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Office of Administrative Law Judges
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Issue Date: 30 June 2020

Case Nos.: 2017-LDA-00592
2017-LDA-00945

OWCP Nos.: 06-314553
06-314331

In the Matter of:

TODD O. BROWN,
Claimant,

v.

GLOBAL INTEGRATED SECURITY INC.,
Employer,

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
c/o AIG CLAIMS, INC.,
Carrier in case number 2017-LDA-00592,

and

AMERICAN HOME ASSURANCE COMPANY,
Carrier in case number 2017-LDA-00945,

and

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

Appearances: Jeffrey M. Winter, Esq.
For Claimant

John F. Karpousis, Esq.
Matthew Pallay, Esq.
FREEHILL HOGAN & MAHAR, LLP
For Employer/Carrier

Before: MONICA MARKLEY
Administrative Law Judge

DECISION AND ORDER

These claims arise under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651 *et seq*. ("the Act"). These claims are governed by the Act and implementing Regulations found in the Code of Federal Regulations, Title 20, Chapter VI, Subchapter A (Parts 701 to 704) ("the Regulations"). Claimant Todd O. Brown ("Claimant" or "Mr. Brown") alleges that he incurred a back injury while working for Employer Global Integrated Security, Incorporated ("Employer") in Iraq in August 2013, and that he suffered cumulative re-injury to his back due to repetitive trauma from wearing protective gear, physical training, lifting, and carrying, through the end of his employment in April 2015.

PROCEDURAL HISTORY

Case No. 2017-LDA-00592 was referred to the Office of Administrative Law Judges by the District Director, Office of Workers' Compensation Programs ("OWCP") on May 9, 2017. On July 25, 2017, I issued a Notice of Hearing and Scheduling Order setting Case No. 2017-LDA-00592 for formal hearing on October 25, 2017.

Case No. 2017-LDA-00945 was referred to the Office of Administrative Law Judges by the District Director, OWCP, on September 12, 2017. On September 25, 2017, I issued a Notice of Assignment and Notice of Hearing and Order for Carrier to Respond in this case, also setting it for formal hearing on October 25, 2017.

On September 25, 2017, I issued an order consolidating the two cases, and on October 3, 2017, the first scheduled hearing was continued for a later date, due to difficulty of the parties scheduling medical examinations, deposition of Claimant's back surgeon, and pending mediation. On March 12, 2018, I issued a Notice of Hearing and Scheduling Order setting the cases for formal hearing on July 23, 2018.

On March 29, 2018, Claimant filed a Motion for Summary Decision. On May 8, 2018, Employer filed an Opposition to Claimant's Motion for Summary Decision and Cross-Motion. By Order dated July 6, 2018, I denied Claimant's motion.

On July 19, 2018, I issued an Order Cancelling Hearing, due to the unavailability of Claimant's treating surgeon on the scheduled hearing date. On August 1, 2018, I issued a new Notice of Hearing setting the cases for formal hearing on December 4 and 5, 2018.

The formal hearing was held in Columbia, South Carolina, on December 4, 2018. The parties were afforded full opportunity to present evidence and argument as provided under the Act and applicable Regulations. Jeffrey M. Winter, Esq. appeared on behalf of Claimant, and John F. Karpousis, Esq. and Matthew Pallay, Esq. appeared on behalf of Employer. The District Director did not appear.

At the hearing, Claimant's Exhibits 1-50 and 53 were admitted into evidence without objection. I also granted leave at the formal hearing for Claimant to submit Exhibit 55 thereafter,

but he never did so, and as such, it has not been included in evidence for these matters. (TR at 11, 231.)

Claimant's Exhibits 51 and 52 were conditionally admitted into evidence, subject to additional questioning at the hearing, and were both formally admitted at the hearing's conclusion. (TR at 226, 237.) More specifically, Exhibit 51 included e-mails between Claimant and Employer regarding his return to Iraq after a period of leave in 2014, and Employer expressed concern about the existence of additional e-mails that were not submitted. At the hearing, I gave Claimant time post-hearing to search for and submit additional e-mails. Specifically, I directed Claimant to submit e-mails between himself and employees of Employer, for the periods of December 2014 through January 2014 and May 2014 through December 2014. (TR at 226.) Further, rather than using search terms, I directed Claimant to "scroll through all of them." *Id.* I stated:

> I know that may be time consuming to scroll through. But unfortunately, here we are at the hearing with the evidence ready and bound and everything, and yet, obviously what was intended before was not complete. So because of that, I think we are going to need a more comprehensive search for the e-mails to find out what might still be outstanding.

(TR at 226-227.)

On December 28, 2018, Claimant submitted the subject e-mails, identified as Exhibit 54. In cover correspondence, Claimant indicated that his search of his e-mails was limited to certain search terms, including globalgroup-gis.com, Taskorder6.HR@globalgroup-gis.com, Bruce Tindal, Tim Spizak, Andrew Leeson, and Dan Moritz. Thereafter, on January 14, 2019, Employer renewed its objection to the admission of both Exhibit 51 and Exhibit 54, as not having been submitted in accordance with discovery rules, and requested an adverse inference. Claimant responded to these objections, via correspondence dated January 18, 2019.

With regard to Exhibit 51, I note that at the formal hearing, Employer did not object to the content therein, but rather to the possibility that other, related e-mails might exist that had not been submitted. (TR at 218-220.) As such, I admitted Exhibit 51 into evidence (TR at 226), and I do not reverse that decision here. Claimant testified regarding the content of the e-mails in Exhibit 51 on both direct and cross-examination, and they are relevant to the issues here, particularly notice of Claimant's injury.

As for Exhibit 54, as noted above, Claimant produced e-mails that he located after using certain search terms. This was despite my specific instructions at the formal hearing to not use search terms, and instead to scroll through all e-mails from the relevant time periods. (TR at 226-228.) By limiting his search for the e-mails Claimant produced in Exhibit 54, he defeated the purpose of the exercise, which was to ensure the production of all existing e-mails between Claimant and any employees of Global (Employer). For these reasons, I will exclude Exhibit 54 from evidence. However, in so doing, I also note that the only e-mails of useful substance in Exhibit 54 are duplicative of e-mails already contained in Exhibit 51, and this ruling has little substantive effect.

Employer's Exhibits A-Z and AA-QQ were admitted into evidence without objection, with the following exceptions. Exhibit NN was withdrawn and included in Claimant's exhibits. Exhibit OO was reserved for impeachment or rebuttal evidence and not used. Exhibits E, GG, and MM were reserved for recordings or videos of depositions, and were not ultimately offered and/or did not exist. (TR at 12-15.) Finally, I admitted Exhibit RR into evidence, after overruling Claimant's objection as to its relevancy. (TR at 217.)

The record was held open for the parties to submit post-hearing briefs in lieu of closing argument at the hearing. Claimant submitted his post-hearing brief on February 15, 2019. Employer submitted its post-hearing brief on April 12, 2019. Claimant filed his reply brief on May 1, 2019. Employer filed a sur-reply brief by correspondence dated May 14, 2019, without leave of court, and Claimant objected to its filing by correspondence dated May 21, 2019. Claimant's objection is overruled. The record is now closed.

In this case, the initial determination at the District Director's level was made in Jacksonville, Florida. The case therefore falls under the jurisdiction of the United States Court of Appeals for the Eleventh Circuit.

The findings of fact and conclusions which follow are based upon a complete review of the entire record, the arguments of the parties, and applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

On the record at the formal hearing, the parties agreed to the following as fact, and I find that:

1. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, as amended, applies to this claim.
2. There was an Employer/Employee relationship at the time of the alleged injuries.

(TR at 5.)

ISSUES

The contested issues are as follows:

1. Whether Claimant provided timely notice of his alleged back injuries under Section 12 of the Act.
2. Whether Claimant timely filed his claims under Section 13 of the Act.
3. Whether Claimant suffered disabling back injuries.
4. Whether the alleged back injuries arose out of and in the course of Claimant's employment with Employer (causation).
5. The nature and extent of any disability.
6. Claimant's average weekly wage at the time of injury.

7. Claimant's retained wage earning capacity.
8. Whether Claimant is entitled to authorization of Section 7 medical treatment.
9. Whether Claimant is entitled to interest and penalties, and attorney's fees and costs.

(TR at 6-7.)

PARTY CONTENTIONS

Claimant's Position

Claimant argues that his claims were timely noticed and filed under Section 12 and Section 13. He also argues that he has established a *prima facie* case and is entitled to the Section 20(a) presumption, in that he has shown that he suffered a back injury arising out of and in the course of his employment with Employer. Claimant contends Employer did not rebut the Section 20(a) presumption by showing an absence of a causal relationship between his back injury and his employment. Claimant argues that he has reached maximum medical improvement and is permanently partially disabled, as of May 18, 2017. He further argues that his average weekly wage should be calculated based on his earnings in the year prior to his injury date of April 14, 2015, in the amount of $4,837.44. His residual wage earning capacity, based on his employment as a police officer, is $446.07 per week, or $173.08 per week, based on his earnings as a real estate agent. For all periods of either temporary total disability or permanent partial disability, he is entitled to the maximum compensation rate of $1,377.02 per week. He also asserts entitlement to medical benefits and attorney's fees.

Employer's Position

Employer argues that Claimant's notice of injury and claims for compensation were not timely filed under Section 12 and Section 13. Alternatively, Employer contends that the Section 20(a) presumption is rebutted in this case, because Claimant suffered a subsequent intervening injury while working for the police department. If Claimant is entitled to compensation, Employer argues that Claimant cannot be found to be disabled until October 2016, when he left his police department job to have surgery, and his disability ended as of May 18, 2017, when he was released to full duty. If he is found to be disabled beyond May 18, 2017, his disability should be classified as partial and calculated based on suitable alternative employment and residual wage earning capacity established by Employer's vocational expert, and an average weekly wage calculated based on his employment with the police department.

SUMMARY OF RELEVANT EVIDENCE

I admitted Claimant's Exhibits 1-53, and Employer's Exhibits A-D, F-Z, AA-FF, HH-LL, and PP-RR. I have reviewed and considered all the evidence before me. The evidence relevant to the issues in dispute is summarized below.[1]

[1]The record in this matter is quite large, including, but not limited to, deposition transcripts, written discovery responses, medical reports, employment and wage records, and the hearing transcript. Though it would be impractical to summarize all of the admitted evidence, I have reviewed and considered all evidence in the record, as noted above, and have summarized only the most pertinent parts in this decision.

I. Testimony from the Formal Hearing

A. Claimant's Testimony (TR at 31-169, 205-207)

The following is primarily a summary of Claimant's formal hearing testimony, supplemented with non-duplicative and relevant information from his deposition. Claimant testified that his employment history includes a three-year period in the United States Army, after he graduated from high school in 1986. Thereafter, he attended college and obtained a bachelor's degree in criminal justice. (TR at 31.) His next employment was in various positions for the United States Secret Service, from 1995 through 2008. (TR at 31-32.) He then worked for Sam's Club as a field investigator for about one year. (TR at 31.) Following a period of unemployment, he was hired by Employer in 2011. (TR at 31-32.) He worked for Employer overseas until April 2015. (TR at 32.) Per his deposition, he held a number of positions for Employer, including Protective Security Specialist, Emergency Response Team Shift Lead, Firearms Instructor, Integrated Training Instructor, Training Manager, and Deputy Project Manager. (CX-26 at 255.) After he returned home, he was hired by the Columbia Police Department in August 2015. The hiring process for this job included a written application, interview, panel interview, physical agility test, medical exam, and polygraph. (TR at 32.)

Claimant applied for his job with the police department because he knew Employer was losing its contract in Iraq. During his time with Employer, he worked as a Deputy Project Manager of Operations and Deputy Project Manager for Guard Force. The incoming company, Triple Canopy, told him that he could not stay in any of the Deputy Project Manager positions and that they had not found a place for him. They did not offer him employment. (TR at 32-34.) He was told that if he were to stay on, it would be as a protective security specialist, which was a more strenuous job. (TR at 34.)

His training for his position with Employer was geared toward the Iraqi environment, like mass casualty situations and personal protective security. This was done differently than his previous training because of the amount and weight of equipment he was required to wear. (TR at 36.) The weight ranged from 40 to 60 pounds. (TR at 37.) The police department training was more scaled down, because they wore only soft body armor and were not trained to pick teammates up and carry them any distance. Their equipment weighed only 15 to 20 pounds. (TR at 36-37.)

At the time of Claimant's injury, he was in the gym performing dead lifts. He felt a sharp pain in his lower back, stopped what he was doing, and left the gym. He tried to alleviate his pain with over-the-counter medication for a few days, but it did not really subside, so he went to the clinic. (TR at 39.) During his deposition, he testified that he visited the clinic approximately five days after the injury. (CX-26 at 256.). He missed a day or two of work after his clinic visit, because he was given medication the use of which prohibited him from carrying a firearm. (TR at 47.) Thereafter, he continued to work, but not work out. (CX-26 at 257.) His contract with Employer required him to maintain a standard of physical training in order to be able to perform the job. (TR at 40.) He had to undergo periodic physical training tests, which measured strength and cardiovascular fitness, as well as training to practice responses in different kinds of attack

scenarios. (TR at 41.) During his deposition, he testified that he sustained his injury in September 2013. (CX-26 at 255.) He also indicated that eventually, he returned to working out and running, but did only body weight exercises and did not lift additional weight. (CX-26 at 258-259; TR at 141-142.) On cross-examination during the formal hearing, he stated that between January 2014 and June 2014, he was performing his usual job duties, climbing stairs, and running short distances, but not doing CrossFit. (TR at 118-119.)

