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Office of Administrative Law Judges



DATE ISSUED:

**CASE NO.: 2011-LDA-00327
2011-LDA-00328**

**OWCP NO.: 02-169497
02-176070**

**IN THE MATTER OF
JERAMEY BULLOCK,
Claimant**

Vs.

**SERVICE EMPLOYEES
INTERNATIONAL, INC.,
Employer**

and

**INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA.
Carrier**

APPEARANCES:

**GARY PITTS, ESQ.,
JOEL S. MILLS, ESQ.
On Behalf of Claimant**

**JOHN SCHOUEST, ESQ.
LIMOR BEN-MAIER, ESQ.
On behalf of Employer Carrier**

**BEFORE: CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, and its extension, the Defense Base Act (DBA), 42 U.S.C. § 1651 *et seq.* (2000) brought by Jeramey Bullock (Claimant) against Service Employees International, Inc. (Employer) and Insurance Company of the State of Pennsylvania. The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on September 12, 2011 in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their respective positions. Claimant testified and introduced 11 (eleven) exhibits including various DOL forms, (LS- 18, 203, 207); Claimant's medical and tax records for 2005 through 2010; vocational rehabilitation documents; informal conference recommendations for Section 28 purposes; Employer's discovery responses.

Employer introduced 28 (twenty-eight) exhibits including various DOL forms (LS-18, 202, 203 207, 210) ; Claimant's undated, handwritten statement; employment agreement dated January 12, 2006; Claimant's wage data, personal file, pre-deployment medical records; Claimant's medical records from July 8, 2006 to November 16, 2010; Claimant's discovery responses; Claimant's income tax returns from 2001-2005 and 2008-2010; labor market surveys from Laura Bridges; DOL vocational reports by Michelle Mobbs, Claimant's deposition; medical records from Drs. E. Peter Sabonghy, Mark Barhorst and K. Matthew Warnock; medical records from Ergo Rehab., Neuro Care Plus. 1

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant injured his right shoulder on September 15, 2007. Claimant alleges he aggravated his right shoulder and injured his left shoulder and neck from overuse on April 22, 2008.
2. An employer/employee relationship existed at the time of the alleged injuries/accidents.
3. Claimant filed timely claims for both injuries. Employer accepted and has paid

¹ References to the record are as follows: Transcript-Tr. ___; Claimant's exhibits- CX-___; Employer exhibits-EX-____.

temporary total disability benefits for the September 15, 2007 right shoulder injury from May 10, 2008, and continuing at the rate of \$1,114.44 per week.

4. Employer filed a notice of controversion on August 4, 2008 for the alleged injury of April 22, 2008.
5. An informal conference was held on November 8, 2010.
6. Claimant's average weekly wage at the time of the alleged April 22, 2008 injury was \$1,905.08.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Fact of injury: whether Claimant suffered a compensable injury to his right shoulder on September 15, 2007, or April 22, 2008, and if so did Claimant also suffer, on either dates, a compensable injury to his neck and left shoulder.
2. Nature and extent of said injury (injuries).
3. Section 7 medical benefits for the left shoulder and neck.
4. Attorney fees and expenses.

III. STATEMENT OF THE CASE

A. Claimant, and his wife's, testimony

Claimant is a 37 year old male born in Aberdeen, South Dakota where he lived until almost 17 years old after which he moved to Minneapolis, Minnesota, joined the military, and then started driving trucks in the U.S. until January 19, 2006 when he was hired by Employer as a heavy equipment transport driver to work in Iraq. Claimant worked as a heavy equipment driver in Iraq from January 2006 to May 2008 during which time he was required to lift heavy objects weighing up to 100 pounds, including chains, which were used to strap down and haul all sorts of damaged and undamaged vehicles. Included with these duties was the preparation of paper work for the set up of convoys. (EX-10,12 ; Tr. 10).

