not lift more than 20 pounds, go up and down stairs, was unable to work long or

extended hours, should not engage in extensive travel, and should not perform any extreme work or be put under any extreme stressful or weather conditions. Id. at 35-36.

Ms. Aulita identified six positions in total in her labor market survey. Id. at 40-41. In speaking with these six prospective employers, she did not discuss the restrictions imposed by Drs. Nocero and Bitar in their deposition testimony. Id. at 43-44.

Ms. Aulita identified two positions in Kuwait, each with a work schedule of 12 hours per day, seven days per week. Id. at 45. Ms. Aulita concedes that she would defer to the medical experts as to whether Claimant is a viable candidate for a position from a physical limitations standpoint. Id. at 59. However, none of the jobs identified in Ms. Aulita's labor market survey were presented to either Dr. Nocero or Dr. Bitar to see if they would approve of the jobs from a physical limitations standpoint. Id. at 60.

Ellen Sherman

Claimant's Wife testified that she owns a house on about 12 acres of land in Geneva, Florida. JX. 28, at 5. She operates a small, personal use farm – not a commercial farm – on the property where she raises parrots and has six cows and 13 sheep, as well as two donkeys. Id. at 6. She also has rescue birds on the property, along with some bunnies and chickens. Id. at 7.

Mrs. Sherman does not generate income from the farm. Id. at 9. She testified that she is more than likely breaking even. Id. at 14-15. There is no separate business entity that runs the farm. Id. at 9. While she does sell chicks from some of the parrots, Mrs. Sherman also puts money back into taking care of the rescue birds. Id. at 9. Mrs. Sherman hires a helper when needed since Claimant is not able to do much. She also has a couple of volunteers. Id. at 12-13.

Claimant helps out by doing what he can on the farm, such as repairing a fence or cage and filling the feed room. Id. at 15. Claimant did build a corral, but paid dearly for it as it wore him down. Id. at 17-19. Otherwise, he piddles around the farm. Id. at 20. There are things Claimant would like to do around the farm but cannot due to his physical limitations. Id. at 22-23. She ventured that Claimant only has 30% heart function from a recent stress test, so he's in congestive heart failure. Id. at 24.

RELEVANT LAW

An injured person must satisfy four elements in order to receive compensation under the Act. ***Chesapeake & Ohio Ry. Co. v. Schwalb,*** 493 U.S. 40 (1989). First, the person must be injured in the course of employment. 33 U.S.C. § 902(2). Next, the employer must have employees engaged in maritime employment. § 2(4). Third, the injured person must have "status," that is, be engaged in maritime employment. § 2(3); ***Dir., OWCP v. Perini N. River Assocs.***, 459 U.S. 297, 317 (1983). Finally, the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading,

repairing, dismantling, or building a vessel)." § 3(a).[1] This last element is the "situs" test. *See, e.g.*, ***Schwalb***, 493 U.S. at 45.

I may evaluate the credibility of all witnesses and to draw inferences and conclusions from the evidence. ***Quinones v. H.B. Zachery, Inc.***, BRB No. 97-0688 (Feb. 10, 1998). Accordingly, credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *Id.*; ***Cordero v. Triple A Mach. Shop***, 580 F.2d 1331 (9th Cir. 1978).

The Act must be construed liberally in favor of the claimant. ***Voris v. Eikel***, 346 U.S. 328 (1953); ***J.B. Vozzolo, Inc. v. Britton***, 377 F.2d 144 (D.C. Cir. 1967).[2] § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d). Subsection 7(c) establishes that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. ***Dir., OWCP v. Greenwich Collieries***, 512 U.S. 267, 271 (1994). In ***Ceres Marine Terminals, Inc. v. Green***, 656 F.3d 235 (4th Cir. 2011), the Fourth Circuit held that based on ***Greenwich Collieries***, 512 U.S. 267, when evidence is evenly balanced, the claimant must lose.

To establish a *prima facie* claim of entitlement to compensation, a claimant must establish that: (1) he/she sustained 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. *See* ***Merrill v. Todd Pac. Shipyards Corp.***, 25 BRBS 140 (1991); ***Kier v. Bethlehem Steel Corp.***, 16 BRBS 128, 129 (1984). Where an employment-related injury aggravates or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable. ***Strachan Shipping v. Nash***, 782 F.2d 513, 517 (5th Cir. 1986).