During his deposition, Claimant could not remember the name of his supervisor at the time of the injury. (CX-26 at 257.) At the hearing, Claimant testified that he advised his supervisor at the time, Bruce Tindall, of his deadlifting injury, after he went to the clinic. (TR at 42.) Claimant stated that Mr. Tindall never gave him any paperwork to fill out. (TR at 54.) Claimant testified he also told a subsequent program manager, Tim Spizak, that he had gotten hurt in the gym. (TR at 44-45.) Mr. Spizak did not ask him to fill out an incident report, because the sick call report from his initial visit to the clinic counted as such. (TR at 45.) Mr. Spizak also never advised him of anything he needed to do to make sure he received workers compensation benefits. (TR at 54.) With regard to the sick call report, Claimant stated it was filled out without specific details because the policy from Employer and the State Department was not to put any specific medical details therein, because the reports were not controlled and they did not want the reports left open for HIPPA violations. (TR at 64.) However, Claimant testified on cross-examination that a new local program manager later changed this policy, sometime in 2015. He did not go back and re-document his own injury, because Employer was aware of it, as far as he knew. (TR at 112-114.)

Claimant came home from Iraq in May 2014, and saw his family practice physician, Dr. Roberts, in June 2014. He had also seen Dr. Roberts when he was home in December 2013. (TR at 48-49.) On the plane ride home from Iraq in May 2014, Claimant first began experiencing numbness and tingling in his lower extremities. (TR at 49-50.) During the June 2014 examination, Dr. Roberts found that Claimant did not have an Achilles reflex in his left leg. He prescribed 800mg of Motrin and sent Claimant for an MRI. After Dr. Roberts got the results of the MRI, he sent Claimant to Dr. Toussaint. (TR at 50-51.) Dr. Toussaint referred Claimant to a pain management physician, Dr. Krafft. He saw Dr. Krafft for two injections, which both helped but did not last. (TR at 51-52.) During his deposition, Claimant testified that the relief from the injections lasted until January 2015, and then his symptoms started to return over time. (CX-26 at 261.)

After the second injection, Claimant returned to Iraq, in December 2014. (TR at 53.) A local program manager for Employer, Daniel Moritz, required him to have a letter from his doctor saying that he could return to full duty. (TR at 53.) When he returned to Iraq, he was still taking the Motrin, and continued to do so through April 2015. (TR at 55.) From December 2014 through April 2015, his condition continued to progress and his symptoms worsened. (TR at 55-56.) He testified during his deposition that he does not know if he made his supervisor, Mr. Spizak, aware at that time that his pain had started to worsen again,. (CX-26 at 261-262.) He did not miss work or seek treatment. (CX-26 at 262.)

Claimant returned to the United States in April 2015. He eventually had a lower lumbar fusion surgery, at the level of L5-S1, in October 2016. From April 2015 through October 2016,

he continued to take Motrin and his condition progressively worsened. (TR at 56.) While he was working for the police department, he wore suspenders that helped shift the weight of his utility belt from his hips to his shoulders. (TR at 56-57.) During his time at the police department, he made about 15 to 20 arrests, and some of the people he arrested put up a fight. (CX-26 at 264.) When he applied for his position with the police department, he advised them of his previous back injury, and Dr. Alan Weldon cleared him to work for the police department. (TR at 57.) Dr. Weldon had him do a range of motion test and touch his toes, which he completed successfully. He was also able to do a full range of motion for Dr. Raiszadeh. (TR at 58.) Aside from immediately following his surgery, he has always pretty much had full range of motion in his back. (TR at 59.)

Claimant stated his police work did increase his back pain. He decided to have surgery as a result of his back injury, which required him to take time off from his police job. During that time, he received short-term and long-term disability benefits, which he was entitled to as a result of his police department employment. (TR at 59-60.) He does not believe he suffered an injury while working for the police department, but that his injury was a result of the dead lifting incident. (TR at 60.) However, he also testified at his deposition that he did reinjure his back or suffer a flare up of his back injury during his police employment. (CX-26 at 264.) In addition, on cross-examination at the formal hearing, he testified that at the police academy, he had to do physical activities such as 90-minute strength and endurance training sessions, climbing, crawling, wrestling, jumping, lifting and dragging heavy weights, operating a motor vehicle at various speeds, including very high speeds, safely handling weapons, participating in physically rigorous defensive tactics training, and completing an obstacle course. (TR at 152-154.) He further noted that he had flare-ups of his symptoms on a daily basis whenever he worked. (TR at 156.)

When Claimant was treating with his surgeon, Dr. Gunter, there were times he was seen only by Dr. Gunter, and times when he was seen only by Dr. Gunter's physician's assistant, Mr. Palmer. (TR at 66.) With regard to the work note from Dr. Gunter's office, dated May 18, 2017, which was electronically signed by Sharleen Geiger, LPN, Claimant testified that he did not see Ms. Geiger on that date. He was never clinically examined by a female in Dr. Gunter's office after his surgery. (TR at 67-68.) Dr. Gunter completed a physical capabilities evaluation for him on May 8, 2017 that he understood to be the limitations and restrictions placed on him through November 2017. (TR at 68-69.) Neither Mr. Palmer nor Dr. Gunter told him during examinations that he was to return to work full time, full duty, with no limitations. (TR at 70.) There was never a time that Dr. Gunter advised him of any restrictions different than the ones from May 8, 2017, or that he was lifting those restrictions. (TR at 85-86.)

When Claimant resigned from the police department, he knew that he would not be able to work there without a more flexible schedule, and he had used up all of his sick leave. He did not believe at that time that he could return to full duty, without limitations. No other jobs were offered to him at the police department following his surgery. (TR at 72.) He never received any performance evaluations as a police officer that questioned his ability to do the job. The only problems ever noted were with time management and paperwork. (TR at 74.)

While working for Employer, there were periods when Claimant was receiving $9,000.00 or $10,000.00 bi-weekly in pay. (TR at 75.) On a daily productive day, his gross pay was $806.24. (TR at 75-76.) He was expected to work 12 hours per day, 6 days per week. Technically, he was to work 105 days in Iraq, and then have 35 days of leave, on a rotating basis. (TR at 76.) He never received an anniversary bonus. He believes he may have received a retention bonus. Employer also periodically gave bonuses for working past 105 days. (TR at 77.)

Claimant began looking into a real estate position shortly before he resigned from the police department. He went to real estate school from February 2017 to April 2017. (TR at 80.) At the time of the formal hearing, he had earned approximately $9,000.00 so far that year. (TR at 98-99.)

He does not believe he could go back to his position as a Deputy Project Manager of Operations for Employer. Due to his injury, he would not be able to do all the things required by the position. His duties included office work and debriefings, as well as physical training, including the scenario drills referenced above. He did have to participate in the scenario drills from December 2014 through May 2015. (TR at 80-82.) During Emergency Response Team drills and scenario drills, he had to wear his personal protective equipment, including two steel plates, weighing 10 pounds each. (TR at 82-83.) His work between December 2014 and May 2015 increased his pain. (TR at 89.)

He does not currently run for exercise and last did so sometime prior to October 9, 2016. He has tried to run half a dozen times since his surgery, but experienced pain in his lower back each time. (TR at 83-84.) He had to run as part of his physical training for Employer. For testing, he had to do a shuttle run and a 1.5 mile run. He could not do that running today. (TR at 84.)

When he informed Bruce Tindall and Tim Spizak of his back injury, they were at Employer's offices in Basra. These conversations occurred before he left for leave in April 2014. (TR at 85.)

Claimant did not report to anyone that he suffered a back injury while working at the police department. He did advise people that that his police work increased his pain, attempting to run increased his pain, and that picking up heavy items on a daily basis increased his pain. (TR at 89.)

Claimant owns seven motorcycles, three of which are rideable. He does ride them from time to time. He also owns a Jeep, and he went off-roading on one occasion in North Carolina. This did not increase his back pain. (TR at 90.) His hobbies also include going to the shooting range, stand up paddle boarding, and lake swimming. (CX-26 at 267; TR at 162-166.)

Claimant applied for certain jobs after receiving the labor market survey in this case, including several positions with the City of Columbia. He did not receive any response from them, though he was told when he called to follow up that the part-time police associate position to which he had applied had been filled, but that his name was being kept active in case

additional positions became available. (TR at 91.) He was not able to apply for the Security Coordinator position with DynCorp that was included in the survey, because he could not find the listing on their website. (TR at 92.) He looked up all of the jobs from the labor market survey and applied for anything that was active, as well as for some similar positions. (TR at 92, 95.) However, he did not think he was physically capable of doing all of the jobs. (TR at 93.) He was selected for an interview for a detention officer position. After the interview, he did not think he was physically capable of performing the job, and he did not receive a job offer. He did not think he could physically restrain someone. (TR at 94.)

B. Dr. Gunter's Testimony (TR at 169-204)

Brett Gunter, M.D. is Claimant's treating neurosurgeon. He testified that he first saw Claimant on July 19, 2016, at which time Claimant complained of low back pain, left leg neuromuscular problem, and herniated lumbar disc. (TR at 172.) His symptoms were characterized as waxing and waning. On examination, he had good flexion, but some issues with extension. His power examination was good, including with regard to the extensor hellicus longus. (TR at 173-174.)

Dr. Gunter recommended surgery for Claimant, even though his strength examination was intact, in order to attempt to relieve Claimant's back pain and leg pain, which had not been relieved with conservative management. (TR at 174.) Dr. Gunter classified Claimant's back pain as progressive, continuing to worsen with time. He also noted that mechanical activities worsened Claimant's pain, such as bending, stooping, lifting, and twisting. (TR at 176.)

The goals of Claimant's surgery were to achieve mechanical stability and decompression of the neural elements. (TR at 177-178.) He felt that the surgery achieved these goals because based on imaging, they achieved a solid bony union. (TR at 178-179.)

Claimant first informed Dr. Gunter of his deadlifting injury post-surgery, on November 15, 2016. (TR at 179-180.) When Dr. Gunter opined on that date that Claimant's condition was caused by this injury, he was speaking based solely on Claimant's report. (TR at 180.)

Dr. Gunter testified that though his objective is to see every patient in his office personally, that is not always possible. (TR at 184.) He does not know whether he saw Claimant personally on April 25, 2017. However, the assessment made that day regarding Claimant's activities would only have been made by him. (TR at 185-186.) More specifically, in response to whether he would ever allow his physician's assistant to return a patient to normal activity, he stated, "As long as he's following a plan program, yes. But in general terms, the program and all those things are discussed with me. There's a specific set of things that you expect, that's expected that I'll do." (TR at 186.) With regard to the release note drafted by Sharleen Geiger, LPN on May 18, 2017, he noted that she would have put his name on it at his direction, he signed off on its contents prior to it being sent out, and the opinion contained therein is his own. (TR at 190.) He further testified on cross-examination that the note would have been generated at six months post-surgery; in a normal case, there is no mechanical restriction on a patient's return to work. (TR at 197, 199.)

Finally, Dr. Gunter testified that he never reviewed Claimant's pre-employment application for the police department, the physical requirements for that job, or the form that cleared him for that job. (TR at 193.)

C. Rebecca Sprick's Testimony (TR at 208-217)

Ms. Sprick prepared a vocational rehabilitation and labor market survey in this matter, at the request of Employer. She prepared it based in part on Claimant's deposition testimony. (TR at 209.) She identified four DynCorp jobs for Claimant, one of which was no longer available at the time of the formal hearing. (TR at 210-211.) She also identified a position for Kohl's that was no longer available. (TR at 211.) She identified an additional job for Vectrus, for which she did not believe, based on the job posting, that weapons maintenance experience was necessary. (TR at 211-212.)

The DynCorp position of security specialist, posted for Afghanistan, would have required Claimant to wear personal protective gear. (TR at 214.) She last saw the security specialist job in the Marshall Islands and the Kohl's position as being available when she completed her report, in July 2018. (TR at 215-216.)

II. Medical Evidence

A. Medical Treatment Records from Time of Alleged Deadlifting Injury

On September 14, 2013, Claimant saw Valeri Gorra in the medical clinic while overseas, complaining of left back pain and left foot pain. He reported that the left-sided low back pain had begun three weeks prior. He was in the gym doing deadlifts, and had a sudden onset of pain. He also reported pain and numbness radiating down the back of his left thigh to his knee, particularly after 10 to 15 minutes of sitting. On examination, he exhibited left paralumbar and buttocks tenderness and a positive straight leg raise at 70 degrees. Ms. Gorra assessed lumbar radiculopathy, prescribed "back off" tablets, and recommended follow up with a primary doctor or orthopedist. (CX-8 at 42-44.)

Claimant completed an "Incident Report" after his visit to Ms. Gorra, on the same date. The type of incident was described as a "Sick Call," and the stated details were simply, "On 14 Sep 13, I responded to the DSH for sick call. I have returned to full duty status." Notification was made to PM Tindall. (CX-20.)