Claimant testified that on September 15, 2007 he was in the process of parking different kinds of tractors in a gravel field when he misjudged the height of the vehicle as he exited the tractor, overstretched and popped his right shoulder. (EX-1,p.1). Claimant did not seek immediate medical

care because it did not hurt. However later in the day his right shoulder began to hurt. By the following day the pain had progressed to the point he could not raise it up and then he sought help from the military medic. (Tr. 11).² At the medic Claimant was told he had sprain or strain, and to take it easy. Claimant was placed on light duty for several days and then returned to his normal duties without any apparent significant pain or loss of pay.

On April 22, 2008, Claimant was assigned to drive down a road and set up a check point by getting out of his vehicle and removing barriers in conjunction with the military and Iraqi soldiers. After working an unspecified length of time, Claimant began to experience severe pain in his right arm and shoulder as he was getting out of his vehicle with his body armor which weighed about 40 pounds. Despite the pain Claimant had to finish driving since he was the only one capable of “driving the system.” (Tr. 13,14). Later that afternoon Claimant told his foreman he was going to the medic. The following morning Claimant went to the medic. In turn the medic again told him he had a shoulder strain and to take it easy. Claimant was placed on light duty and sought but was initially denied further medical treatment. Eventually Employer permitted Claimant to see a doctor in Kuwait who told him he had a rotator cuff tear and needed to go home for treatment. (Tr. 15).³

Claimant returned to the U.S. and was initially treated by Dr. Warnock who operated on the shoulder and repaired the rotator cuff, that later failed to eliminate the shoulder pain. When Claimant sought and was then successful in obtaining another shoulder MRI, without Dr. Warnock’s knowledge or approval, Dr. Warnock “fired him as a patient”, which caused him to seek Dr. Sabonghy who performed a second shoulder surgery. According to Claimant this surgery also failed, with his shoulder continuing to pop in and out of the socket and subjecting him to severe pain requiring use of Vicodin for about 3 years. On August 13, 2010, Dr. Sabonghy filled out an OWCP-5c form placing him at maximum medical improvement (MMI) and limiting Claimant from lifting, pushing or pulling more than 10 pounds, with no reaching or operating motor vehicles. (Tr. 16,17; CX-1, p. 40). At the hearing Claimant agreed with these restrictions.

Regarding the left shoulder and neck injury, Claimant asserted that as a result of the two right shoulder injuries he had to use a sling for about 9 months which put a lot of pressure on the left side of his neck which in turn caused his neck to get stiff when he slept on or turned it. The surgeries also caused him to use his left arm and shoulder more than usual which caused a shoulder and neck strain that allegedly produced a sharp and painful response after the second surgery. Employer has refused to provide any treatment for this condition. Claimant also testified that despite his efforts he has not found any employment since returning to the U.S. (Tr. 18, 19).

² On September 3, 2010 Claimant filed a claim for compensation for the September 15, 2007 injury claiming not only a right shoulder injury but injury to his left shoulder from overuse plus an injury to the body generally, a grinding of teeth (TJM) and a neck injury. The TJM and general body injury were not pursued by Claimant at the hearing although it was clearly a part of Claimant’s alleged injury. (EX-15).

³ On May 27, 2008 Employer filed a Notice of Controversion contesting this alleged injury on the basis there was no medical evidence of a causally related disability and no evidence of causal relationship of disability to employment. (EX-3).

On cross, Claimant admitted receiving \$1,144.14 per week in maximum compensation benefits since May 2008 without issue of not being properly paid for the right shoulder injury. Further Claimant is attempting through the current hearing to secure an additional \$45 per week, or \$1,160.36.(Tr. 20). Claimant admitted injuring his neck and back during a rollover accident before being employed by Employer, when driving for Watkins Motor Lines. (Tr. 21,22). 4