Under the "aggravation rule," where an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant condition is compensable; the relative contributions of the work-related injury and the prior condition are not weighed to determine claimant's entitlement. *Id*; *see also* ***Lamon v. A-Z Corp.,*** -- BRBS --, BRB No. 11-0322 (Dec. 15, 2011), slip op. at 3, *citing, inter alia*, ***Marinette Marine Corp. v. Dir., OWCP***, 431 F.3d 1032, 39 BRBS 82 (CRT) (7th Cir. 2005) and ***Crum v. Gen. Adjustment Bureau***, 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984)). However, if the disability results solely from the natural progression of the prior injury, it is not compensable. *See, e.g.,* ***Metropolitan Stevedore Company v. Crescent Wharf and Warehouse***, 339 F.3d 1102, 1105 (9th Cir. 2003), *cert. den.*, 543 U.S. 940 (2004). "The only legally relevant question is whether the work injury is a cause of the disability," not whether it is the sole cause. ***Director, OWCP v. Vessel Repair, Inc. [Vina]***, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

Once a *prima facie* case is established, a presumption is created under section 20(a) of the Act that the employee's injury or death arose out of his employment. 33 U.S.C. §920(a). Once the presumption is invoked, the burden shifts to the employer to establish by specific and comprehensive medical evidence that the claimant's condition was not caused or aggravated by the employment. ***Manship v. Norfolk & Western Ry. Co.***, 30 BRBS 175 (1996); ***Holmes v.***

[1] *See Rodriquez v. Bowhead Transp. Co.*, 270 F.3d 1283 (9th Cir. 2001). "Vessel" includes "time charterer."

Universal Maritime Serv. Corp., 29 BRBS 18 (1995); ***Hampton v. Bethlehem Steel Corp***., 24 BRBS 141, 144 (1990); ***Ranks v. Bath Iron Works Corp***., 22 BRBS 302, 305 (1989); ***Conoco, Inc. v. Dir., OWCP,*** 194 F.3d 684 (5th Cir. 1999);[3] ***Parsons Corp. of Cal. v. Dir., OWCP***, 619 F.2d 38 (9th Cir. 1980).

To satisfy the "harm" element of a prima facie case, the Claimant must offer affirmative evidence that something went wrong within his human frame. ***Shoener v. Sun Shipbuilding & Dry Dock Co***., 8 BRBS 630, 632 (1978). The injury need not be traceable to a definite time or event, but can gradually occur over time. See ***Pittman v. Jeffboat, Inc.***, 18 BRBS 212 (1986). Further, the relevant consideration is whether the Claimant suffered an injury in the broadest sense and is not to be narrowed or limited to a specific medical diagnosis. See ***Walkley v. SEII***, Inc., BRB No. 09-0573 (2010). 62).

In order to invoke the presumption under the "working conditions" prong, the U.S. Supreme Court has required a claimant to at least allege an injury that arises out of and in the course of employment. ***U.S. Industries v. Director, OWCP***, 455 U.S. 608(1982). However, a claimant need not introduce affirmative medical evidence that the working conditions in fact caused his harm. To satisfy this element, a claimant need only introduce affirmative evidence of the existence of working conditions that could conceivably have caused the alleged harm. ***Champion v. S&M Traylor Bros***., 690 F. 2d 285, 295 (D.C. Cir. 1982).

Moreover, under the Defense Base Act, the causation element of a prima facie claim is broadened, such that the requisite "working conditions" include the entire "zone of special danger" created by the "obligations or conditions" of the injured worker's employment overseas. ***O'Keeffe v. Smith, Hinchman & Grylls Assocs***., 380 U.S. 359 (1965). The zone of special danger is so broad, in fact, that it includes nearly any harm sustained while abroad in the employment of a covered employer, including harm that results from purely recreational activities. ***O'Leary v. Brown-Pacific-Maxon, Inc***., 340 U.S. 504 (1951). Further, an employee need not establish a causal relationship between the nature of his employment and the accident that occasioned his injury. Neither is it necessary that an employee be engaged at the time of injury in activity of benefit to his employer. Rather all that is required for compensability is that the obligations or conditions of employment create the "zone of special danger" out of which the injury arose. Id. at 504 – 07.