Claimant saw his primary care physician, Douglas Roberts, M.D., for the first time following his injury on December 10, 2013. At that time, he again complained of left-sided back pain, which originated three months prior, after the deadlifting incident in the gym. At that time, his physical examination was entirely normal, including with regard to musculoskeletal and neurological function. Dr. Roberts recommended that Claimant avoid deadlifts and lumbar exercises and ordered a lumbar spine x-ray. (CX-10 at 86-87.) Claimant followed up with Dr. Roberts on January 8, 2014, for an annual physical examination, and had not obtained the x-ray that Dr. Roberts previously ordered. His related physical examination was again normal, and Dr. Roberts simply refilled Claimant's Motrin (Ibuprofen) prescription. (CX-10 at 89-91.)

B. Medical Treatment Records from 2014

Claimant next saw Dr. Roberts on June 19, 2014, complaining of left leg pain, on the posterior side down to his foot. On examination, Claimant exhibited a positive straight leg raise on the left, as well as an absent left ankle reflex. Dr. Roberts prescribed Medrol and Norco and ordered a lumbar spine MRI. He also recommended that Claimant avoid prolonged sitting and that he sleep on his right side with a pillow between his legs. (CX-10 at 92-94.)

On June 20, 2014, Claimant had his lumbar spine MRI. It revealed a "[r]ather large left preforaminal extrusion at L5-S1 exert[ing] mass effect on the descending left S1 nerve root with the right margin even abutting the right." (CX-11 at 117.)

On July 8, 2014, Claimant saw a neurosurgeon, Phillip Toussaint, M.D., complaining specifically of left lower extremity pain. On examination, he exhibited decreased strength in the left EHL, 4+/5. He also had decreased sensation and decreased reflexes in the left lower extremity. Dr. Toussaint recommended that Claimant undergo a left microdiscectomy at L5-S1, and they scheduled the surgery for August 2014. However, he also referred Claimant to pain management to try injections in the interim. (CX-23 at 177-179.)

On July 17, 2014, Claimant saw a pain management physician, Ryan T. Krafft, D.O. Claimant complained of low back pain radiating to his left leg and left foot. On examination, Claimant exhibited moderate tenderness in the left paraspinal muscles, as well as severe left paraspinal muscle spasm. His lumbar spine range of motion was also mildly restricted in all planes. Dr. Krafft recommended an epidural steroid injection, which he administered on July 21, 2014. (CX-17 at 149-154.) Thereafter, Claimant reported a 40% reduction in his pain, and Dr. Krafft noted that he had canceled his surgery. (CX-17 at 155-157.) Claimant underwent a second epidural steroid injection on August 22, 2014. (CX-17 at 158-159.)

Claimant followed up with Dr. Roberts on October 1, 2014 for a medical release to return to work, as well as to complete a new hire form for the police department. At that time, Claimant reported that he was having no present symptoms of his lumbosacral radiculopathy, and that he had been pain free since July 2014. He also reported that he had started running again. His musculoskeletal and neurological examinations were normal and Dr. Roberts completed the employment forms. (CX-10 at 95-97.)

On December 21, 2014, Claimant underwent an examination in connection with his overseas work with Employer, and denied debilitating back pain or back injury. His back examination was normal. (CX-19 at 166-167.)

C. Medical Treatment Records from 2015 through 2017

On May 20, 2015, Claimant returned to Dr. Roberts, for completion of a pre-employment physical for the police department. He did not complain of back pain at that time, and his physical examination was normal. (CX-10 at 98-99.)

On July 8, 2015, Claimant was evaluated by Allan M. Weldon, M.D., with regard to his physical fitness for police academy training. Claimant reported his history of a back injury, but indicated that he was also currently participating in CrossFit, paddle boarding, and running activities, and his physical examination was normal. Dr. Weldon signed off on his participation in police training. (CX-14 at 136-142.)

Claimant saw Dr. Roberts again on September 30, 2015, for various complaints, including left leg cramps. However, Dr. Roberts did not prescribe any treatment for the issue at that time, and Claimant indicated that he wanted to wait on another lumbar spine MRI. (CX-10 at 101-104.)

Claimant next saw Dr. Roberts on May 11, 2016, with renewed complaints of left-sided back pain, with some posterior left leg pain. Claimant requested an updated MRI and wanted to discuss back surgery. Claimant's related physical examination was normal that day, but Dr. Roberts ordered an updated MRI and initiated a referral to a neurosurgeon. (CX-10 at 105-107.)

On May 19, 2016, Claimant underwent his second lumbar spine MRI. It showed "[l]ess prominent protrusion to the left at the lumbosacral junction with continued height loss especially to the left of midline at L5-S1 with some new bony ankyloses." (CX-12 at 119.) Claimant followed up with Dr. Roberts on May 27, 2016 following the MRI, and Dr. Roberts advised that he see a neurosurgeon. (CX-10 at 109-111.)

Claimant first saw his treating neurosurgeon, Brett Gunter, M.D., on July 19, 2016. Claimant complained to Dr. Gunter of low back, left hip, and left leg pain. On examination, he exhibited mild tenderness to palpation diffusely throughout his lower lumbar spine. He was able to forward flex to the dorsum of his feet bilaterally with mild stiffness, and extension of the spine was mildly restricted and uncomfortable. His straight leg raise was weakly positive on the left. Claimant and Dr. Gunter discussed treatment options, including different surgical options. (CX-13 at 121-123.) Dr. Gunter completed a short-term disability form for Claimant on September 21, 2016, indicating that Claimant had elected to proceed with surgery, and that he would be expected to be out of work from the date of surgery, October 17, 2016, through April 24, 2017. (CX- 18 at 164.) Claimant next saw Dr. Gunter on October 11, 2016, who noted that Claimant had elected to proceed with a left L5-S1 transforaminal lumbar interbody fusion, which indeed took place on October 17, 2016. (CX-13 at 126-128; CX-29.)

Claimant saw Dr. Roberts on November 3, 2016, for completion of paperwork for his attorney. At that time, he was still on hydrocodone and Valium for his back pain following surgery, and he reported that Dr. Gunter had restricted his work for six months. Dr. Roberts completed Claimant's paperwork, but noted that all future work excuses needed to be completed by Dr. Gunter. (CX-10 at 113-115.) On the form, which was Part B of LS-1 Request for Examination and/or Treatment, Dr. Roberts stated that he believed Claimant's disc herniation was caused by the deadlifting incident in 2013, and that he was totally disabled from August 2014 to December 2014, and again from April 2016 to present. Per Dr. Gunter, he could not return to work until April 27, 2017. (CX-25 at 221.)

On November 15, 2016, Claimant followed up with Dr. Gunter. At that time, he reported significantly improved leg pain, but that his back pain was not much better. Dr. Gunter did a minimal physical examination, which was normal, and advised Claimant to remain off work "for now." He also advised Claimant to begin physical therapy in two months. (CX-13 at 129-130.) X-rays taken that day showed fusion of L5-S1 with associated hardware and good anatomical alignment. (CX-13 at 130A.) In his note that day, Dr. Gunter stated, "To a reasonable degree of medical certainty the patient injured himself on the job in August 2013 as described. The injury is causally related to the treatment that he is required including his recent surgery. This opinion is based on the patient's oral history which provided me today." (CX-13 at 130.) Dr. Gunter also completed Part B of Form LS-1 for Claimant that day, essentially incorporating the foregoing statement and reiterating that Claimant was to remain out of work. (CX-13 at 125.)

Claimant next saw Dr. Gunter's physician's assistant, Andrew Palmer, on January 18, 2017, at which time he described 90% improvement in his pre-surgery symptoms, with some pain remaining in his upper lumbar and lower thoracic spine. Mr. Palmer directed Claimant to begin physical therapy, but also stated he should remain off work for another month, pending reevaluation. (CX-13 at 131-132.) Dr. Gunter executed a work note to that effect. (CX-13 at 133.) X-rays on that date also showed stable postoperative changes and no abnormalities. (CX-13 at 133A.) On February 13, 2017, Dr. Gunter completed a form for Claimant's long-term disability provider showing his period out of work to be October 16, 2017 through April 24, 2017. (CX-43 at 257.) Similarly, on March 28, 2017, someone from Dr. Gunter's office completed a form extending Claimant's return to work date to April 27, 2017, and specifying a lifting restriction of 15 pounds. (CX-13 at 135B.)

Claimant saw Mr. Palmer again on April 25, 2017, at which time he described lower back pain when he tried to run. His physical examination was normal, and Mr. Palmer assessed apparent solid bony union from the lumbar fusion. He indicated that Claimant could resume his normal activities, but was to use proper lifting technique and avoid excessive weights. (CX-13 at 134-135.) X-rays on that date showed no evidence of hardware complication. (CX-13 at 135A.)

On May 8, 2017, Dr. Gunter completed a form for Claimant's long term disability provider, indicating that Claimant could return to work on April 27, 2017, with no lifting over 15 pounds. (CX-13 at 135C.) Dr. Gunter also completed a Physical Capabilities Evaluation form on the same date, specifying various exertional and non-exertional restrictions for Claimant, in effect until November 2017. (CX-13 at 135D-135E.) However, a few days later, on May 18, 2017, Sharleen Geiger, LPN, from Dr. Gunter's office, electronically signed a letter, indicating that Claimant could return to work full time at full duty, and that he had no limitations. Dr. Gunter's name was on this letter, but he did not electronically sign it. (CX-13 at 135F.)

Claimant underwent another MRI on October 9, 2017. It showed postoperative change at L5-S1 with soft tissue thickening in the left lateral recess resulting in thickening of the left S1 nerve root. (CX-34.)

Most recently, Claimant saw Dr. Roberts on September 7, 2018, again presenting with low back pain. His musculoskeletal and neurological examinations were normal, and Dr.

Roberts prescribed Duexis (Ibuprofen/Famotidine) for Claimant's ongoing pain. (CX-10 at 116A-116D.)

D. Plas T. James, M.D. (CX-27)

On September 14, 2017, Plas T. James, M.D. conducted a physical examination of Claimant, having been retained by Claimant's counsel. Claimant reported to Dr. James that he injured his back in the deadlifting incident on August 23, 2013, and that he reinjured it on April 14, 2015. On examination, Dr. James found Claimant to exhibit positive paraspinous muscle spasms. His straight leg raise was positive on the right and left, sitting and lying, to 45 degrees, increased with ankle dorsiflexion and hip internal rotation. X-rays on that day showed evidence of his fusion surgery, with questionable fusion mass present.

Dr. James recommended that Claimant undergo an MRI and CT scan of his lumbar spine, to evaluate the fusion mass. He opined that Claimant was not at maximal medical improvement, since it had been less than one year since his surgery. He recommended light work.

E. Randall Drye, M.D. (CX-37)

On November 1, 2017, Randall Drye, M.D. conducted an examination of Claimant, at Employer's request. He observed Claimant to have moderately limited range of motion at the waist, with no other abnormalities.

With regard to causation, Dr. Drye stated,

> While I believe his personal career decisions and lifestyle have likely resulted in additional and unnecessary stress upon his back and perhaps contributed to his ongoing symptoms, I do believe that more likely than not, his symptoms are in fact a continued result of his initial spine injury of 2013. He most likely would have continued to develop degenerative problems at the injured level with or without the stresses of his police work. I do not believe that he could return to either of his previous employment positions in his current state. I have no way of evaluating him to offer any meaningful permanent restrictions which would require a functional capacity exam. He does however have significant limitations in his range of motion, mobility and needs to avoid excessive stress to his lumbar spine in the future.

(CX-37 at 326.)

F. Ramin Raiszadeh, M.D. (CX-38, CX-49)

On December 18, 2017, Ramin Raiszadeh, M.D. conducted a physical examination of Claimant, having been retained by Claimant's counsel. On examination, he found Claimant to exhibit decreased flexion and extension of the lumbar spine, but all other findings were normal. (CX-38 at 329.)

In his initial write-up, Dr. Raiszadeh opined that Claimant's back pain and October 2016 surgery were related to his August 2013 deadlifting injury, and noted that he did not have any medical records to suggest a prior or subsequent injury. He felt Claimant was not employable as a police officer or security contractor. He could not sit or stand for any prolonged period of time. He could not wear a gun belt, vest, or any sort of protective gear because of his back pain. He could accommodate other work, not having to lift any more than 15 to 20 pounds, but nothing that would require him to carry protective gear. (CX-38 at 330.)

He recommended a CT scan of Claimant's lumbar spine, to ensure L5-S1 was healed after surgery, as well as x-rays, to show stability. If it was healed, there would be no further treatment, except perhaps to remove the posterior screws. If it was not healed, a revision fusion at L5-S1 could be considered, or a fusion at L4-5, where Claimant has additional problems. (CX-38 at 331.)

In an addendum to his initial report, Dr. Raiszadeh stated that he had an additional conversation with Claimant, and he reiterated again that there was no injury, other than the deadlifting incident in August 2013. As such, Dr. Raiszadeh's opinion on causation was unchanged, and he did not consider Claimant's police work to be contributory to the need for surgery. (CX-38 at 331.)

On December 29, 2017, Dr. Raiszadeh completed an extensive Medical Records Review Report, wherein he reviewed Claimant's medical treatment records and his deposition transcript. He stated that nothing reviewed changed his statements from the initial evaluation. (CX-38 at 333A-333J.)