Claimant also admitted undergoing an FCE in November 2008 while he was being treated by Dr. Warnock, but denying it showed him able to do medium level work and that following it he was set up for a work hardening program which Claimant never did, but instead went to a physical therapist with complaints of right shoulder pain. In turn he had the Director of Therapy, Dr. Bodin, order an MRI, at which point Dr. Warnock refused to continue treating Claimant causing Claimant to seek out Dr. Sabonghy who operated on his right shoulder and eventually placed him at MMI with the ability to lift and push and pull 10 pounds. (Tr. 23-26). Claimant also admitted being given a list of jobs by vocational expert, Laura Bridges, and that he applied for most of those jobs but that they were mostly outside his limits, with headhunters or in different states. When pressed about the specific jobs he applied for he was not able to name them claiming he had a list at home which was never produced. Claimant admitted going in to Enterprise and trying to apply in person but was refused because they did not take applications, except online which Claimant did not do. (Tr. 27-30). Claimant admittedly did not apply for any jobs until October 2010. (Tr. 48,49). 5

Concerning his neck complaints, Claimant testified at one point he started to complain about neck pain between the first and second surgery and then changed his testimony saying he told Dr. Sabonghy about it after the second surgery.(Tr. 30, ll. 10-25). Claimant testified he also complained about his left shoulder after the second injury. Dr. Sabonghy admittedly made no reference to left shoulder pain until November 2010 when he asked Dr. Sabonghy to make a note of it in his records. (Tr. 31). Claimant admitted he has seen Dr. Sabonghy only rarely since Dr. Sabonghy placed Claimant at MMI, and saw him only two weeks ago at the request of his pain management doctor to seek authorization by his pain management doctor for a denervation of his right shoulder.(Tr. 32). Claimant admitted that both orthopedists say his shoulder is structurally ok and that he takes two hydrocodene pills per day for pain. (Tr. 33,34). Claimant also admitted when undergoing an FCE in October of 2009 there were no deformities or range of motion issues of his neck or left shoulder. (Tr. 35). Claimant stated that he is unsure who will perform the denervation procedure but that Dr. Barhorst recommended it. To date Claimant admittedly has not been denied

4 Claimant drove for Watkins Motor Lines from 1999 to 2006.(EX-15,p.3)

5 On July 25, 2011, in his answer to interrogatories, Claimant lists only two employers he sought employment with following his injury, with Employers: Enterprise and Marriott Hotel. He successfully filled out only the Enterprise application and did no followup thereafter.

any medical treatment for his right shoulder. (Tr. 46-48). Further no doctor has requested permission to treat his left shoulder or neck. (Tr. 49,50).

Claimant, on cross, also admitted being a full time student taking 12 hours a semester since 2009 and working towards a bachelor's degree in political science. He currently goes to class on Tuesday and Thursday, getting there at 7:00 a.m. and leaving at 2:30 p.m., and on Saturday from 8 a.m. to 11:30 a.m., with a 3.8 GPA. (Tr. 38-41).

On redirect, Claimant asserted his right shoulder pain is constant with a level 7 or 8 out of 10 most of the time. The left shoulder pain is intermittent and getting to the point it is starting to bother him more and more. Claimant takes his Vicodin right before going to sleep and when he wakes up in the morning. (Tr. 44,45).

Claimant's wife testified that before going to Iraq he never had a problem with his right or left shoulder. Within the last year he has complained about left shoulder problems. Claimant had his right arm in a sling for 6 weeks following the first surgery, and an additional 6 weeks following the second surgery, and not during the 9 months he asserted. (Tr. 52).

B. Medical Records

Claimant's medical records show him reporting to the Anaconda Clinic on September 16, 2007, with moderate pain caused by his right shoulder popping out the previous day when he climbed out of his truck. Claimant had no obvious shoulder deformity but complained of severe pain with movement. Claimant was diagnosed with right shoulder strain vs sprain, given motrin, and told to return if his condition worsened. (EX-14, pp.1-6). Claimant next reported to the Clinic on April 23, 2008, complaining of right shoulder pain from the previous day but apparently he also claimed of continuing pain in his shoulder from his previous clinic visit. Claimant was found to be in moderate pain on movement, and received a similar diagnosis of right shoulder sprain or strain. Claimant was placed on restricted duty for 7 days with no lifting more than 15 pounds or driving outside of the wire. (EX-14, p.9). Claimant denied any fall/trauma or injury as the cause of current complaint but claimed he "aggravated" his shoulder while climbing into the truck. There was no edema. The neck was supple with a normal range of motion. (Id. at 10). There was pain with full external, but none with internal range of motion.