In ***Harris v. England Air Force Base***, 23 BRBS 175 (1990), the Board found that in Defense Base Act cases an employer can be said to create a zone of special danger by simply employing an employee in a foreign country. As an example, in ***E.C. v. KBR***, 2008-LDA-00054 (July 22, 2008), the Court found the injured worker's cardiomyopathy compensable and directly related to his exposure to a virus while employed in Iraq under the "zone of special danger" precedent. The Court stated that, "[w]hile the virus or viruses in question could easily have

[3] In *Conoco*, 194 F.3d 684, the Fifth Circuit held a standard requiring an employer to "rule out" the possibility of a causal relationship between a workplace injury and the claimant's employment was too high a standard to place on employer to rebut the § 20(a) presumption. In *American Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810 (7th Cir. 1999), the Seventh Circuit iterated the employer's burden is one of "production" only. In *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003), the court observed the Board has expressed several different formulations of the Act for proving an injury is not work-related, i.e., rule-out, unequivocally state, and affirmatively state, but these all violate its *Conoco* decision.

existed in Houston as well as Iraq, Claimant did not develop cardiomyopathy until exposed to such virus or viruses while working in Iraq."

Where a claimant is alleging a stressful working condition, he is not required to show unusually stressful conditions in order to establish a prima facie case. Rather, even where the stress may seem relatively mild, the claimant may recover if any injury results. ***Konno v. Young Brothers, Ltd***., 28 BRBS 57, 61 (1994); see generally ***Wheatley v. Adler***, 407 U.S. 307 (D.C. Cir. 1968); 1B ***Larson, Workmen's Compensation Law***, section 42.25(f), (g) (1996). The issue in such situations is not the degree of stress, but rather the effect of this stress on the claimant. Thus, the relevant central issue for the Court to evaluate is the Claimant's subjective reaction to the conditions or events to determine whether his reactions, symptomology and affects result in an injury. ***Konno v. Young Brothers, Ltd***., *supra*.

FINDINGS OF FACT

Claimant argues that although his employment certainly would not cause his underlying coronary artery disease, his claim arises because the physical exertion and mental stress of his employment in the middle of the desert, in extreme heat, and in a war zone aggravated or accelerated his cardiac condition, leading to symptoms that required medical care. Employer directs me to the May 2011 heart attack while Claimant was off duty and outside the course and scope of his employment. I am advised that Employer was not involved in treating Claimant's first heart attack or otherwise clearing him for duty. Ultimately, Claimant recovered from the May 2011 heart attack.

This case revolves around the Claimant's medical condition in 2012. At times, during 2012, Claimant was able to work only 15 to 20 minutes at a time because of the heat, which could reach 125 to 130 degrees. The job required him to work: 1) as a heavy vehicle mechanic, 2) in a combat zone in Afghanistan, 3) seven days per week and 12-plus hours per day, 4) in July in the middle of the desert, 5) with fear of incoming mortar and rocket attacks, and 6) with the loud sounds of outgoing missiles.

I find that Claimant has satisfied both prongs of a prima facie case under Section 20(a). Claimant's treating physician, Dr. Bitar, testified that Claimant suffers from coronary artery disease, which led to cardiomyopathy. JX. at 5. Dr. Bitar also testified that physical and mental stress will put more stress on the heart and can aggravate or accelerate the onset of physical symptoms in someone suffering from coronary artery disease. Id. at 6. In Dr. Bitar's opinion, Claimant's work environment, including working 84 hours or more per week in a combat zone on a forward operating base in extreme weather conditions, caused stress that accelerated his coronary artery disease. Id. Dr. Bitar stated that the unusual stress probably made Claimant's blood pressure much higher than usual, causing a plaque rupture leading to acute coronary syndrome. Id. at 7. In summary, Claimant's employment environment accelerated his underlying coronary artery disease to the point that it became symptomatic in July 2012 while working in Afghanistan, thereby necessitating his repatriation in order to receive medical care. Id. These symptoms included chest pain, dizziness, difficulty breathing, as well as left arm pain and swelling in his right lower leg. JX. 14, 1-2. "When an injured employee seeks benefits under the LHWCA, a treating physician's opinion is entitled to special weight." ***Amos v. Director, OWCP***, 1998 U.S. App. LEXIS 33883, *9, 1998 AMC 2769 (9th Cir. 1998), amended

by 164 F. 3d 480 (9th Cir. 1999), *cert. den*. 528 U.S. 809 (1999); see also ***Pietrunti v. Director, OWCP***, 119 F. 3d 1035 (2nd Cir. 1997).