On July 2, 2018, Dr. Raiszadeh was deposed for this matter. During his deposition, he again stated that he did not have any medical evidence to show that Claimant had any injury after August 2013 that could have caused his back and leg symptoms. (CX-49 at 373.) In general, he did not change any of his previously stated opinions during the deposition. (CX-49.)

On October 26, 2018, Dr. Raiszadeh offered a Supplemental Report, after reviewing various updated records in the case. He stated that his causation opinion had not changed from above, and that he accepts Claimant's statements that he cannot return to his work as a security specialist or police officer. (CX-38 at 333O-333P.)

Finally, Dr. Raiszadeh authored another Supplemental Report, dated November 2, 2018, after reviewing *sub rosa* videos of Claimant, from August 14, 2018 and September 18, 2018. He did not consider any of the activities in which Claimant engaged on the videos to conflict with the physical restrictions he prescribed for Claimant in his initial report. He also did not believe any of the recorded activities implied that Claimant could return to his work as a security contractor or police officer. (CX-38 at 333Q-333R.)

G. Keith Osborn, M.D. (CX-41, CX-50)

On April 25, 2018, Keith Osborn, M.D. conducted a physical examination of Claimant, at Employer's request. On examination, he found Claimant to have back tenderness. He could forward flex and nearly touch his toes, but with some pain. (CX-41 at 344.)

Dr. Osborn opined that Claimant's L5-S1 disc herniation was a result of his 2013 deadlifting injury, and that there was no objective or subjective evidence that his condition was aggravated by his work as a police officer. He noted that his MRI actually improved over that period. Dr. Osborn stated,

> There is no inherent restriction to his activities as a result of his surgery. Patient can return to high-level activities, including police work and military work, following the type of surgery that Mr. Brown has had performed. Having said that, there are certainly individuals who experience pain and are unable to return to those activities. Based on his appearance today, it seems that he could safely return to a 50-pound lifting limit, but whether or not he could perform the running, sudden moves, and activities necessary to engage in hand-to-hand combat where personal and other individuals' safety is concerned, is more of a subjective than objective observation, and in his opinion, he is unable to do that.

Id. He further noted that though he felt Claimant could function as a police officer, he might be better placed in a detective division, as opposed to a standard patrol officer position. *Id.*

Dr. Osborn completed an addendum to his initial report on May 31, 2018, after he reviewed the May 18, 2017 note from Dr. Gunter's office releasing Claimant to full duty. Dr. Osborn stated,

> Based on additional review of his records, there appears to be no indication of restrictions to his ability to serve as a police officer following his initial treatment for the L5-S1 HNP. This raises the question of whether his need for surgery resulted entirely from his initial injury or instead from worsening of his condition as a result of subsequent duties as an officer.

(CX-41 at 344D.)

On July 10, 2018, Dr. Osborn underwent a deposition for this matter. During the deposition, he further indicated that Claimant could do a job requiring him to wear 25 to 30 pounds of body armor, where he would have to sit and stand at a desk, requiring him to walk, or requiring him to ride a bicycle. (CX-50 at 416.) He also clarified the statements in his May 31, 2018 report addendum, stating:

> The reason for the addendum was that I was asked the question is it possible that something happened that was not reported in the record that could also have accounted for his need for surgery, so I went back and looked at the records and the timeline in detail, and that's when it was apparent that there was this gap of time of nearly two years where there's no – there's no report of injuries but

there's also no report of back pain. And during that time he was still engaged in physically demanding work.

So I can't say with certainty that something happened then, but it's certainly possible that another event intervened because we went from him having a lot of pain through July 2014 and then we have the gap between that point and May of 2016 when he's doing his regular duties, not missing any time, no visits for his back, and then he starts to see a doctor again for back pain.

So that's the other possible scenario is that something happened as a result of his work with the Columbia police force that led to his recurrence of pain.

(CX-50 at 419.)

Dr. Osborn was also asked at his deposition why he believed that Claimant's work overseas from September 2013 through April 2015 did not contribute to his need for surgery. In response, Dr. Osborn noted the improvement between Claimant's 2014 and 2016 MRIs, which showed that his body was healing his injury. He also noted that Claimant continued to perform his duties and pass his physical exam during that timeframe. (CX-50 at 421.) Dr. Osborn further opined that while a CT scan could be used to obtain a definitive answer as to whether Claimant's fusion was solid, the fact that Claimant's pain is significantly diminished is also consistent with that conclusion. (CX-50 at 422.)

III. Claim-Related Documents

A. LS-201, Notice of Employee's Injury or Death (2013 Injury Date) (CX-1; EX-Y)

Claimant filed an LS-201 Notice of Injury dated October 14, 2016. He reported a date of injury of August 23, 2013, in Basrah, Iraq, and described the cause of injury as "[p]hysical training required to maintain employment." Under "Effects of Injury," Claimant reported: "Injury of lower back leading to pain, numbness and tingling down left leg, at times making it difficult to maintain ADL's" (activities of daily living).[2]

B. LS-202, Employer's First Report of Injury or Occupational Illness (2013 Injury Date) (CX-2; EX-X)

Employer filed an LS-202 on October 13, 2016 (one day prior to Claimant's filing of the LS-201 Notice of Injury), with September 14, 2013 listed as the date of accident. In response to the question "How was knowledge of accident or occupational illness gained," Employer wrote: "Received phone call on October 6, 2016 from client requesting to initiate a DBA claim for previously unreported injury." Under "Describe in full how the accident occurred," Employer

[2] There is no other LS-201 in evidence; thus, it does not appear Claimant filed a separate Notice of Injury for the claim of cumulative trauma through April 2015.

wrote: "unknown; alleged injury not previously reported. Awaiting details of the incident to be provided by the former employee." (CX-2 at 3.)

C. LS-203, Employee's Claim for Compensation (2015 Injury Date) (CX-3; EX-Z)

Claimant filed an LS-203 Claim for Compensation dated October 27, 2016. On this form, he specified a date of injury of April 14, 2015. He described the accident as follows: "Prior injury in 2013. Repetitive trauma up through April 2015." He specified the involved body parts as the back and left leg.[3]

By letter dated November 3, 2016, OWCP sent "Notice to Employer and Insurance Carrier that Claim has been Filed." The letter referenced OWCP claim number 06-314553 and a date of injury of April 14, 2015, and stated that a copy of the claim for compensation was enclosed. (CX-40.)

D. LS-1, Request for Examination and/or Treatment (CX-5)

Claimant submitted a Request for Examination and/or Treatment, which requests authorization for medical treatment by Dr. Douglas Roberts, for a date of injury of April 14, 2015. The form states the accident occurred as follows: "Prior injury in 2013. Repetitive trauma up through April 2015."

Part B of the form, the "Attending Physician's Report of Injury and Treatment," was completed by Dr. Roberts and dated November 3, 2016. In this report, Dr. Roberts noted the following history of injury reported by the employee: "On first visit 12/10/2013 he stated pain began about 9/2013 while doing dead lifts in the gym. He had to stay in shape to carry all his gear for job." Dr. Roberts recorded the following findings: "Annular tear of lumbar disc L5-S1 on left side with spondylosis L5-S1 on MRI May 2016." He had diagnosed L5-S1 disc herniation, and stated Claimant had been hospitalized on October 17, 2016 and discharged the next day. Surgery had been performed on October 17, 2016: a left L5-S1 transforaminal interbody fusion L5-S1. No additional hospitalization was required. Dr. Roberts noted that Claimant had not been discharged from treatment by the neurosurgeon, and the neurosurgeon had given a work excuse until April 27, 2017. Dr. Roberts wrote: "(I will not fill out future work limitation forms.) All future work limits will need to come from surgeon." His "remarks and recommendations for future care" stated "no work until after 4/27/17, physical therapy, follow up Dr. Gunter his neurosurgeon."

E. LS-207, Notice of Controversion of Right to Compensation (2013 Injury Date; 2015 Injury Date) (CX-4; EX-AA; EX-BB)

[3] There is no other LS-203 in evidence; thus, it does not appear Claimant filed a separate Claim for Compensation for the claim of injury in August/September 2013.

Employer filed a Notice of Controversion dated November 14, 2016, controverting a claim of "lower back pain" with a date of injury of September 14, 2013. (CX-4 at 5A.) Employer stated its first knowledge of the injury was October 6, 2016. Employer listed reasons for its controversion of the right to compensation, including "[n]o timely notice, claimant never provided medical evidence of a work related injury to his employer. All medical was provided in October 2016 and thereafter." Employer filed a second Notice of Controversion of the September 14, 2013 injury claim on April 11, 2017. (CX-4 at 6). Employer stated that it disputed the recommendation of the Informal Conference, and listed reasons why.

Employer filed a Notice of Controversion dated March 10, 2017, controverting a claim of "lower back pain" with a date of injury of April 14, 2015. (CX-4 at 6A-6B). Employer stated its first knowledge of injury in this claim was March 10, 2017, and the claim was controverted for reasons including "lack of timely notice of injury under Section 12" and "claim is time barred pursuant to Section 13(a) of the Act."

F. LS-202, Employer's First Report of Injury or Occupational Illness (2015 Injury Date) (CX-2; EX-CC)

Employer filed an LS-202 dated March 20, 2017, for the accident date of April 14, 2015. Employer stated: "We were not aware of this injury until receipt of the LS203 on 18 March 2017. The employee did not report the incident to us." For the description of the accident, Employer wrote: "Prior injury in 2013. Repetitive trauma up through April 2015." Employer noted the involved body parts were the back and left leg. (CX-2 at 2.)

G. Informal Conference (CX-7)

The informal conference in this matter took place on March 21, 2017. It addressed both claims.[4] The resulting memorandum was issued on March 31, 2017. (CX-7.)

On April 26, 2017, Claimant filed an LS-18 for OWCP claim number 06-314553, for alleged re-injury of his back due to repetitive trauma (date of injury April 14, 2015). On September 5, 2017, Claimant filed an LS-18 for OWCP claim number 06-314331, for his alleged deadlifting injury in August/September 2013.

IV. Employment and Wage Evidence

The record includes the following employment and wage-related evidence for Claimant:

1. Claimant's Employment Agreement with Employer, dated February 15, 2014, for the Deputy Project Manager of Operations position, and an addendum thereto, dated February 16, 2014. (CX-6.)
2. Claimant's 2015 Forms W-2 from Employer and the City of Columbia. (CX-16.)

[4] The Memorandum of Informal Conference is the first document in the record to reference the OWCP claim number for the alleged August/September 2013 injury (claim number 06-314331).

3. Itemized listing of Claimant's paychecks from Employer, from February 15, 2012 through May 29, 2015. (CX-21, EX-G.)
4. LS-202 forms, on which Claimant reported his 2017 and 2018 income. (CX-30.)
5. Claimant's Performance Appraisal from the Columbia Police Department, dated May 16, 2017. (CX-48.)
6. Claimant's entire employment file from the Columbia Police Department. (EX-K.)

V. Other Notable Evidence

The record includes a Vocational Rehabilitation Consultation report, dated July 11, 2018, by Rebecca Sprick. (CX-53, EX-II.) Claimant also submitted records of his subsequent job search. (CX-52.)

Finally, Employer submitted surveillance videos of Claimant, taken on August 13, 2018, August 14, 2018, September 7, 2018, and September 18, 2018. (EX-JJ.) Employer also submitted accompanying surveillance reports, dated August 17, 2018 and September 19, 2018. (EX-KK.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Timeliness

As noted at the outset of this decision, there are two claims at issue here. The first claim is for Claimant's alleged 2013 deadlifting injury to his back, and the second claim is for his alleged cumulative re-injury of the back, due to wearing protective gear, physical training, lifting, and carrying, through the end of his employment in April 2015. I will evaluate these claims separately, for purposes of determining whether they were timely noticed and filed.

A. Traumatic Injury v. Occupational Disease

In determining whether a claimant provided a timely notice and timely filing, the ALJ must initially determine whether the claimant is seeking compensation for a traumatic injury or for an occupational disease; the time periods for such filings differ under Section 12 and Section 13 of the Act, depending on this classification.

The Act does not define what constitutes an "occupational disease," but courts have generally defined it as "any disease arising out of exposure to harmful conditions of employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." *Gencarelle v. General Dynamics Corp*., 892 F.2d 173, 176 (2d Cir**.** 1989). Occupational diseases have a gradual onset, although the fact that a condition gradually develops does not automatically make it an occupational disease; a cumulative injury gradually developing over a long period of employment may be classified as an accident. *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 623 (9th Cir. 1991); *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 219 (1991); *Rodriguez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984).

In *Gencarelle*, the Second Circuit ultimately held that the claimant's arthritis of the knee, which was aggravated by repeated bending, stooping, and climbing on the job, was not an occupational disease, as his job activities were not peculiar to his employment as a maintenance man.[5] Similarly, in *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, the Fifth Circuit considered the case of a claimant who fell from a ship ladder and injured his lower back. He missed a short amount of work at the time, but was then diagnosed with degenerative facet disease several years later. In holding that the claimant's condition was not an occupational disease, the court noted that his activities of lifting, bending, and climbing ladders were commonly required in manual labor occupations, and were not peculiar to his line of work. The court further noted that occupational diseases are traditionally limited to those conditions that arise from exposure to dangerous substances, and since the claimant's condition resulted from a traumatic physical impact, not exposure to external hazardous environmental conditions of employment, his condition did not fit within the definition of an occupational disease. 130 F.3d 157, 160 (5th Cir. 1997).