On May 6, 2008, Claimant returned to the Clinic with complaints of shoulder pain despite use of a steroid taper, naproxen, and returned to restricted duty. Claimant requested transfer to Kuwait for an MRI which was apparently approved along with his transfer back to the U.S. The MRI showed evidence of moderate supraspinatus impingement with partial thickness tear. (Id. at 15, 19). On May 16, 2008 Claimant went to the St. Luke's Emergency Room, where Claimant was treated for right shoulder pain, which Claimant stated was not caused by any injury but rather getting in and out of his vehicle, which was the same problem he had experienced previously in 2007.

Claimant received a medrol dosepak and vicodin, and a sling for his arm, and was advised not to drive. (Id. at 23).

On June 18, 2008, Claimant saw orthopedist, Dr. K. Matthew Warnock, for his right shoulder pain, which Dr. Warnock found was out of proportion to the physical findings. Dr. Warnock's impression was right shoulder impingement syndrome, rotator cuff tear, for which Dr. Warnock recommended arthroscopic subacromial decompression and rotator cuff repair and possible open biceps tenodesis. (Id. at 24-26). On July 10, 2008, Dr. Warnock performed an arthroscopic rotator cuff repair and biceps tenodesis, subacromial decompression and AC joint resection. (Id. at 29, 30). Following surgery Dr. Warnock had Claimant undergo therapy which Claimant did on 36 occasions in August and September 2008. (Id. at 37-69). On October 7, 2010 Claimant returned to Dr. Warnock and was found, despite complaints of pain, to have better range of motion and strength than expected with a return to full duty within the next 3 months. (Id. at 72). Claimant went to 10 additional therapy sessions in October and November, 2008 plateauing on November 7, 2008, at which time work hardening was recommended. (Id. at 87).⁶

On November 10, 2008, Claimant saw Dr. Warnock again at which time Dr. Warnock recommended light duty for 3 weeks, then full duty. Claimant still complained of pain but was released to full duty effective November 8, 2008. (Id. at 90). On November 20, 2008 Claimant underwent a functional capacity evaluation which showed Claimant functioning at the medium to heavy physical demand level which did not meet with his previous very heavy physical demand level, with recommendation of 4-6 weeks of work hardening. (Id. at 98). During the second week of work hardening, after 10 sessions, Claimant discontinued it on December 8, 2008, complaining of shoulder pain and muscle spasms. (Id. at 101). On January 21, 2009 Claimant underwent a right shoulder MRI which showed moderate to severe tendinopathy and post surgical changes without a new tear, with a moderate to large amount of fluid within the subacromial/subdeltoid bursa. (Id. at 181,182). Dr. Warnock did not order the new MRI and when he learned that it had been ordered by medical personnel of Functional Restoration Services, because of Claimant's continued complaints of pain, Dr. Warnock dismissed Claimant as his patient. (Id. at 205).

On February 17, 2009, Dr. Gabel of Functional Restoration Services filled out an evaluation of Claimant's work status by limiting Claimant to 10 pounds of lifting. (Id. at 208). On February 23, 2009, of the following week, Claimant underwent an FCE which showed Claimant performing at the medium level of work. (Id. at 209, 229). On April 27, 2009, Claimant chose another treating orthopedist, Dr. Peter Sabonghy who ordered a cervical MRI on May 11, 2009, which showed minor degenerative disk dessication with a shallow but broad based protrusion at C5-6 with minimal narrowing and no stenosis. (Id. at 236). Claimant saw Dr. Sabonghy on May 18, 2009 at which time his impression was right shoulder pain, internal derangement with possible anterior labral lesion, right shoulder AC joint for which Claimant received an injection. (Id. at 238). Thereafter, he saw Dr. Sabonghy on June 8, July 8, 2009. (Id. at 239,261).