Dr. Nocero testified that an individual with underlying coronary artery disease may experience symptoms such as chest pain, shortness of breath, easy fatigue-ability, and lightheadedness or dizziness, as well as a more severe symptom of left arm pain. JX. 10, at 27-28. Dr. Nocero testified that increased demands on the heart could cause an asymptomatic individual with coronary artery disease to become symptomatic and exhibit some of these symptoms. Id. at 28. Dr. Nocero advised that increased demands on the heart could be brought on by physical exertion and stress. Id. Dr. Nocero confirmed that Claimant, in fact, became symptomatic as he experienced chest pain, dizziness, shortness of breath and left arm pain while working in Afghanistan and agreed that it was appropriate for Claimant to be sent home in July 2012 for further medical evaluation due to these symptoms. Id. at 29-30.

However, Employer argues that Dr. Nocero opined that Claimant's second (2nd) heart attack was independent of his working environment and that the working environment did not cause a progression of his pre-existing heart disease.

I find that Claimant was exposed to a harsh working environment which, according to competent medical opinion evidence, is competent to produce physical and emotional stress that caused his underlying coronary artery disease to become symptomatic, thereby accelerating his need for medical care. Accordingly, Claimant has met his burden and established his right to the Section 20(a) presumption.

Employer/Carrier Did Not Rebut the Presumption

Once the Section 20(a) presumption has been invoked, the burden shifts to the Employer/Carrier to rebut the presumption with substantial evidence that the Claimant's condition is unrelated to his employment. See ***Port Cooper/T. Smith Stevedoring Co. v. Hunter***, 227 F. 3d 285 (5th Cir. 2000); ***Conoco, Inc. v. Dir., OWCP***, 194 F. 3d 684 (5th Cir. 1999); ***Gooden v. Dir., OWCP***, 135 F. 3d 1066 (5th Cir. 1998); ***Santoro v. Maher Terminals, Inc***., 30 BRBS 171 (1996). In order to rebut the presumption, the Employer must produce specific and comprehensive evidence that the Claimant's condition was not caused, aggravated, or contributed to by the work accident. ***Brown v. Jacksonville Shipyards, Inc.***, 893 F. 2d 294, 297 (11th Cir. 1990); ***Swinton v. J. Frank Kelly, Inc***., 554 F. 2d 1075, 1082 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976).

Although Employer maintains that Dr. Nocero opined that Claimant's second (2nd) heart attack was independent of his working environment and the working environment did not cause a progression of his pre-existing heart disease, I find that his statements when deposed are inconsistent with this conclusion. Dr. Nocero testified that an individual with underlying coronary artery disease may experience symptoms such as chest pain, shortness of breath, easy fatigue-ability, and lightheadedness or dizziness, as well as a more severe symptom of left arm pain. Dr. Nocero testified that increased demands on the heart could cause an asymptomatic individual with coronary artery disease to become symptomatic and exhibit some of these symptoms. Dr. Nocero advised that increased demands on the heart could be brought on by physical exertion and stress. Dr. Nocero confirmed that Claimant, in fact, became symptomatic

as he experienced chest pain, dizziness, shortness of breath and left arm pain while working in Afghanistan and agreed that it was appropriate for Claimant to be sent home in July 2012 for further medical evaluation due to these symptoms.

Claimant argues that he has never alleged that the working conditions he was exposed to in Afghanistan caused his coronary artery disease.