Pursuant to this case law, Claimant's claims in this matter should both be classified as traumatic injuries, rather than occupational disease. Claimant allegedly injured himself while deadlifting weights in the gym, pursuant to the requirement of his employment to maintain a certain level of physical fitness. Thereafter, he claims that he suffered re-injury to his back, as a result of wearing protective gear, physical training, lifting, and carrying, through April 2015. Like the claimant in *LeBlanc*, Claimant's job activities, particularly of lifting/carrying weight and physical training, are not peculiar to his position; there are many, many occupations that require lifting/carrying heavy weights and maintaining the physical abilities to do so. Furthermore, Claimant's condition allegedly resulted from a traumatic physical event, in the gym in 2013, not exposure to external hazardous environmental conditions. For these reasons, both of his claims are most appropriately categorized as traumatic injuries.

B. Section 12 and Section 13 Timeliness Provisions

Section 12 provides that a claimant must give timely notice of an injury or death.[6] Section 12(b) provides that notice must be in writing and details the required contents, while Section 12(c) states that notice must be provided to both the employer and the District Director. 33 U.S.C. § 912; 20 C.F.R. §§ 702.211, 215. Because the "awareness" provisions are identical under Sections 12 and 13, the case law on this issue applies to both provisions. Sections 12 and 13 must be considered in conjunction with Section 20(b), which provides that in the absence of substantial evidence to the contrary, it is presumed "that sufficient notice of such claim has been given." *Stevenson v. Linens of the Week*, 688 F.2d 93 (D.C. Cir. 1982), *rev'g* 14 BRBS 304 (1981); *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 12 BRBS 478 (5th Cir. 1980); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989) (overruling prior Board decisions). To rebut the presumption, the employer must produce substantial evidence showing that timely notice was not provided.

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[5] *See also Dir., OWCP v. Gen. Dynamics Corp. [Morales]*, 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir. 1985) (arthritic condition can be an occupational disease, but in this case there was no evidence that osteoarthritis was a "peculiar hazard" of employment).

[6] This time limitation is mandatory and jurisdictional in nature. *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146 (3d Cir. 1975).

In determining whether a claimant provided a timely notice after the date of "awareness," the ALJ must initially determine whether the claimant is seeking compensation for a traumatic injury or for an occupational disease. For traumatic injury cases such as the claims at issue here, Section 12(a) provides that notice of an injury or death for which compensation is payable must be given within 30 days after the date of the injury or death or within 30 days after the employee or beneficiary is aware, 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. A claimant is not "aware" of an "injury" until he knows or reasonably should know that he has sustained a work-related injury which will likely result in an impairment in earning capacity. *Stancil v. Massey*, 436 F.2d 274, 276-277 (D.C. Cir. 1970); *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979), *aff'g* 10 BRBS 391 (1979) (Smith, S., dissenting).[7]

Failure to give notice as required by Section 12(a) will bar the claim unless Section 12(d) applies. Pursuant to this subsection, the failure to file timely notice will not bar the claim for compensation if: (1) the employer, carrier, or designated official has actual knowledge of the injury or death; (2) the District Director or ALJ determines that the employer or carrier has not been prejudiced; or (3) the District Director or ALJ excuses the claimant's failure to file timely notice because (i) while not given to a designated official, notice was given to an official of the employer or its insurance carrier and the employer or carrier was not prejudiced by the failure to notify a designated official; or (ii) for some satisfactory reason, notice could not be given. In addition, failure to give notice is not a bar unless the employer raises an objection on this basis at the first hearing on a claim for compensation for injury or death. 20 C.F.R. § 702.216; *Fulks v. Avondale Shipyards*, 637 F.2d 1008, 12 BRBS 975 (5th Cir. 1981). Pursuant to Section 20(b), the employer must produce evidence that it did not have knowledge of the injury and was prejudiced by the late notice.

Section 13 governs the timely filing of a claim for compensation.[8] For traumatic injury cases,[9] Section 13(a) states that, "[e]xcept as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death." 33 U.S.C. § 913(a). This time does not "begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment." 33 U.S.C. § 913(a). Section 20(b) provides the claimant with a presumption that his claim was

[7] In *Galen*, the claimant felt back pain at work, but believed it would subside, until his physician attributed the pain to discogenic disease and arthritis. The court stated that a claimant's awareness that his back hurts is not the same as his awareness that his back is injured within the meaning of the statute, quoting *Stancil*. The court reasoned that "since the Act exists to compensate a worker for loss of earning power, there is little purpose in penalizing a claimant for not reporting a pain he reasonably did not believe would impair his earning power. A rule requiring earlier notice would force employees to report every ache and sore throat that might lead to eventual disability."

[8] The Section 13 time limitation is mandatory and jurisdictional in nature. *Dir., OWCP v. Nat. Van Lines Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979). Section 13(b)(1) provides that the Section 13(a) time limitation will not be a bar unless it is raised at the first hearing on the claim. 20 C.F.R. § 702.214. That requirement is satisfied here.

[9] As discussed with regard to Section 12, in determining whether a claim was timely filed, the ALJ must initially determine whether the claimant is seeking compensation for a traumatic injury or for an occupational disease. I have determined that the claims at issue here are for traumatic injuries.

timely filed. 33 U.S.C. § 920(b). In order to rebut the presumption, the employer must produce evidence that the claim was not filed within the required time after the claimant's "awareness."[10]

Section 30(f) states that where the employer or carrier has notice or knowledge of an injury and fails to file the injury report required by Section 30(a), the Section 13 time period does not begin to run against the employee's claim until the report of injury is filed. 33 U.S.C. § 930(f). The employer's burden under Section 20(b) (to rebut the presumption of a timely filed claim) includes establishing that it complied with Section 30 before it can prevail under the time limitations of Section 13. *See, e.g.*, *Blanding v. Dir., OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999), *rev'g in pert. part* 32 BRBS 174 (1998); *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992) (Dolder, J., dissenting). However, Section 30(f) does not toll the limitations period of Section 13 if the employer was not given notice of the work-relatedness of the injury. *Stark v. Washington Star Co*., 833 F.2d 1025, 20 BRBS 40 (D.C. Cir. 1987).

1. *Claim for 2013 Deadlifting Injury*

The parties devoted significant time in their post-hearing briefs to arguing the issue of whether Claimant timely filed notice of his deadlifting injury under Section 12. However, I find that regardless of the resolution of the Section 12 issue, the question whether this claim of injury is time-barred is more clearly resolved in the Section 13 analysis.

As noted above, for traumatic injury cases such as this one, a claim for compensation must be filed within one year after the injury, which is defined according to the "awareness" standard. For Claimant's 2013 deadlifting injury, it is reasonable to conclude that he was not necessarily aware that he had sustained an injury that was likely to impair his earning capacity at the time that the injury occurred, particularly as the record shows that he did not miss more than a minimal amount of work in August/September 2013. Nor was Claimant necessarily aware of the character of his injury when he saw Dr. Roberts in December 2013 and January 2014, as he did not yet have diagnostic imaging completed at that time.

However, I conclude that Claimant's awareness should have arisen in mid-2014, such that the one-year filing period commenced at that time. Specifically, the medical evidence shows that Claimant returned to Dr. Roberts with complaints of back pain and leg pain again in June 2014, and his MRI on June 20, 2014 showed the L5-S1 disc herniation that was purportedly causing his pain. (CX-10 at 92-94; CX-11 at 117.) Shortly thereafter, on July 8, 2014, Claimant saw neurosurgeon Dr. Toussaint, and scheduled surgery to address the disc herniation for August 2014. (CX-23 at 177-179.) As such, July 8, 2014 is a reasonable date on which to conclude Claimant should have been aware either (1) that he had sustained a work-related injury resulting in the likely impairment of his earning capacity, or (2) of the full character, extent, and impact of the harm resulting from his work injury. This means that he had until one year from that date to file a claim for compensation, under Section 13. Because Claimant did not file his LS-203 Claim

[10] *Bath Iron Works Corp. v. U.S. Dept. of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *E.M. [Mechler] v. Dyncorp Int'l*, 42 BRBS 73 (2008), *aff'd sub nom. Dyncorp. Int'l v. Dir., OWCP*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only). Because the "awareness" provisions are identical under Sections 12 and 13, the case law addressing this issue applies to both provisions.

for Compensation until October 27, 2016,[11] his claim for compensation due to the 2013 deadlifting incident is time-barred under Section 13.

Claimant argues that the filing period under Section 13 was tolled, because Employer did not timely file a Section 30(a) report of injury, pursuant to Section 30(f). However, as noted above, Section 30(f) cannot be used to toll the filing period if the employer is not given notice of the work-relatedness of the injury. Claimant argues that he provided notice to Employer of his work-related injury on two separate occasions prior to 2016. Specifically, he cites the Incident Report he completed on September 14, 2013, after his visit to the medical clinic that day, as the first notice to Employer of his injury. This report contains scanty information and is plainly insufficient to provide notice of an injury. The one-page form, labelled as an "Incident Report," lists Claimant as the "Person(s) Involved" and describes the "Type of Incident" as "Sick Call"/Medical. It states the incident occurred at 8:30 a.m. on September 14, 2013, and provides the following "Incident details":

> On 14 Sep 13, I responded to the DSH for sick call. I have returned to full duty status.

The report lists "N/A" for "Actions Taken" and "None" for "Comments," and was submitted at 12:30 p.m. on September 14, 2013. (CX-20; EX-I.) This report cannot reasonably be considered as notice to Employer that Claimant incurred a work-related injury. It includes no details whatsoever of what actually happened to Claimant—no mention of deadlifting or the gym, no reference to an injury or Claimant's back—and any person reading the report could just as easily conclude that Claimant had a stomach bug. Indeed, the statement that Claimant had returned to full duty within four hours of the sick call was further indication that nothing was amiss. With no information about the nature of the sick call and no reference to Claimant's back, an injury, or even to an incident occurring in the gym or with weights, the "sick call" report does not show that Employer had notice of an injury for which it failed to file a report of injury.

Claimant alleged at the formal hearing that the incident report purposefully omitted details, because Employer's policy was not to put any "specific medical details" therein, and "no detailed information as to any particular event or sickness or anything like that," for HIPPA reasons. (TR at 64.) Claimant's incident report went well beyond simply omitting specific medical details, however, and provided absolutely no useful information to Employer whatsoever; it did not even include indication of an "injury." I find Claimant's assertion that this was Employer's policy—which is not corroborated by any other evidence in the record—unlikely and not credible, in the context of a workers compensation system that largely requires notices and claims to be in writing. Employer presented evidence of a memorandum written by Claimant for another injured employee with a similar deadlifting injury, which described the nature of the injury ("On 14Feb15, Mr. [Employee] was exercising in the ConGen MWR gym

[11] Claimant's LS-203 listed a date of injury of April 14, 2015, arguably advancing only the claim of repetitive trauma. However, the description of the injury on the LS-203 stated: "Prior injury in 2013. Repetitive trauma up through April 2015." A claim for compensation must be in writing and filed with the District Director (20 C.F.R. § 702.221), but need not be filed on any particular form. Any written document can suffice as long as it discloses an intention to assert a right to compensation, i.e., as long as the fact that a claim is being made is inferable from the writing. Therefore, I assume without deciding that the LS-203 dated October 27, 2016 constitutes a claim for compensation for the 2013 injury.

and injured his lower back doing deadlifts."), the steps taken (the employee attempted to rest the injury but the pain continued, so he "reported to the DSH to have his back evaluated"), and the diagnosis (sciatica). (EX-RR.) This appropriate level of detail, to provide notice of an injury, rebuts Claimant's assertion that Employer had a policy against collecting such information. When confronted with this memorandum at the hearing, Claimant testified that he did not remember this employee's deadlifting injury (he remembered a separate volleyball injury), and did not remember filling out a memorandum regarding the injury. (TR at 109-110.) When asked why there was a record of the injury created in the other employee's case, but none for his own deadlifting injury, Claimant initially answered, "I can't tell you." (TR at 112.) Claimant then stated that the Local Program Manager to whom the memorandum of injury was directed was "a very contract-based person" who "changed the policy" "due to the fact that Global had numerous injuries, reported injuries," so he changed the policy to require the injured person to be interviewed in person by a Deputy Project Manager or higher, who would then provide the injury information to him. (TR at 112.) This explanation is not credible for multiple reasons: the purported policy change to requiring *interviews* does not explain away the lack of any relevant details in Claimant's own incident report; the explanation itself references numerous previous "reported injuries"; and this explanation came after Claimant initially said he could not explain the difference in the level of detail in his own incident report and the one he prepared for the other employee, nor recall writing the memorandum of the injury. I find that Claimant's testimony is self-serving, unsupported by other evidence, and not credible, and I do not credit his testimony that Employer had a policy to omit relevant details, and even a mention of "injury," from injury reports.

The incident report also indicated that Claimant made notification to PM (Program Manager) Tindall. (CX-20.) At the formal hearing, Claimant testified that Mr. Tindall was his supervisor at the time. (TR at 42.) However, during his deposition, Claimant could not remember the name of his supervisor when he was injured. (CX-26 at 257.) Claimant also testified that he told another program manager, Tim Spisak, of the injury, after Mr. Tindall left the theater and Mr. Spisak was promoted to Program Manager. (TR at 44-45.) However, Claimant testified that Mr. Tindall and Mr. Spisak did not give him any paperwork to complete, which is highly doubtful in the context of an alleged work-related injury.[12] (TR at 45, 54.) I find Claimant's testimony that he provided notice of a work-related injury to Mr. Tindall and Mr. Spisak not credible, and with no other evidence to support these assertions, I do not credit the self-serving claims of oral notice of a work injury.[13]

Claimant also argues that e-mails he exchanged with local program manager Daniel Moritz in August 2014 constituted notice to Employer of his work-related injury. However,

[12] Claimant testified: "As far as they were concerned, the incident report is the sick call report …." (TR at 45.)

[13] The Incident Report (CX-20) shows Mr. Tindall was notified of Claimant's "sick call," but does not show he was given any information or indication that the sick call was actually a work-related back injury. The emails with Mr. Moritz (CX-51) include Claimant's assertion that he told "Tim" (Spisak) in June 2014 he would not be returning overseas on time due to a back injury, but (as discussed in more detail below) they do not show Mr. Spisak or Mr. Moritz were given any information or indication that the back injury was work-related or had occurred prior to June 2014, during his employment with Employer.

these e-mails were sent while Claimant was home in the United States,[14] and while they reference a "back injury" that had delayed Claimant's return to Iraq, nothing in the emails gave any indication that the back injury was work-related or had occurred in Iraq before Claimant came home to the United States. (CX-51.) Claimant also gave no indication that the nature of the injury (including when and where it occurred) was something Employer knew about or should have known about (as would be the case with a work-related injury). Instead, Claimant minimized the injury and gave little information about it, stating to Mr. Moritz that he was trying to complete "an additional non-surgical treatment" and "still be able to fly out" by the end of the month.

Specifically, on August 4, 2014, Mr. Moritz wrote Claimant to "check[] in to try and determine your status." He stated: "You have transitioned to LWOP now and the team in the field has not heard from you." He stated that Tim resigned and Andrew was moving up to the project manager spot, and stated they were looking for a deputy project manager to "backfill the PM when he is out on rotation." He asked Claimant: "Do you intend on returning to Contract or should we begin the process of removing you from the employment with GIS?" Claimant responded:

> Slight correction to your information…I did inform the field in June, namely Tim, I would not be returning on time due to a back injury…I have received treatment and will be returning to the doctor in the next week or so for an additional non-surgical treatment…at this time I do NOT wish to resign…I would like to inquire as to whether you would be interested in bringing me over there to cover either in a DPMO or PM position while Drew is on leave […] That would allow me to finish treatment and still be able to fly out…

(CX-51.[15]) Mr. Moritz responded that if Claimant was "available and medically cleared [he] would bring [Claimant] back on to plug either the PM or DPM position," and Claimant would need to get a clearance from his "medical provider that [he was] good to go." Claimant asked Mr. Moritz to send "whatever docs my physician needs to sign," and Mr. Moritz replied that "[i]t will have to be a letter prepared by your medical providing indicating that you are medically fit to return to 'Full duty' and that the 'back injury' you have has been resolved and will not affect your ability to meet the fitness standards required for performance on the task order." He appended a copy of the "Physical Fitness Entrance Requirements."[16]

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[14] Claimant "left the theater" in May 2014, and was in the United States until his return overseas in December 2014. (*See* TR 46, 49, 55.) Claimant testified that some of the symptoms he reported to Dr. Roberts in his June 2014 examination developed "during and right after" the 16-hour flight home from Iraq. (TR at 49-50.)

[15] With the exception of the one set of bracketed ellipses, the ellipses throughout this email are Claimant's own and do not reflect omissions.

[16] On August 14, 2014, Mr. Moritz wrote Claimant again, to "get confirmation of your availability to launch to fill the vacant DPMO spot" with travel on or about August 22, 2014 (eight days later), and to inquire when he could expect to receive the "letter from your medical provider that you are cleared to return to full duty." Claimant responded that he would not be able to "make these dates"; he had been hoping for a cancellation at his doctor's office "so [he] could get the second procedure knocked out in time to make it back for those dates…right now [his] next appointment is scheduled for the 22nd of August." He asked Mr. Moritz to keep him "on the books" for a return in September. Mr. Moritz asked for an idea when Claimant would be available in September. The next message in CX-51 was from a different employee, dated November 26, 2014, stating that she "hope[s] all is well and you are enjoying your time off," and providing a schedule for Claimant's return. (CX-51).

Claimant's statement that he told the field (Mr. Spisak) in June that he would not be returning overseas on time due to a back injury is too vague to constitute notice that he had incurred a work-related back injury in Iraq while working for Employer, prior to having come home to the United States, and instead creates the impression that he incurred a back injury at home in June. Further, Claimant did not say the delay was due to *the* back injury (which would have suggested he was referring to something Mr. Moritz knew or should have known about), or provide any additional details or context that would have alerted Mr. Moritz to the idea that Claimant was referencing a work injury (such as saying his return was delayed due to a back injury *from September 2013*, or a back injury *from his physical training*, or *from work*, etc.). Indeed, in the face of an accusation that the team had not heard from him and he was on LWOP, and a question whether they should remove him from employment with GIS, an assertion that his return had been delayed due to *an injury incurred at work* would be a logical first line of defense, making it even more questionable that Claimant omitted this detail. I cannot find that Mr. Moritz knew, or should have known, that Claimant had suffered a work-related back injury while working for Employer based on the contents of these emails. As the messages do not convey that Claimant incurred a work-related injury, they do not show that Employer had notice of such.

Once again, like the "sick call" report, I find that these emails are too vague to be considered notice to Employer of the work-relatedness of his back injury. The unadorned references to a back injury, made while Claimant was home in the United States and had not returned overseas on time, free of any context or detail, could not be construed to provide notice to Employer that Claimant injured his back a year earlier in Iraq while working for Employer. On the contrary, I find that Claimant was intentionally vague and endeavored to conceal the nature of his injury from Employer. It appears Claimant did not want Employer to know he had suffered a work injury.

Finally, on December 21, 2014, Claimant underwent an examination in connection with his overseas work with Employer, upon his return after a period of leave. At that time, he denied debilitating back pain or back injury, and his back examination was normal. (CX-19 at 166-167.) This is yet another example of why Employer did not reasonably have notice of Claimant's work-related back injury at that time.

Overall, Claimant's allegations that he provided notice of a work-related injury to Employer are not credible. His assertions of oral notification to his supervisor and manager in 2013 are not credible, and his written notifications—the 2013 Incident Report and the 2014 e-mails—are so vague that I cannot conclude that Claimant even intended for them to be used as notice. As a manager himself, Claimant should have been well aware of the specificity required when noticing a work-related injury, and the memorandum he wrote to document the other employee's injury (EX-RR) shows that he was. Had Claimant intended the Incident Report to serve as notice of an injury, it could and would have included more details than the words "sick call." Similarly, Claimant's emails to Mr. Moritz in August 2014 to explain his delayed return and to arrange a return to a project manager or deputy project manager position easily could and would have described the back injury as work-related, had Claimant wanted Employer to know that he had incurred a work-related injury. Claimant's allegations of notice are not credible, and

the evidence suggests the opposite: Claimant did not want Employer to know he had an on-the-job injury at the time, and did not take action to notify Employer of an injury or pursue a claim for the injury until the eve of his back surgery in October 2016.[17]

In summary, Claimant's assertions that he provided notice of the 2013 deadlifting injury to Employer are simply not believable. I find that Employer has established that it did not have notice of the work-related injury prior to October 6, 2016 (thus, the Section 30(f) tolling provision does not apply), and has rebutted the presumption that the claim for compensation was timely filed. The one-year claim-filing period of Section 13(a) began to run by July 8, 2014, and expired by July 8, 2015, without being tolled under Section 30(f). The claim for compensation filed on October 27, 2016 was untimely as to the 2013 deadlifting injury, and that claim is time-barred.

Accordingly, Claimant is not entitled to compensation benefits on his claim of injury arising from the deadlifting incident in August or September 2013.

2. *Claim for 2015 Cumulative Injury*

With regard to Claimant's second claim, for re-injury of the back due to cumulative trauma through the end of his overseas employment in April 2015, the primary question to be addressed is his date of awareness of this alleged injury, since this is the date from which the notice and filing limitations must run.

Following Claimant's return from overseas, in April 2015, he was not in active treatment for his back pain, and he even indicated during his police academy physical that he was engaging in CrossFit, paddle boarding and running activities. (CX-14 at 136-142.) It was not until May 2016 that Claimant began actively seeking treatment for back pain again, when he returned to Dr. Roberts to request an updated MRI. (CX-10 at 105-107.) After obtaining same, Claimant was referred to Dr. Gunter and entered into renewed discussions of surgery on July 19, 2016. (CX-13 at 121-123.) It is unclear at what point Claimant actually elected to undergo surgery, but the record does show that Dr. Gunter completed a short-term disability form for Claimant on September 21, 2016, indicating that he had elected to proceed with surgery, and that he would be expected to be out of work from the date of surgery, October 17, 2016, through April 24, 2017. (CX- 18 at 164.) Therefore, September 21, 2016 is a reasonable date on which to conclude Claimant should have been aware, for the second time, either (1) that he had sustained a work-related injury resulting in the likely impairment of his earning capacity, or (2) of the full character, extent, and impact of the harm resulting from his work injury.

Section 12 provides that Claimant had 30 days from his date of injury to provide notice of same. He filed his LS-201, Notice of Employee's Injury or Death, on October 14, 2016, within 30 days of the September 21, 2016 date referenced above. (CX-1.) Therefore, his notice of injury was timely under Section 12.

[17] Indeed, it is quite notable that Claimant called Employer on October 6, 2016 to initiate a claim, and filed his Notice of Injury on October 14, 2016, just before his back surgery on October 17, 2016. Claimant did not even request authorization for treatment with his choice of physician until after November 3, 2016 (the date of the Part B physician's report appended to the LS-1).

Under Section 13, for a traumatic injury case, Claimant had one year from his date of injury to file his claim for compensation. He filed his LS-203, Employee's Claim for Compensation, on October 27, 2016, shortly after he filed his injury notice. (CX-3.) As such, his claim was filed well within the one year period, and was timely under Section 13.

Therefore, Claimant's claim of cumulative injury from repeated lifting, carrying, and wearing of protective gear, culminating in April 2015, was timely noticed and filed.

II. Injury and Causation

A. Section 20(a) Presumption

Pursuant to Section 20(a) of the Longshore Act, a proceeding for the enforcement of a claim for compensation shall be presumed to come within the provisions of the Act, absent substantial evidence to the contrary. 33 U.S.C. § 920(a). To invoke the Section 20(a) presumption, a claimant must first establish a *prima facie* case, in which the claimant must show (1) that he suffered a harm, and (2) that conditions existed or an accident occurred at work which could have caused the harm. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 605 (1st Cir. 2004).

As to the first element required to invoke the Section 20(a) presumption, a claimant must establish that he suffered an injury under the Act. A claimant does not need to show that he has a specific illness or disease. Instead, he is required to establish that some harm occurred, meaning something has gone wrong with the human frame. *Crawford v. Dir., OWCP*, 932 F.2d 152 (2d Cir. 1991). With regard to the second element, a claimant has the burden to demonstrate that an accident occurred or demonstrate the existence of working conditions which could have caused the injury. The Section 20(a) presumption does not aid the claimant in establishing his *prima facie* case. *See, e.g., Goldsmith v. Dir., OWCP*, 838 F.2d 1079 (9th Cir. 1988); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). In order to invoke Section 20(a), the claimant is not required to introduce affirmative medical evidence establishing that the working conditions in fact caused the alleged harm; he need only show the existence of working conditions which could conceivably cause the harm alleged. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

If a claimant invokes the Section 20(a) presumption, it places the burden on the employer to produce substantial evidence that the injury was not caused or aggravated by the employment. *See, e.g., Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990). The employer can rebut the presumption in a case involving a potential intervening cause by showing that the claimant's disabling condition was caused by a subsequent non work-related event, provided the subsequent event was not caused by the claimant's work-related injury. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). When the claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation either outside work or with a non-covered employer, the employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural or unavoidable result of the original work injury. 33 U.S.C. §

902(2); *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981); *Pakech v. Atlantic & Gulf Stevedores, Inc.*, 12 BRBS 47 (1980); *Haynes v. Washington Metropolitan Area Transit Authority*, 7 BRBS 891 (1978). If, however, the subsequent progression of the condition is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, the employer is relieved of liability for disability attributable to the intervening cause. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983), *rev'g* 14 BRBS 682 (1982); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Marsala v. Triple A South*, 14 BRBS 39 (1981) (Miller, dissenting). The possibility of an intervening cause does not affect invocation of the Section 20(a) presumption. Thus, the employer must produce substantial evidence that the claimant's disability is the result of an intervening cause. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

If the employer fails to rebut the presumption, causation is established as a matter of law. If the Section 20(a) presumption is rebutted, it falls from the case, and the ALJ must weigh the competing evidence in the record as a whole and render a decision supported by substantial evidence. *See, e.g., Universal Maritime*, 126 F.3d 256, 31 BRBS 119(CRT); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Sprague v. Dir., OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982); *Hensley*, 655 F.2d 264, 13 BRBS 182; *Swinton*, 554 F.2d 1075, 4 BRBS 466; *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). *See also Greenwood v. Army & Air Force Exchange Service*, 6 BRBS 365 (1977), *aff'd*, 585 F.2d 791, 9 BRBS 394 (5th Cir. 1979); *Gifford v. John T. Clark & Son of Boston, Inc.*, 4 BRBS 210 (1976); *Norat v. Universal Terminal & Stevedoring Corp.*, 3 BRBS 151 (1976). The claimant bears the burden of persuasion, and must establish that his condition is work-related by a preponderance of the evidence. *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).[18]

1. *Claim for 2013 Deadlifting Injury*

Although Claimant's 2013 deadlifting injury claim is time-barred for compensation purposes, I consider it here on the question of causation, because Claimant's request for medical benefits remains viable as medical benefits are never time-barred. I find that Claimant has established his *prima facie* case to invoke the Section 20(a) presumption, for the purposes of this injury. Specifically, the medical evidence clearly establishes the first element of the *prima facie* case, that Claimant suffered a harm, and this does not appear to be disputed by Employer. Claimant's Patient Chart from his clinic visit on September 14, 2013, states that Claimant complained of left-sided low back pain that began approximately three weeks ago, when he was performing dead lifts in the gym and felt a sudden onset of pain. (CX-8 at 42.) Claimant's pain persisted over three weeks, and he experienced pain and numbness radiating down the back of his left thigh to his knee. (*Id.*) The medical provider diagnosed lumbar radiculopathy and recommended follow-up with his primary care physician the next time he was home on R&R (or sooner if his symptoms worsened). (CX-8 at 44.) When he was home in December 2013, Claimant reported to Dr. Roberts that the pain was ongoing. (CX-10 at 86-87.) Claimant's next significant treatment was when he was home again in mid-2014, at which time he finally

[18] The Supreme Court rejected the "true doubt rule" which provided that all doubtful fact questions are to be resolved in favor of the injured employee, and held that rule violates Section 7(c) of the APA, which states that "except as otherwise provided by statute the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d).

underwent an MRI, which showed the L5-S1 herniated disc, the likely cause of his ongoing pain. (CX-11 at 117.) He also underwent his first neurosurgical consultation with Dr. Toussaint and his epidural steroid injections with Dr. Krafft at this time. (CX-23 at 177-179; CX-17 at 149-159.) The evidence taken together shows that Claimant incurred a physical injury as a result of the 2013 incident.

As for the second element of Claimant's *prima facie* case, he has also established working conditions which could have caused his harm with regard to the 2013 injury. At the formal hearing, Claimant testified that his contract with Employer required him to maintain a standard of physical training in order to be able to perform the job. (TR at 40.) He had to undergo periodic physical training tests, which measured strength and cardiovascular fitness, as well as training to practice responses in different kinds of attack scenarios. (TR at 41.) As such, his presence in the gym on base, performing weightlifting activities, comes within his working conditions in this matter. Moreover, the necessity of his maintenance of certain physical standards was confirmed in his e-mail communications with Daniel Moritz from August 2014, during which he asked Claimant to obtain certification from his physician that he was medically fit to return to full duty, which included that ability to satisfy the physical efficiency battery scores used by the Federal Law Enforcement Training Center. (CX-51 at 438-439.)

Because Claimant has established a harm and working conditions that could have caused the harm, he has invoked the Section 20(a) presumption with regard to the 2013 deadlifting incident.

Turning to the question of Employer's rebuttal of the Section 20(a) presumption, the record establishes that Employer has successfully rebutted the presumption, by producing substantial evidence of an intervening cause of Claimant's symptoms. Specifically, as Employer argued in its post-hearing brief, following Claimant's initial deadlifting injury in 2013, his inconsistent complaints of pain and gaps in treatment support a conclusion that his ultimately renewed complaints of pain and need for surgery in mid-2016 were the result of an intervening cause, not the initial acute injury. This contention finds support in the treatment timeline, Claimant's testimony, and the opinion of Dr. Osborn.

Following his epidural steroid injections in the summer of 2014, Claimant reported to Dr. Roberts that he was pain-free, and his objective examination was normal. (CX-10 at 95-97.) Similarly, during an employment-related physical examination in December 2014, Claimant denied back pain or injury, and his examination was once again normal. (CX-19 at 166-167.)

Claimant did not see Dr. Roberts to complain about back pain again until May 2016. In the interim, he worked overseas until April 2015, returned to the United States and completed several physical examinations for his police department job with no abnormalities or complaints of back pain, and reported that he was participating in CrossFit, paddle boarding, and running. (CX-10 at 98-99; CX-14 at 136-142.) He also officially started his job with the Columbia police department, going through both training and his first several months as a patrol officer. As such, the evidence shows that Claimant returned to normal activity after his 2013 deadlifting injury and participated in physically demanding work as a police officer and other activities, supporting a possible conclusion that an intervening cause contributed to the resurgence of his pain.

In addition, though Claimant testified at the formal hearing that he does not believe he suffered an injury while working for the police department, he did admit that his police work increased his back pain. (TR at 59-60.) He stated that from April 2015, when he left his overseas employment, through October 2016, when his surgery took place, his condition progressively worsened. (TR at 56.) He noted that while in the police academy, the training was scaled down, compared to his training for Employer, but he had to do a number of very physical training activities, and he stated that he had flare-ups of his symptoms on his work days. (TR at 36-37, 152-154, 156.)

Furthermore, Dr. Osborn initially opined that there was no evidence to show that Claimant's symptoms were caused by anything other than his 2013 deadlifting injury, but in the addendum to his report, Dr. Osborn reviewed the records showing Claimant's improved activities after his initial 2014 treatment for his back injury, and confirmed the possibility of a worsening of his condition due to his police officer duties. (CX-41 at 344D.) During his deposition, Dr. Osborn expounded on his statements, noting the gap of time during which Claimant did not have treatment and did not report back pain, but was engaged in physically demanding work. He said that this raises the possible scenario that something happened during his police work that led to the recurrence in his pain. (CX-50 at 419.)

Employer's burden is one of production, and I find Employer has rebutted the Section 20(a) presumption. Because Employer produced substantial evidence of an intervening cause to rebut the Section 20(a) presumption, I must now weigh the competing evidence in the record as a whole. The above discussion includes a recitation of the entirety of the evidence supporting Employer's argument in this matter: the gap in treatment, Claimant's testimony, and the opinion of Dr. Osborn point to an intervening cause—Claimant's police department employment—which relieves it of liability for Claimant's disability, to the extent it is attributable to that intervening cause.

Considering the record as a whole, however, there is a great deal more evidence in the record to support Claimant's position on this matter, and I find his contentions are well supported and credible on this point. First, it is notable that there is no evidence in the record of any specific aggravation or injury that Claimant suffered while he was working as a police officer. Instead, the evidence is more consistent with the conclusion that his pain was simply intermittent in nature; namely that it improved with the initial epidural steroid injection treatment, but that once those injections wore off, it worsened again. Indeed, at the formal hearing, Dr. Gunter characterized Claimant's condition as waxing and waning, or progressive, in that his pain continued to worsen with time. (TR at 173, 176.) Additionally, when Claimant obtained his second lumbar spine MRI on May 19, 2016, it showed that his L5-S1 disc herniation was less prominent, showing some improvement in his initial injury, rather than worsening due to any intervening activity, despite his renewed complaints of pain. (CX-12 at 119.)

Furthermore, though Claimant testified during the hearing that he reported to people that his police work increased his pain, he also noted that he did not report to anyone that he suffered a back injury while working at the police department. (TR at 89.) In addition, on his application for long term disability benefits, he noted that his initial injury was in 2013, and that his

condition was on/off and had progressively worsened over time. He also stated that his condition was due to his overseas work, and not his employment with the police department. (CX-43 at 352.) This further supports a finding that his pain during that time was the natural progression of his original 2013 injury, and not due to a new injury.

In addition, it is significant that the vast majority of doctors in this case found Claimant's need for surgery to be directly related to his 2013 deadlifting injury, not any intervening cause. For example, on an LS-1 form dated November 3, 2016, Dr. Roberts, with whom Claimant has had the longest treating relationship, characterized Claimant's October 17, 2016 surgery as stemming from his 2013 work injury. (CX-25 at 221.) Similarly, on the November 15, 2016 LS-1 form and accompanying treatment note that Dr. Gunter completed, he stated that Claimant's 2013 deadlifting injury was causally related to his treatment, including his surgery. (CX-13 at 130.) Granted, this was based on Claimant's own statements to Dr. Gunter. However, several of the independent medical experts in this case stated the same opinion.

For example, Dr. Drye spoke to the progression of Claimant's symptoms in his report. Based on the Claimant's oral history, as well as the MRI reports, which Claimant provided to him, he specifically noted the improvement between Claimant's 2014 and 2016 MRIs, stating that they showed "a natural evolution of the herniated disc with significant resorption and marked improvement. There was certainly no evidence of new injury or advancement in pathology. It would appear that the patient has had symptoms continuously except for a brief respite after his injections, throughout the end of his career with a security company as well as throughout his work as a police officer." Dr. Drye further stated that despite Claimant's career decisions and lifestyle, his symptoms, more likely than not, were a continued result of his initial 2013 spine injury, and his problems would have continued to develop even without the stress of his police work. (CX-37 at 326.)

Similarly, Dr. Raiszadeh, in report after report, as well as a deposition, reiterated his opinion that Claimant's back pain and resulting surgery were causally related to his 2013 deadlifting injury, with no records to suggest a prior or subsequent injury. (*See* CX-38; CX-49.) In forming his opinions, Dr. Raiszadeh reviewed Claimant's medical records, Claimant's deposition, and even the surveillance videos of Claimant, and continually arrived at the same causation conclusion, even calling it unequivocal. (CX-38 at 333P.) Essentially, like Dr. Gunter, he characterized Claimant's condition as waxing/waning and progressive in nature. In his opinion, Claimant had one 2013 deadlifting injury, no significant aggravations thereafter, failed the conservative injection treatment, and eventually required surgery. (CX-38 at 333O.)

Overall, I find that the opinions of Dr. Roberts, Dr. Gunter, Dr. Drye, and Dr. Raiszadeh are entitled to significant weight in this matter. Dr. Roberts and Dr. Gunter are Claimant's treating physicians, and though their opinions regarding causation of Claimant's condition are certainly based, at least in part, on Claimant's subjective reports, they are also consistent with their own treatment history. There is nothing in the extensive medical record to show that Claimant suffered an intervening injury any time after 2013, and their opinions are consistent with that fact. Dr. Drye has been practicing in the field of neurosurgery since 1996, and his statements are similarly consistent with the record. (EX-EE.) In particular, his opinion that Claimant's symptoms were a natural evolution of his initial injury in 2013, as opposed to an

intervening injury, is specifically supported by the 2016 MRI evidence, which actually showed improvement in the herniated disc, not worsening thereof. It is also significant that Dr. Drye's opinion weighs against the existence of an intervening cause, despite the fact that he was retained by Employer in this matter; this lends further credibility to his statements. Finally, Dr. Raiszadeh is certified in orthopaedic surgery, and his reports here are particularly notable, due to how they document his close review of the records in this matter. He unequivocally stated, time after time, that Claimant's 2013 injury caused his symptoms and treatment, as there is no evidence to suggest either a prior or subsequent injury, which is consistent with the record before me.

Even Dr. Osborn initially opined that Claimant's condition was a result of his 2013 deadlifting injury, and that there was no evidence that it was aggravated by his police officer work. Similar to Dr. Drye, he noted the improvement in Claimant's MRI in 2016. (CX-41 at 344.) It was only after Dr. Osborn was specifically questioned as to the possibility of there being an injury cause that was not reported in the record, that he offered a hypothetical scenario of Claimant's police work impacting his condition, based on the treatment timeline in the case. (CX-41 at 344D; CX-50 at 419.) Specifically, during his deposition, he stated that due to the gap in treatment, during which Claimant was engaged in police work, it was "possible" that there was an intervening event. (CX-50 at 419.) This opinion was not issued with any degree of medical certainty, was quite equivocal in nature, and does not have any affirmative support in the medical record, other than the identified treatment gap. When considered against the other evidence in the record, particularly the multiple medical opinions that Claimant's condition was simply waxing/waning and progressive in nature, it must be given less weight.

Therefore, based on the record as a whole, I find that Claimant's back condition is due to his 2013 deadlifting injury, and thus arose out of and in the course of Claimant's employment with Employer.

2. *Claim for 2015 Cumulative Injury*

It does not appear that Claimant has established a *prima facie* case to invoke the Section 20(a) presumption with regard to his claim for a 2015 cumulative injury due to wearing protective gear, physical training, lifting, and carrying. Specifically, as noted above, the first prong of the *prima facie* standard requires Claimant to establish that he suffered an injury. However, there are several factors that weigh against finding Claimant to be credible as to the existence of this second alleged injury.

First, it is extremely significant that in both his post-hearing brief and his reply brief, Claimant essentially abandoned his claim for a 2015 cumulative injury. In his Section 20(a) arguments, he refers only to the 2013 deadlifting injury, and does not reference a subsequent cumulative injury at all. In the section of his brief addressing entitlement to medical treatment, Claimant even stated "…unanimous opinion agrees that Claimant [sic] back injury and need for surgery is related to a work injury in Iraq in 2013." In addition, in his prayer for relief, Claimant requested an order stating only that he suffered a work-related injury in 2013, not that there was a subsequent cumulative injury. Furthermore, in his arguments regarding the calculation of Claimant's correct average weekly wage, he characterizes all of Claimant's symptoms and

treatment as a natural progression from the 2013 injury. Even at the time of the hearing, the transcript shows Claimant's counsel noting Dr. Drye's opinion that the evidence did not show a new injury after the 2013 incident, and stating, "This is both after his work in the theater through April of 2015, and after his work as an officer of the Columbia Police Department." (TR at 20.) The fact that Claimant himself is no longer advocating for a finding of compensation for this injury is quite telling.

Indeed, there is nothing in the medical record that confirms that Claimant suffered an injury in 2015 during his overseas employment. The record shows that he underwent treatment, including epidural steroid injections, for the symptoms from his 2013 deadlifting injury in the latter half of 2014. When Claimant followed up with Dr. Roberts on October 1, 2014, to obtain a medical release to return to work, he reported no present symptoms, that he had been pain-free since July 2014, and that he had started running again. (CX-10 at 95-97.) Claimant subsequently underwent another physical examination for his employment when he returned overseas in December 2014, and at that time, he denied debilitating back pain or back injury. (CX-19 at 166-167.)

Thereafter, Claimant worked overseas until April 2015, when he returned home due to Employer's contract termination. When he returned to see Dr. Roberts on May 20, 2015, for completion of a pre-employment physical for the police department, he did not complain of back pain, and his physical examination was normal. (CX-10 at 98-99.) Similarly, at his physical examination with Dr. Weldon in July 2015 for clearance to attend the police academy, he reported his back injury history, but also stated that his current activities included CrossFit, paddle boarding, and running, and his physical examination was again normal. (CX-14 at 136-142.) Thereafter, there was a large gap in Claimant's treatment for his back complaints, until Claimant returned to Dr. Roberts on May 11, 2016 and asked for an updated MRI. (CX-10 at 105-107.)

Therefore, the evidence generally shows a timeline of Claimant reporting complete relief of symptoms in late 2014, and several normal examinations with no complaints in mid-2015, followed by a return of Claimant's back pain in mid-2016 (which, as discussed above, was attributed to the 2013 acute injury). None of this evidence diagnoses or otherwise points to a cumulative injury that arose as a result of Claimant's overseas employment activities through April 2015.

In addition, it is significant that the MRI evidence actually shows improvement in Claimant's 2013 back injury during the relevant time period. As noted above, Claimant's first lumbar spine MRI, on June 20, 2014, showed a "[r]ather large left preforaminal extrusion at L5-S1 exert[ing] mass effect on the descending left S1 nerve root with the right margin even abutting the right." (CX-11 at 117.) Later, on May 19, 2016, Claimant's updated lumbar spine MRI showed a "[l]ess prominent protrusion to the left at the lumbosacral junction with continued height loss especially to the left of midline at L5-S1 with some new bony ankyloses." (CX-12 at 119.) In other words, it appeared that Claimant's herniated disc had undergone some healing in the interim. This is further indication that his overseas employment activities did not cause additional, cumulative injury in his back, after his initial 2013 deadlifting injury.

Finally, though there are a multitude of physician opinions in this matter, as discussed in detail above, none of those physicians opined that Claimant's symptoms or treatment were related to re-injury of his back through April 2015 due to cumulative trauma from his overseas employment. For example, Dr. Drye opined on the causation issue that Claimant's symptoms were a continued result of his initial spine injury in 2013, and would have developed regardless of other activities. (CX-37 at 362.) Similarly, Dr. Raiszadeh, who conducted a very detailed review of all of the records in this matter, continually opined that there was no medical evidence to suggest that any injury either prior or subsequent to August/September 2013 contributed to Claimant's symptoms. (*See* CX-38, CX-49.) Furthermore, as noted above, Dr. Osborne was asked at his deposition why he believed that Claimant's work overseas through April 2015 did not contribute to his need for surgery, and he also noted the improvement between the 2014 and 2016 MRIs, as well as the fact that Claimant continued to perform his duties and pass his physical exam during that timeframe. (CX-50 at 421.) In addition, Dr. Gunter and Dr. Roberts indicated on LS-1 forms in November 2016 that Claimant's condition was caused by his deadlifting injury, which is significant, because if there had been a subsequent 2015 injury, Claimant surely would have informed his treating neurosurgeon and treating primary care provider of such. (CX-13 at 125, 130; CX-25 at 221.) All of these opinions are given significant weight here, since they are fully consistent with the evidence of record, as well as Claimant's own contentions in this matter.

Considering the evidence before me, I find that Claimant has not established the existence of an April 2015 cumulative injury, and I deny benefits based on that claim.

III. Section 7 Medical Benefits

Pursuant to Section 7(a) of the Act, an employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.[19] 33 U.S.C. § 907(a); *see also* 20 C.F.R. § 702.401(a).[20] Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. As interpreted by the Board, in order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary for treatment of a work injury. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). An injury need not be economically disabling in order for a claimant to be entitled to medical expenses. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). Further, medical benefits are never time-barred. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. en banc).

A claimant must establish that the medical expenses are for treatment of the compensable injury. *Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981) (Miller, J., dissenting). The Section 20(a) presumption applies to whether the condition for which treatment is sought is work-related, but it does not aid a claimant in establishing entitlement under Section

[19] Under Section 702.413 of the regulations, all fees charged by medical providers are limited to such charges for the same or similar care, including supplies, as prevails in the community in which the medical provider is located.

[20] 20 C.F.R. § 702.401(a) provides that compensable care "shall include medical, surgical, and other attendance or treatment, nursing and hospital services, laboratory, X-ray and other technical services, medicines, crutches, or other apparatus and prosthetic devices, and any other medical service or supply, including the reasonable and necessary cost of travel incident thereto, which is recognized as appropriate by the medical profession for the care and treatment of the injury of disease."

7. The claimant must establish that treatment is reasonable and necessary for his work-related condition and that he has met the other requirements for the employer to pay medical benefits. *See, e.g.*, *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255, 257-258 (1984).[21] An ALJ may not deny a medical expense simply because a physician's expertise, customary fees, or result of treatment were not documented. *Id*. at 257. Treatment is compensable even though it is due only partly to a work-related condition. *Id.* at 258.

Here, Claimant has established a work-related back injury from the 2013 deadlifting incident. Although his claim for the 2013 work injury was untimely, medical benefits are never time-barred. Therefore, Claimant is entitled to medical benefits for his 2013 deadlifting injury.

Section 7(d) of the Act provides that a claimant must first request medical treatment or services as a prerequisite to the recovery of medical expenses incurred. It states, in pertinent part: "An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless—the employer shall have refused or neglected a request to furnish such services …." 33 U.S.C. § 907(d)(1). Thus, an employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421. A claimant must request authorization even of his initial free choice of physician. A claimant may obtain reimbursement for medical services if a request was made to his or her employer for treatment, the employer refused the request, and the treatment procured thereafter was reasonable and necessary; these factual issues are to be resolved by an ALJ.[22] 33 U.S.C. § 907(d); *Roger's Terminal & Shipping Corp. v. Dir., OWCP*, 784 F.2d 687, 693, 18 BRBS 79, 86(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Schoen*, 30 BRBS at 113. However, if an employer has no knowledge of the injury, it cannot have neglected to provide treatment, and the employee is not entitled to reimbursement for any money spent before he notified the employer. *McQuillen v. Horne Brothers, Inc.*, 16 BRBS 10 (1983). The Act also provides: "No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary." *Id.* § 907(d)(2).

In his post-hearing brief, Claimant alleges that he is entitled to be reimbursed by Employer for all co-pays and medical mileage to date, as well as for future treatment related to his 2013 deadlifting injury. (As noted above, Dr. Raiszadeh recommended further imaging of Claimant's spine, to determine whether the fusion is healed and whether additional treatment is

[21] *Amos v. Dir., OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999) (When the patient is faced with two or more valid medical alternatives, it is the patient in consultation with his own doctor who has the right to choose his own course of treatment); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984) (The fact that biofeedback therapy was prescribed by a treating physician was sufficient to establish that it was appropriate under Section 702.401; a claimant does not have the burden to show that treatment is medically accepted; not necessary that therapist be licensed to administer therapy).

[22] Supervision of medical care generally is the province of the District Director.

needed. (CX-38 at 331.)) Claimant also contends that Employer is responsible for reimbursing Claimant's medical insurer for medical care paid by the insurer.

Claimant has not established that he provided notice of the injury to Employer prior to obtaining the medical treatment for which he seeks reimbursement, and he has not established that he requested authorization for such treatment. Thus, Claimant has not satisfied the requirements of Section 7(d)(1) and 20 C.F.R. § 702.421. As discussed in Section I of this Decision and Order, Employer did not have notice of Claimant's work-related 2013 injury until well after the fact. The earliest dated claim document in this matter is actually *Employer's* LS-202, dated October 13, 2016, on which it noted that it became aware of the matter on October 6, 2016. (CX-2.) Claimant subsequently filed an LS-1 Request for Examination and/or Treatment, seeking authorization for treatment by Dr. Roberts, sometime after November 3, 2016—the date of Dr. Roberts' report attached to the form. (CX-5.) As reflected in Dr. Roberts' report, Claimant had already undergone surgery on October 17, 2016. As Claimant did not comply with the prior authorization requirements of Section 7(d), Claimant is not entitled to reimbursement for any medical expenses in this matter that were incurred prior to the request for treatment filed on or after November 3, 2016.[23]

Claimant would be entitled to reimbursement of medical expenses incurred for reasonable and necessary treatment of the 2013 work injury by authorized providers *after* his November 2016 request for authorization of treatment, but he did not present any evidence of such expenses.[24]

Claimant is entitled to future reasonable and necessary medical treatment related to the 2013 work injury, if any, as provided in Section 7 of the Act.

IV. Conclusion

For the reasons set forth above, the claim for the 2013 deadlifting injury was not timely filed, and compensation benefits are time-barred under Section 13. As for medical benefits, which are never time-barred, Claimant established that his back condition is causally related to his 2013 work-related injury. However, Claimant did not request authorization for medical treatment until after November 3, 2016, and he is not entitled to reimbursement of medical expenses incurred prior to the request for authorization, under Section 7(d) of the Act. Claimant is not entitled to reimbursement of any medical expenses incurred after November 3, 2016 for reasonable and necessary treatment of the 2013 work injury, because he did not disclose or submit any evidence of such expenses. Claimant is entitled to future reasonable and necessary medical treatment for the 2013 work injury as authorized under the Act.

[23] Claimant submitted evidence of "unpaid bills" with statement dates of November 1, 2016 and November 8, 2016; the charges cover Claimant's surgery (November 8 statement) and what appears to be his pre-surgical lab work (November 1 statement).

[24] Employer also noted in its sur-reply letter brief, dated May 14, 2019, that Claimant never produced any invoices or bills in discovery, despite specific requests from Employer. As discovery closed and the hearing record closed without any evidence of qualifying expenses, there are none to award.

With regard to the claim for a 2015 repetitive trauma injury, Claimant provided timely notice of the alleged injury and filed a timely claim, but he did not establish that he suffered a repetitive trauma injury. Therefore, Claimant is not entitled to benefits on the claim of repetitive trauma through April 2015.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, it is hereby ORDERED that:

1. The claim for compensation and medical benefits for a cumulative injury incurred through April 2015 is DENIED.

2. The claim for compensation benefits for a back injury incurred in August or September 2013 is DENIED.

3. The claim for reimbursement of past medical expenses for a back injury incurred in August or September 2013 is DENIED.

4. Claimant is entitled to future reasonable and necessary medical treatment related to the 2013 deadlifting injury, as provided in Section 7 of the Act.

SO ORDERED.

Digitally signed by MONICA F. MARKLEY
DN: CN=Monica F. Markley, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Newport News, S=VA, C=US
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MEMORANDUM FOR: **Jacksonville District Director**
Jacksonville, FL

FROM: **MONICA F. MARKLEY**
ADMINISTRATIVE LAW JUDGE

SUBJECT: **BROWN TODD O v. GLOBAL INTEGRATED SECURITY INC**
Case No. 2017LDA00592, OWCP No. 06-314553
Case No. 2017LDA00945, OWCP No. 06-314331

In accordance with the Regulations implementing the Defense Base Act, I am transmitting herewith my signed document this 30th day of June, 2020.

Five (5) Business Days from today, this Decision and Order will be posted on our website (www.oalj.dol.gov); however, under the Act and regulations such posting will NOT constitute official service, which is to be effected by your office.

FORWARDED:

Digitally signed by JOAN BUCHANAN
DN: CN=JOAN BUCHANAN, OU=Paralegal Specialist, O=US DOL Office of Administrative Law Judges, L=Newport News, S=VA, C=US
Location: Newport News VA

JOAN BUCHANAN
Paralegal Specialist
Enclosure

cc: Clm Atty (w/o encl)
Emp Atty (w/o encl)
Sol (w/o encl)

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