⁶ On June 1st, 2008, Claimant reported to Dr. Warnock that his pain started two months previous with getting in and out of truck. (EX-27). On a subsequent report of June 19, 2009, Claimant reported to Dr. Nicolas Nammour that his injury commenced in September 2007 with no reference to any additional injury in April 2008. (EX-28).

When conservative measures, including therapy were unsuccessful, Dr. Sabonghy performed a second surgery on September 11, 2009 that involved an arthroscopic rotator cuff repair, and anterior labral reconstruction of the right shoulder, with intraarticular debridement, subsacromial decompression with acromioplasty, and distal clavicle resection. (Id. at 303-306). This was followed by therapy Claimant underwent an FCE on June 2, 2010 which showed an ability to do light work. (Id. at 334) On August 13, 2010 Dr. Sabonghy completed a work capacity evaluation of Claimant stating he was at maximum medical improvement, could work 8 hours per day with pushing, pulling and lifting limited to 10 pounds, with limitations on reaching above shoulder, twisting, and operating a vehicle at work. (Id. at 333). On November 16, 2010, Claimant secured a letter from Dr. Sabonghy saying Claimant had complained of neck and shoulder pain from overuse but that it was unlikely related to his right shoulder surgery. (Id. at 334).

In 2011 Claimant saw Dr. Sabonghy on March 28, June 14, and August 25. As of the last visit Claimant had right shoulder swelling, pain and internal derangement with possible anterior labral lesion and A/C joint pain with cervical strain with right C5 radiculopathy to be treated by pain management with use of 1 Darvocet, 3 Lyrica, 2Naprosyn, and 1Vicodin tablets per day. (EX-25, pp. 32,33).

On September 10, 2010 Claimant was evaluated by Dr. Abraham G. Thomas of the Houston Back and Neck Clinic for chronic pain commencing in 2007 and described as a shooting , shocking, stabbing and constant pain which is made worse or better by nothing. On October 16, 2010, Dr. Mark Barhorst consulted with Dr. Sabonghy and in evaluating Claimant's condition stated that his initial trauma on September 15, 2007 was followed by several months of symptom free relief followed by shoulder pain in April 2008, getting up and down out of a truck. Dr. Barhorst notes that Claimant had a previous cervical injury which is not part of his current claim. (EX-26,p 10). Dr. Barhorst notes that pain killers provide moderate pain relief with pain worsened by prolonged standing, with an ability to lift light weight and walk up to one mile. (Id. at 11). During the exam Claimant was in mild to moderate distress with recommendations for an EMG which was essentially normal. (Id.at 13, 17). On November 10, 2010 Claimant underwent a right subacromial bursal block which provided some immediate pain relief. (Id. at 20).

On November 24, 2010 Claimant saw Dr. Barhorst, who noted a 50% improvement in symptoms suggesting that Claimant was not at MMI as previously found and was resolving with previous inflammatory responses to Dr. Sabonghy's surgery. (Id. at 25). On December 21, 2010, Dr. Barhorst performed a right AC joint arthrography and block with follow up visits on January 4, 31; February 9, 17, 2011 with no improvement in symptoms. On February 23, 2011 Dr. Barhorst ordered another MRI of the right shoulder which was equivocal saying there appears to be a partial or post surgical change of rotator cuff supraspinatus. (Id. at 44). On March 9, May 16, June 26, July 26, 2011, Claimant made return visits to Dr. Barhorst with no improvement noted, with Claimant being told that inflammatory MRI signal is from post surgical repair. (Id. at 58).