Dr. Nocero testified that increased demands on the heart could be brought on by physical exertion and stress, could cause an asymptomatic individual with coronary artery disease to become symptomatic and exhibit symptoms, including chest pain, shortness of breath, easy fatigue-ability, lightheadedness or dizziness, and left arm pain. I note that these are symptoms that Claimant experienced while working in Afghanistan in July 2012. JX 10 at 27-30. Claimant reminds me:

> Dr. Nocero understood that Claimant's job required him to work: 1) as a heavy vehicle mechanic, 2) in a combat zone in Afghanistan, 3) seven days per week and 12-plus hours per day, 4) in July in the middle of the desert, 5) with fear of incoming mortar and rocket attacks, and 6) with the loud sounds of outgoing missiles. JX. 10, p. 28-29. Dr. Nocero opined that these factors could increase demands on the heart. JX. 10, p. 29. And, as previously stated, it is undisputed that the increased demands on Claimant's heart, in fact, led to the development of symptoms due to the underlying coronary artery disease, requiring him to be sent home immediately for medical care, which ultimately included heart surgery.

See Brief.

Whereas Employer/Carrier asserted that Dr. Nocero "is of the opinion that the working conditions were not a causal factor in causing his symptomology…" TR. at 11, I accept Claimant's argument that the evidence proves otherwise. I accept that physical exertion and mental stress of employment aggravated and/or accelerated underlying coronary artery disease, leading to a condition that required medical care.

I also reject Employer's argument that Claimant needed to show that his duties or work environment was changed or materially different than the work he traditionally performed on a daily basis. What he needs to show is that the work is competent to produce the impairment. ***Champion v. S&M Traylor Bros***, *supra*. I find that he did. The burden is on Employer to show that the condition was part of a natural progression, not impacted by work in Afghanistan. ***Metropolitan Stevedore Company v. Crescent Wharf and Warehouse***, *supra*.

I find that Dr. Nocero did not provide any logic or basis to conclude that field conditions precluded contribution to the cardiac history. I find that Dr. Nocero confused the burden of proof and apparently assumed that the Claimant had the burden. Dr. Nocero opines that Claimant's heart condition would have progressed in the same manner irrespective of his employment overseas. In the brief, Employer admits that Dr. Nocero does not rule out compensability, but rather, he states that the current medical literature does not support such a connection, i.e., environment and acceleration of heart disease. Because he relied on generalities without

reference to the record, that admittedly shows increased symptomology when "in country," at onset, July 13, 2012, I find that his opinion is unpersuasive.

Moreover, I imply that Dr. Nocero expressed a false dichotomy, an "either/or" determination and did not consider that causation does not have to be all inclusive. "The only legally relevant question is whether the work injury is *a* cause of the disability," not whether it is the sole cause. ***Director, OWCP v. Vessel Repair, Inc. [Vina]***, *supra*. Emphasis added.

Dr. Nocero does not address the relevant causation question in this case. Dr. Nocero states in his report that "it is my opinion that the environment he was exposed to in the Middle East and his type of employment as a mechanic had nothing to do with causing his coronary artery disease." JX. 13 at 5. This conflicts with his testimony that work factors could increase demands on the heart. Id. at 29. Dr. Nocero testified that temperature changes, heat, and physical exertion in an individual with coronary artery disease will affect that individual and sometimes cause symptoms. Id. at 35.

To the contrary, I accept that the treating physician, Dr. Bitar, is more persuasive. ***Amos v. Director, OWCP***, *supra*, and ***Pietrunti v. Director,*** *supra.*

I find that Claimant's impairment is compensable.

Nature and Extent of Disability and Retained Earning Capacity

The Parties stipulated that Claimant reached maximum medical improvement on July 10, 2013. The Parties also stipulated Claimant has not returned to his usual job but that he has engaged in alternative employment. Additionally, the Parties stipulated that, if the claim is found compensable, compensation benefits would be owed and classified as follows: temporary total disability from July 13, 2012 through March 7, 2013, temporary partial disability from March 8, 2013 (when Claimant returned to alternate work) to July 10, 2013 (when Claimant reached maximum medical improvement), and permanent partial disability from July 11, 2013 onward. ALJ 1.

By way of the Parties' stipulations, Claimant has established his disability so that the burden shifts to the employer to demonstrate that suitable alternate employment exists. ***Universal Mar. Serv. Corp.***, 137 Fed.Appx. at 214, n.4. See also ***Nguyen v. Ebbtide Fabricators***, 19 BRBS 142, 144-145 (1986). In this regard, Claimant has returned to work, thereby demonstrating, and acknowledging, that alternate employment exists.

I need to address the rate at which compensation is to be paid. As to temporary total disability from July 13, 2012 through March 7, 2013, benefits would be owed at the maximum compensation rate of $1,295.20 based on the stipulated average weekly wage of $3,029.59.

With regard to temporary partial disability from March 8, 2013 through July 10, 2013, Claimant returned to work driving a tractor-trailer for the duration of this period. Ms. Aulita acknowledges that Claimant's gross earnings were $700 per run. JX. 22, p. 91. Claimant testified that he would do approximately two runs per week, which accounted for net earnings of

no more than $350 per run (or $700 per week) after accounting for expenses. TR. at 32, 38-39. Ms. Aulita does not provide an opinion, either in her testimony or report, regarding Claimant's retained earning capacity. Therefore, temporary partial disability benefits would be owed at the maximum compensation rate of $1,295.20 ($3,029.59 - $700 = $2,329.59 x 2/3 = $1,553.13, subject to the maximum rate).

Finally, I must determine the rate for permanent partial disability benefits that are to be paid from July 11, 2013, once Claimant was placed at maximum medical improvement, and continuing.

Although Claimant has returned to work, the Employer/Carrier apparently disputes that his current income of $400 per week represents his retained earning capacity. However, it is not clear what the Employer/Carrier's position is in regard to Claimant's retained earning capacity as their retained expert never provided an opinion, either in her testimony or report. Accordingly, I must make a determination regarding this issue.

Generally, to establish the existence of suitable alternate employment, an employer must show the existence of realistically available job opportunities in the relevant community, which the claimant is capable of performing, considering his age, education, work experience and physical restrictions. ***Patterson v. Omniplex World Services***, 36 BRBS 149, 154 (2003). In the simplest terms, I am asked to determine if Claimant's current employment, in which he earns $400 per week, represents suitable alternate employment. Permanent partial disability benefits are owed at the maximum compensation rate of $1,295.20 ($3,029.59 - $400 = $2,629.59 x 2/3 = $1,753.14, subject to the maximum rate).

If Claimant is underemployed and that his current employment and earnings do not represent suitable employment or his true retained earning capacity, then I must determine what jobs in the Employer/Carrier's labor market survey, if any, represent suitable alternate employment for Claimant, such that the prospective wages for those jobs can be used to determine his retained earning capacity. Mr. Sullivan determined based on Claimant's residual physical capabilities, work history, and current stamina, his current part-time job earning $400 per week is an appropriate position for him and represents his retained earning capacity. JX. 25, p. 19.

Ms. Aulita, prepared a report and labor market survey on December 4, 2013. JX. 23, at 1-14. She also provided deposition testimony in this matter. However, Ms. Aulita does not have an opinion on Claimant's retained earning capacity. Ms. Aulita did complete a labor market survey which identified six separate jobs, including three dispatcher positions, one driver position, and two overseas positions in Kuwait. Mr. Sullivan disagrees with Ms. Aulita that any of these six positions can be considered appropriate alternative employment because Claimant's skills, vocational experience and medical status do not meet the requirements of any of the positions. JX. 24, 11-12.

Claimant argues further, that Ms. Aulita did not even consider the opinions of Drs. Nocero and Bitar, when evaluating Claimant's physical fitness for these positions:

> Despite being advised there was physician testimony, Ms. Aulita chose not to request this from the Employer/Carrier. Perhaps she chose to ignore this valuable information. Perhaps she simply neglected to request this information due to her limited experience performing vocational work. Whatever the reason, Ms. Aulita's report and labor market survey have no evidentiary value as she did not even incorporate the opinions of the medical experts regarding Claimant's physical capabilities, a necessary prerequisite. If Ms. Aulita had appropriately considered the opinions of these experts, she would never have included certain positions as Claimant would have been immediately disqualified as a candidate.

See brief.