C. Labor Market Survey

Employer presented a labor market survey and supplement conducted by vocational expert Ms. Laura Bridges on October 5,6, 2010. The labor market survey of October 5, 2010 was based upon the restrictions of Dr. Sabonghy which placed Claimant in the sedentary category with no reaching above shoulder, no reaching or twisting or operation of motor vehicle at work with pushing, pulling, lifting and climbing of 10 pounds. The following were found appropriate considering his background and limitations:

1. Apple One- online application for outbound sales/telephone sales coordinator making \$11.50 per hour plus commissions;
2. Marriot- online application for night clerk audit paying \$8.46 and \$8.77 per hour;
3. Sleep Inn- contact human resources for night clerk audit paying \$8.46 and \$8.47 per hour;
4. Marriot Courtyard- online website for front desk and office clerk at \$8.46 and \$8.77 per hour;
5. Dollar Thrifty Automotive- online application for rental service agent paying \$9.96 to \$12.26 per hour;
6. National Car Rental- online application for greeter job paying \$9.96 to \$12.26 per hour;
7. Mercedes Benz- online application for rental car associate paying \$9.96 to \$12.26 per hour;
8. AHI- online application for dispatcher/monitor paying \$44,000 per year;
9. Seven Trent Services- online application for dispatcher paying \$24,000 to \$30,000 per year;

On October 6, 2010 Dr. Sabonghy approved the jobs of hotel clerk, automobile clerk, and dispatcher. (EX-20,21).

On October 8, 2010, Ms. Michelle Mobbs provided vocational rehabilitation services for Claimant to determine a vocational feasibility assessment. A vocational assessment was never completed because medical issues continued with an additional MRI and possible surgery recommendations pending as of February 26, 2011. On October 15, 2010 Claimant reported during his initial interview that he had no intention of discontinuing his courses but hoped DOL could sponsor him as he proceeded to get his associate's degree. (EX-22, p.9).

IV. DISCUSSION

A. Contention of the Parties:

Claimant contends that: (1) on April 22, 2008 he sustained “an aggravation of his right shoulder” and a compensable injury to his left shoulder and neck invoking the Section 20 (a) presumption; (2) he is entitled to temporary total disability compensation from May 10, 2008 to August 13, 2010, and permanent total disability compensation from August 13, 2010 to present, based upon Dr. Sabonghy’s opinion; (3) alternatively he is entitled to temporary total disability from May 10, 2008 to August 25, 2011 when Dr. Sabonghy placed Claimant again at MMI based upon right shoulder pain, internal derangement with possible anterior labral lesion s/p labral repair, right shoulder A/C joint with pain, possible post block neuralgia, spine sprain/spasm with right radiculopathy; (4) the jobs listed by the VE were not appropriate because: (a) the job for AppleOne involved clerical experience and an online application which Claimant had trouble filling out, (b) the Marriott had two jobs for which he applied and had no response, (c) the job at Sleep Inn involved good computer skills and standing for long periods of time, (d) the jobs at Dollar Thrifty, National Car Rental and Alamo Rent a Car involved sales experience of which Claimant had none with Claimant applying for the position at National, (e) the job at Mercedes involved two years of customer service experience of which Claimant had none, (f) the job at AHI required a strong familiarity with the Houston area with Claimant having lived previously in El Paso, (g) the dispatcher job at Seven required employee to be proficient in MS Office application and preferred a person with prior dispatch experience ; (5) Claimant applied for the jobs located by Michelle Mobbs, a RTW specialist employed by DOL.

Employer contends that: (1) Claimant suffered an injury to his right shoulder in September 2007 for which he currently receives the maximum compensation benefit rate of \$1,114.44; (2) Claimant did not suffer an aggravation injury in April 2008 to justify an increase compensation rate to the maximum compensation rate of \$1,160.36; (3) Claimant has no credible medical evidence to show that his alleged left shoulder and neck injury were related to his employment with Employer; (4) there is no record that he requested treatment or had work restrictions related to left shoulder or neck injuries; (5) Employer has shown suitable alternative employment for Claimant which he has not pursued; (6) Claimant has not shown a prima facie case of left shoulder or neck injury and thus has not invoked the Section 20(a) presumption regarding them; (7) Claimant injured his right shoulder in September 2007, which progressively got worse and was not aggravated, accelerated or deteriorated by his April 2008 injury ; (8) Claimant reached MMI to the right shoulder by February 23, 2009 when Claimant demonstrated a full range of shoulder motion and Dr. Warnock released Claimant from his care and had Claimant undergo an FCE showing medium duty capabilities. (EX-14, pp. 137-209); (9) Dr. Sabonghy performed a second surgery on Claimant’s right shoulder on September 11, 2009 and again found him to be at MMI on August 13, 2010 with sedentary to light duty restrictions (EX-14, pp. 310,330 and 333), after which Employer established suitable alternative employment on October 6, 2010, (EX-20); (10) Claimant’s earning capacity should be based on \$21.15 per hour or \$846 for a 40 hour week, or 84 hours per work week for

\$1,776.60, resulting in a difference of $\$128.48 \times \frac{2}{3} = \85.65 ; (11) Claimant is not entitled to any additional right shoulder surgery as there is no consensus for such surgery and no evidence to show any entitlement for left shoulder or neck compensation or medical benefits.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Assn v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In this case I was not impressed by Claimant's testimony claiming in addition to right shoulder problems, left shoulder and neck problems which he never brought to the attention of any medical personnel until he mentioned it to Dr. Sabonghy on November 16, 2010 after undergoing two right shoulders. Even then Claimant did not seek nor did Dr. Sabonghy evaluate or relate his neck and left shoulder complaints to his September 2007 or April 2008 right shoulder complaints. Claimant asserted the neck and left shoulder problems came from overuse due to having to wear a sling after the first surgery for 9 months when in fact testified his wife testified he wore the sling for only 6 weeks after the first and 6 weeks after the second surgeries.

Claimant's search for work was likewise unimpressive. Claimant would have me believe he applied for most of the 9 jobs mentioned by the VE but in truth filled out at most one application, (Marriot or Enterprise), for which there was no follow up. Claimant would have me also believe he had a problem filling out an online application because it involved a headhunter agency. Yet he had no trouble in filing out an online application for Employer or maintaining a 3.8 average out of a 4.0 in college. In truth he had no desire to work at any of the listed jobs and in his response to interrogatories and his work with Mobbs, admitted such. (Tr. 43,44; 48,49; EX-22, p. 9; EX-15, p.10).

C. Causation

To establish a *prima facie* claim for compensation, a claimant need not establish a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), on reh'g, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998) (quoting *Brown v. ITT/Continental Baking Co.*, 921

F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. 556(d) (2002). By express statute, however, the Act presumes that a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary.⁷ 33 U.S.C. § 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979) (compensating the effects of a progressive degenerative condition when that condition was aggravated by conditions at work), aff'd sub nom., *Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981)

Section 20 provides that in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act. 33 U.S.C. § 920(a). To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this prima facie case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. [T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). See also *Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered an prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24

BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

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

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

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

In this case I find that Claimant established only right shoulder pain stemming from a sprain in September 2007 and a recurring sprain in April 2008 injury. Only after being place at MMI on August 2010 did he attempt to change his story by including severe neck and left shoulder pain in his comments to Dr. Sabonghy in November 2010.⁸ Thus I find Claimant only established a Section 20 (a) presumption for right shoulder pain. While Dr. Sabonghy mentions such complaints in a report of November 2010, Dr. Sabonghy nowhere adopts or finds the new complaint as anything other than an insignificant or mild complaint by Claimant.

⁸ While Claimant did allege cervical pain on April 27, 2009, this was not in connection with any work related injury but as a alleged result of a right shoulder cortisone injection consistent with June 23, 2009 cervical MRI showing only a possible mild right suprascapular nerve lesion. Thereafter there is no evidence of any mention of severe cervical let alone left shoulder pain until the November 16, 2010 comment of it to Dr. Sabonghy by Claimant despite Claimant's assertion that he developed it after the second surgery.

C. Nature and Extent of Injury

Disability is defined under the Act as the, "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity. Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

In this case Claimant argues that he aggravated a preexisting condition on April 22, 2008. While Claimant is correct in asserting the Section 20 a presumption relating it to his work, he is not correct in using it to establish a reinjury or aggravation of a pre-existing condition. However, Dr. Warnock after examining Claimant classified it as a re-injury involving an impingement syndrome and rotator cuff tear requiring surgery if it did not improve associated with getting in and out of truck.

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

Act.

In this case the record clearly shows Claimant injury as of April 22, 2008 reinjured his right shoulder which in turn prevented him from doing his past work and required him to leave Iraq on May 10, 2008 with the maximum compensation rate of \$1,160.36 applying at that time.

Further he did not reach MMI until following the second surgery by Dr. Sabonghy and his findings on August 13, 2010 when he imposed permanent sedentary restrictions upon Claimant. Thus Claimant is entitled to a finding of temporary total disability from May 10, 2008 to August 13, 2010. From August 14, 2010 to October 6, 2010 when Employer established suitable alternative employment by the labor market surveys of Laura Bridges, Claimant was entitled to permanent total disability followed by permanent partial disability thereafter. Although argued in the alternative that Claimant might be able to improve further per Dr. Barhorst opinion, I am convinced that is mere speculation on his part based upon Claimant alleged symptom improvement which I am not convinced he has showed. Rather in many instances I am convinced that Claimant has exaggerated his symptoms by claiming very late left shoulder and neck impairments plus Claimant has demonstrated no real attempt at finding work. In reviewing all the jobs named by Ms. Bridges I find all despite Counsel for Claimant's claim to the contrary to be suitable for Claimant. In particular I find could do the job of dispatcher for AHI or \$846.00 for a 40 hour week which reduces his average weekly wage to \$1059.08. Indeed never testified about any inability to do those jobs mentioned by the VE for the reasons stated by his counsel.

E. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000). Where neither Section 10(a) nor Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Assoc., v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir. 1997); *Deewert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9th Cir. 2001); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998). In this case Section 10(a) is not appropriate because of Claimant's 7 day a week schedule. Neither is Section (10)(b) because of the lack of wages of comparable workers making Section 10 (c) appropriate. In that regard I look to Claimant earnings in the past 52 weeks which by agreement amount to an AWW of \$1905.08 reduced by retained earnings of the AHI dispatcher job of \$846.00 = \$1059.08 x 2/3 = \$706.05 as the new compensation rate.

F. Medical Benefits

Section 7(a) of the Act provides that the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require. 33 U.S.C. Sec. 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima facie case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

In this case Employer is not required to pay for any medical treatment for the left shoulder or neck because Claimant did not injure either body part as a result of his work for Employer. Further I find no agreement by his treating doctors for any additional invasive procedures on his right shoulder with the present treatment limited to non-invasive pain management.

G. Interest

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

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

I. Attorney Fees

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

V. ORDER

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

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from May 10, 2008 to August 13, 2010 based on the maximum compensation rate of \$1,160.36.
2. From August 14, 2010 to October 6, 2010 Employer shall pay to Claimant permanent total disability compensation at the maximum rate of compensation of \$1,160.36 pursuant to Section 908(a).
3. Employer shall pay to Claimant permanent partial disability compensation pursuant to Section 908 (e) for the period from October 7, 2010 to present and continuing based on an average weekly wage of \$1,905.08 reduced by earning capacity of \$846.00 or \$1,059.08 for a weekly compensation rate of \$706.00.
4. Employer shall continue to pay medical expenses to Claimant only for his right shoulder injury pursuant to Section 7 of the Act.
5. Employer shall be given a credit for all payments it has already paid to Claimant in connection with his right shoulder injury of April 22, 2009.
6. If Claimant's counsel feels he is entitled to a fee he shall have thirty (30) days to

file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

7. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

A

CLEMENT J. KENNINGTON
Administrative Law Judge