Ms. Aulita included positions for a supply technician and a movement control foreman in Kuwait. JX. 23, at 11-12. Ms. Aulita identified these as appropriate positions for Claimant based on her mistaken understanding that there are no specific limitations on Claimant's work abilities, other than that he should not work in extreme heat or cold. Id. at 8. Ms. Aulita testified that each of these two positions in Kuwait had a work schedule of 12 hours per day, seven days per week. Id. at 15. The positions include physical requirements of frequent sitting, standing and walking, as well as lifting up to 50 pounds and the ability to travel domestically and internationally. Id. at 12.

Dr. Nocero restricts Claimant from working seven days a week, 12 hours per day. Id. at 31. Further, Dr. Bitar testified that Claimant is restricted from working in extreme weather conditions, lifting anything more than 20 pounds, going up and down stairs, and working for extended hours. Id. at 5. I accept that the medical evidence demonstrates that neither of these positions in Kuwait can be considered suitable alternate employment for Claimant.

Ms. Aulita's labor market survey includes a driver position. JX. 23, 10-11. This position requires lifting up to 50 pounds and the ability to pass a DOT physical. Id. at 11. As previously noted, Dr. Bitar has restricted Claimant from lifting more than 20 pounds. Further, although Dr. Nocero initially opined that Claimant is not able to go back to work in any capacity. JX 10, 25, When advised that he was actually working driving a truck, Dr. Nocero testified that he would let him do this, but that it would depend on how well he does and that he would modify his recommendations depending on the development of symptoms. Id. at 26. As previously noted, Claimant's symptoms persist and have actually grown more severe. Finally, Mr. Sullivan testified that Claimant would not pass a DOT physical based on his current symptoms and that he is unlikely to be able to continue working in his current capacity as a truck driver when his commercial driver's license expires in September 2014. JX. 25, p. 16, 18. Clearly, this is not an appropriate employment consideration for Claimant.

The remaining three positions identified by Ms. Aulita in her labor market survey are dispatcher jobs. JX. 23, 10-11. Mr. Sullivan opined that Claimant's vocational experience does not meet the requirements for these positions, such that they cannot be considered appropriate alternative employment. JX. 24, 11-12.

Ms. Aulita spends time in her report discussing the Shermans' farm. Claimant labels this discussion as a red herring. Employer/Carrier presented no evidence that Claimant earns income from anything he does on the farm. In fact, Mrs. Sherman testified that the farm does not make a profit and, at best, they break even after expenses. JX. 28, 14-15. Second, Mrs. Sherman testified that she does not run a commercial farm but one operated for personal use. Id., 6. Finally, Claimant does not have a defined job but, instead, "piddles" around the farm, helping out by doing what he can. Id. at 15, 17-19. I accept that although there are things Claimant testified he wanted to do around the farm, he is unable due to his physical limitations.

The vocational evidence, including the opinion of Mr. Sullivan, an OWCP-certified vocational rehabilitation counselor, establishes that Claimant's retained earning capacity is $400 per week. This is what he presently earns in his current position as a part-time truck driver. Claimant's current position is appropriate for him given his occupational history and the significant physical limitations imposed by Drs. Nocero and Bitar. Further, as outlined above, none of the jobs identified in the Employer/Carrier's labor market survey are appropriate employment considerations for Claimant. Accordingly, permanent partial disability benefits are valued at $1,295.20 per week.

ORDER

IT IS HEREBY ORDERED that Claimant's claim against for compensation and medical benefits is **GRANTED** to the extent set forth above;

IT IS FURTHER ORDERED that the average weekly wage is $3,029.59 and compensation rate is $1,295.20.

IT IS FURTHER ORDERED that Employer shall pay benefits as follows:

1 Temporary total benefits from July 13, 2012 to March 7, 2013 at a rate of $1,295.20 per week; [4]

2. Temporary partial benefits from March 8, 2013 to July 10, 2013 at a rate of $1,295 per week;

3. Permanent partial benefits from July 11, 2013 to present at a rate of $1,295.20 per week.

IT IS FURTHER ORDERED that the Employer/Carrier shall pay for reasonable and appropriate medical, surgical, and related expenses, including transportation and prescription costs, for Claimant's conditions as overseen by the District Director;

IT IS FURTHER ORDERED the employer shall pay interest on all past due compensation payments. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. The Director shall determine the exact amount.

[4] Please note that these amounts reflect the maximum compensation rate. All would be considerably higher.

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

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

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE