U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 April 2009

CASE NO.: 2008-LHC-00562

OWCP NO.: 07-179363

IN THE MATTER OF

K.M., [1]
Claimant

v.

TETRA TECHNOLOGIES, INC.,
Employer

LIBERTY MUTUAL INSURANCE CO.,
Carrier

APPEARANCES:

ISSAC SOILEAU, ESQ.,
KAREN KOVACH, ESQ.,
On Behalf of Claimant

CHRISTOPHER ZAUNBRECHER, ESQ.,
On Behalf of Employer/Carrier

Before: CLEMENT J. KENNINGTON
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (hereafter, "the Act" or "LHWCA"), 33 U.S.C. § 901, *et seq*., brought by K.M. (hereafter, "Claimant") against Tetra Technologies, Inc., (hereafter, "Employer") and Liberty Mutual

[1] Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

Insurance Co., (hereafter, "Carrier"). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. A formal hearing on this matter was held on December 5, 2008 in Covington, Louisiana.

At trial, Claimant testified and introduced thirteen (13) exhibits which were admitted, including Medical Records of Dr. Dan K. Eidman, M.D.; Medical Records of Kirby Surgical Center; Medical Records of Rehabilitation Services of Houston; Subpoena Response from Concentra Medical Center; Documentation regarding Outstanding Medical Bills; Portions of the claim file at the Department of Labor bearing Case No. 07-179363; Portions of the claim file at the Office of Administrative Law Judges bearing Case No. 2008-LHC-00562; Documents regarding Claimant's Personnel File, Claim File, and Earnings Records; Documents regarding Average Weekly Wage Calculations; Documents regarding Section 7 Benefits; Discovery Responses of Employer and Insurance Carrier; Deposition of Dr. Dan K. Eidman, M.D.; and Medical Records of Lake Charles Memorial Hospital. Post-trial, Claimant supplemented the record by introducing two exhibits, one of which was admitted, including the Deposition of Dr. Larry Stokes.[2]

At trial, Employer/Carrier introduced twenty (20) exhibits which were admitted, including Employer's Wage Statement; Personnel Records of Claimant; Post Accident Earnings of Claimant; Benefit Payment Breakdown from Carrier; Medical Cost Summary Detail from Carrier; Summary Payroll Register from Employer; Medical Records from Acadian Ambulance Service, Inc.; Medical Records from Lake Charles Memorial Hospital; Medical Records from Lordex Spine Institute; Medical Records from Dr. David B. Vanderweide, M.D.; Medical Records from The McKenzie Institute; Medical Records from Memorial Hermann Healthcare; Medical Records from River Oaks Imaging & Diagnostic; Medical Records from Dr. Gerard T. Gabel, M.D.; Medical Records from Dr. Michael G. Kaldis, M.D.; Medical Records from Dr. Dan K. Eidman, M.D.; Medical Management Records from Concentra; Medical Records from North Houston Imaging; Deposition of Dr. Michael G. Kaldis; and Labor Market Survey performed by Carla Seyler.[3]

Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

Prior to the issuance of trial briefs, the parties stipulated and I find:

1. Claimant's date of injury was December 27, 2006.

2. Claimant was injured during the course and scope of employment.

[2] Both parties refer to the Memorandum of Informal Conference dated November 11, 2007 but the undersigned will not permit the findings of the examiner at the informal conference to be admitted into evidence under the Federal Regulations.
[3] References to the exhibits are as follows: Claimant's exhibits-CX-__, p.__; Employer's Exhibits-EX-__, p.__.

3. An Employer/Employee relationship was present at the time of the accident.

4. Employer was advised of the injury on December 27, 2006.

5. Employer filed notices of controversion on November 25, 2008 and December 4, 2008.

6. An informal conference was held on November 27, 2007. [4]

II. ISSUES

The following unresolved issues were presented by the parties:

1. Causation

2. Nature and Extent of Disability

3. Date of Maximum Medical Improvement

4. Choice of Physician

5. Future Medical Benefits

6. Average Weekly Wage and Compensation Rate

7. Mileage and Prescription Reimbursement

8. Interest, Penalties and Attorney Fees

III. STATEMENT OF THE CASE

A. Facts of the Case

Claimant is a 42 year old male who, prior to his injury, worked for Employer as an 'A' operator and rigger for approximately a year and a half. (Tr. 34). As an 'A' operator, Claimant was the supervisor on the deck of the platform, maintaining all rigging and crane operations. (Tr. 35). As part of his employment, Claimant would have to lift heavy tubing, tools and pipe, climb stairs and climb ladders. While performing his job duties, Claimant had Employer-enforced lifting restrictions. (Tr. 37; CX-8).

On December 27, 2006, while on the offshore platform, Ameritech Platform West Cameron 360, Claimant was removing a wellhead, using a torch to cut through the inner and outer casing of the wellhead. (Tr. 39). While using the torch, Claimant was standing thirty feet

[4] Stipulations and issues were entered into evidence as ALJX-1.

above the rig floor on a secured ladder, and was attached to the platform by a safety harness. (Tr. 40). After finishing the cutting, Claimant and his crew ran an E-line down a string of tubing to sever the well. While the crewmembers were in the process of pulling the wellhead and string of tubing out of the well, Claimant was struck in the head and neck by a falling wing valve. (Tr. 40). Claimant was rendered unconscious and fell off of the ladder, hanging 27 feet off the deck. (Tr. 41). After being helped by the other crewmembers, he regained consciousness but could not move due to pain. (Tr. 41).

Claimant was taken by helicopter to Lake Charles Memorial Hospital. Upon arrival, Claimant complained of neck, back and shoulder injuries. Claimant underwent x-rays and CT scan, was given pain medication and sent home. (Tr. 42). Shortly thereafter, Employer sent Claimant to the Lordex Spine Institute for physical therapy. Claimant was also sent to see Dr. Vanderweide, who prescribed therapy sessions and medication to Claimant to manage his pain. (Tr. 42-43). Claimant was then referred to Dr. Gable, who diagnosed Claimant with a torn rotator cuff in Claimant's left shoulder. Dr. Gable performed surgery on Claimant's left shoulder and prescribed pain medication and post operation therapy to Claimant. (Tr. 43). Dr. Gable subsequently placed Claimant at maximum medical improvement for his left shoulder and released him to return to work. (Tr. 44). No treatment was ever provided to Claimant's right shoulder, even though Claimant complained of pain.

While being treated for his left shoulder, Claimant complained to Dr. Gabel that his neck and back were bothering him since the accident. As Dr. Gabel only treats shoulder injuries, Claimant was referred to Dr. Gabel's medical partner, Dr. Kaldis. Dr. Kaldis examined Claimant twice and found no treatable injury to the neck or back that would keep Claimant from returning to work. (Tr. 45). Claimant thereafter refused to visit Dr. Kaldis again, and after some time, began seeing Dr. Eidman for neck, back and right shoulder pain. (Tr. 44-45). Dr. Eidman began treating Claimant every six weeks, and advised Claimant that he had injuries to his neck and back that could not be corrected with surgery. (Tr. 46). Dr. Eidman prescribed physical therapy sessions and pain medication to Claimant, and sought authorization for steroid injections into Claimant's neck. (Tr. 46). Dr. Eidman further proposed the possibility of a discogram with Claimant.

Shortly after Claimant began treating with Dr. Eidman, Carrier requested that Dr. Kaldis perform an independent medical examination[5] on Claimant for his neck and back injuries. (Tr. 46). Dr. Kaldis found no injuries to Claimant's neck and back that required treatment. Carrier has since not approved any physical therapy sessions or doctor visits for Claimant, and will not provide authorization for injections into Claimant's neck or any further treatment with Dr. Eidman. (Tr. 46).

B. Testimony of Claimant

Claimant has a high school education and further completed one year of college studies at Cameron Community College, majoring in computer programming. (Tr. 57). While at college,

[5] Dr. Kaldis has consistently referred to himself as an independent medical examiner in this case. It should be noted that the Department of Labor did not ask Dr. Kaldis to provide an independent medical examination and he has not been recognized as the independent medical examiner in this matter.

Claimant worked at a local factory. (Tr. 57-58). After completing one year of college, Claimant lost his factory job, and was forced to drop out of college because of the lack of monetary resources. (Tr. 58). After leaving college, Claimant joined the U.S. Marine Corps., where he served four years before being honorably discharged. (Tr. 34). After leaving the service, Claimant began working for Walgreens before becoming a mechanic for Waste Management Services. (Tr. 34). After working some time as a mechanic, Claimant began working for Superior as an offshore rigger. (Tr. 34). After finishing work with Superior, Claimant was self-employed as an auto repair mechanic. As mechanic work began to slow, Claimant was hired by Employer and returned to offshore labor.

Prior to Claimant's injury, he was earning $16.50 per hour along with a $2.00 an hour per diem while working offshore for Employer. (Tr. 39). Claimant was working anywhere from ninety six to one hundred twenty hours a week while working offshore for Employer. (Tr. 50). Claimant normally worked twelve hour shifts for seven days a week, and also attended two hours of safety meetings each week. (Tr. 55). Claimant had the chance to collect overtime while working offshore prior to his injury. (Tr. 55). Claimant normally worked a consistent schedule, but was off for approximately three weeks in March, 2006, due to the lack of work for Employer. (Tr. 68). Claimant did not work approximately six months due to Hurricane Katrina. (Tr. 66).

Initially after his injury and prior to being placed on light duty by Dr. Gable, Claimant received bi-weekly checks from Carrier totaling $701.40 for compensation. (Tr. 48). After being released to light duty work by Dr. Gable, Claimant began working for Employer at an office position in New Orleans. (Tr. 49). Claimants worked eighty hours a month in New Orleans and then return home to Houston for two weeks. (Tr. 49-50). While at the job in New Orleans, Claimant was responsible for making copies, a job that required Claimant to stand and sit all day. (Tr. 51). Claimant continued to receive a check from Carrier for $700.00 a month while working light duty to supplement Claimant for his lost earning capacity. (Tr. 52). Claimant testified that this amount did not come close to representing what he earned prior to his injury. (Tr. 81).

Claimant voluntarily agreed to treat with Dr. Gabel based upon Dr. Vanderweide's recommendation. (Tr. 69-70). Claimant testified that he told both Dr. Vanderweide and Dr. Gabel about his multiple injuries that he received due to his accident while offshore. Claimant further did not object to seeing Dr. Kaldis based on Dr. Gabel's recommendation after Dr. Gabel released Claimant to light duty. (Tr. 70). Claimant testified that Dr. Gabel determined that Claimant had no problems with his right shoulder. Claimant further testified that he refused to treat with Dr. Kaldis because of certain conversations between Dr. Kaldis and Dr. Gabel that he overheard during treatment. In these conversations, Dr. Gabel became upset at Dr. Kaldis for prescribing physical therapy to Claimant after Dr. Gabel had already released Claimant to work. (Tr. 70-71). Claimant testified that he did not want to continue to see a doctor who listens to other doctors on how to treat their own patients. (Tr. 71).

After Dr. Kaldis released Claimant back to the care of Dr. Gabel, Claimant was placed at maximum medical improvement by Dr. Gabel in September, 2007. (Tr. 52). Claimant was given a permanent lift restriction of ten pounds with his left arm. On November 2, 2007, Claimant was told by Chad Murray, a representative of Employer, to not come back to light duty work for Employer. (Tr. 52, 82). Claimant also stopped receiving compensation payments from Carrier in

early September, 2007 and has not received any compensation payments since that date. (Tr. 52) Claimant currently treats with Dr. Eidman for his neck and back injuries. Claimant drives himself to his doctor's appointments. (Tr. 47). Claimant cannot afford to pay for any unauthorized prescriptions that are prescribed by Dr. Eidman. (Tr. 48). Claimant testified that he cannot perform certain activities that Dr. Gabel released him to do. (Tr. 91).

Since his shoulder surgery, Claimant has had two accidents where he has injured his shoulder. The first accident occurred when he tripped over a dog and hit his shoulder on a dresser. (Tr. 77). Some time after this, Claimant slipped while walking out of the shower and hit his left arm on the wall. (Tr. 78). Dr. Gabel saw Claimant for both of these injuries, and stated that neither of these accidents affected the left shoulder surgery site. (Tr. 79).

Claimant testified that he is currently not working because Dr. Eidman will not release him to go back to work. (Tr. 85). Claimant further testified that he suffers from pain in his back, neck, and his left leg all day. (Tr. 86). Claimant testified that he barely sleeps because of the pain. (Tr. 89). Claimant is currently on five different forms of medication: Hydrocodone; a muscle relaxer; Mobic; a swelling blocker for the spinal column; and a pill to counter the back pain he receives because of the other medication. (Tr. 86). Claimant can currently stand for a half hour before he has to sit. (Tr. 88). Claimant can currently sit for forty five minutes to an hour before he has to stand. (Tr. 88).

Claimant testified that if the funding were still available to him, he believes would be able to complete the collegiate requirements to become a computer programmer, but has no interest in computer programming anymore. (Tr. 62). Claimant was unable to determine whether his community college credits would transfer to an accredited school, but knew that the credits he earned at Cameron Community College were not accepted by Delgado Community College. (Tr. 61). Claimant believes that with the proper medication and treatment, he could go back to work and would like to go back to work as soon as he is healthy. (Tr. 90). Claimant does not think he could go back to work offshore at this present time. and does not think he could work at any job at this point based on his pain and injuries. (Tr. 97-98).

C. Medical Records of the Lordex Spine Institute

Claimant visited the Lordex Spine Institute on January 8, 2007, for a preauthorization/utilization examination at the request of Carrier. (EX-9, p. 1). Claimant complained of sharp pain in his back and neck while sitting and standing. (EX-9, p. 2-3). Dr. Micah Barber requested that Claimant perform therapeutic exercises, neuromuscular re-education programs and a home exercise program. (EX-9, p. 1). Dr. Barber also suggested heat and electrical stimulation. The contemplated start date for Claimant's therapy was January 8, 2007, and was expected to consist of twelve visits over the course of four weeks, ending on March 28, 2007. (EX-9, p. 1). Mr. Tom Dunn, the physical therapist assigned to Claimant's case, noted that the therapy could last from anywhere between four to six weeks. (EX-9, p. 4).

D. Medical Records of Dr. Dan B. Vanderweide, M.D.

Claimant first visited Dr. Vanderweide on January 17, 2007, complaining of left hand pain, arm pain, midline lower back pain, and a popping in his neck during movement. (EX-10, p. 2). Dr. Vanderweide noted that Claimant had previously visited with Dr. Barber for therapy sessions. (EX-10, p. 1). Dr. Vanderweide diagnosed Claimant with a cervical strain with a possible left upper cervical radicolopathy, lower back pain and left shoulder pain. (EX-10, p. 2). Dr. Vanderweide also noted the lack of presence of any muscle atrophy. Dr. Vanderweide recommended a MRI for Claimant's neck and left shoulder, and prescribed Claimant with some pain medications. (EX-10, p. 2).

Dr. Vanderweide next saw Claimant on January 25, 2007, for a follow up visit. According to Dr. Vanderweide's records, Claimant was doing "perfect" while on the prescription medication, Medrol, but had his pain symptoms return two days prior to his January 25, 2007 visit. (EX-10, p. 5). Dr. Vanderweide noted that Claimant just began therapy sessions for his injuries. (EX-10, p. 5) After viewing Claimant's MRI on his lower back, Dr. Vanderweide observed that Claimant had a one to two millimeter broad based bulge at the L4-5 disc in Claimant's spine, but had no other abnormalities in the cervical spine. (EX-10, p. 5). After viewing Claimant's MRI on his left shoulder, Dr. Vanderweide observed a large posterior labral tear and avulsion with questionable type slap lesion in Claimant's left shoulder. (EX-10, p. 5). Dr. Vanderweide prescribed anti-inflammatory medication and did not release Claimant for work. (EX-10, p. 5).

Dr. Vanderweide next saw Claimant on February 8, 2007. After Claimant continued to complain of pain, Dr. Vanderweide referred Claimant to Dr. Gable and did not release him to work. (EX-10, p. 7).

E. Medical Records of Dr. Gerald T. Gabel, M.D.

Dr. Gabel first saw Claimant on February 14, 2007. Dr. Gabel noted that Claimant had complained of neck and shoulder problems and had a previous MRI taken of both areas. Dr. Gabel further noted that Claimant had undergone therapy for the injuries, and was complaining of little to no neck pain at his initial visit. (EX-14, p. 1). Dr. Gabel diagnosed Claimant with a labral tear with mild impingement in Claimant's left shoulder. (EX-14, p. 1). Dr. Gabel performed a sterile injection to the subacromial space and the glenohumerum joint in Claimant's left shoulder, and prescribed therapy and pain medication. (EX-14, p. 1).

Dr. Gabel next saw Claimant on March 7, 2007. Claimant still complained of pain and soreness in his left shoulder. (EX-14, p. 2). Dr. Gabel noted that the therapy Claimant was performing was not working, and planned to question the therapist to find out if Claimant was receiving the therapy that he assigned. Dr. Gabel gave Claimant a five pound lift limit for his left shoulder. (EX-14, p. 2). Dr. Gabel saw Claimant again on March 28, 2007. Claimant continued to complain of pain in his shoulder. Dr. Gabel suggested surgery on Claimant's left shoulder. (EX-14, p. 3).

Pre-surgery, Dr. Gabel diagnosed Claimant with a left subacromial impingement of his left shoulder and a left superior labral tear of the left shoulder. (CX-2, p. 2; EX-14, p. 4). Dr. Gabel also diagnosed Claimant with eighty percent degenerative tendinosis in his left bicep. (CX-2, p. 2; EX-14, p. 4). Dr. Gabel performed an arthroscopic glenohumeral debridement operation on Claimant's labral tear, biceps tendinosis and partial thickness rotator cuff tendinosis. (CX-2, p.2). Dr. Gabel also performed an arthroscopic biceps tenotomy and an open proximal biceps tendon transfer to the pectoralis major tendon. (CX-2, p. 2). Dr. Gabel saw Claimant on April 19, 2007 for a post-operation follow up. (EX-14, p. 6).

Dr. Gabel next saw Claimant on April 27, 2007, after Claimant slipped and hit his left arm on a dresser. (EX-14, p. 7). Dr. Gabel opined that Claimant did not harm the surgical site with this accident. (EX-14, p. 7). Dr. Gabel next saw Claimant on May 4, 2007, and started Claimant on light strengthening sessions for his shoulder. (EX-14, p. 8). Dr. Gabel next saw Claimant on May 25, 2007, after Claimant tripped over a dog and fell on his left shoulder. Dr. Gabel observed that Claimant had a very good range of motion and prescribed more therapy. (EX-14, p. 9).

Dr. Gabel recommended a FCE for Claimant on June 14, 2007. (EX-14, p. 10). The FCE was completed on July 9, 2007. Claimant failed a significant component on the FCE, and Dr. Gabel noted the presence of a validity issue on the FCE. (EX-14, p. 12). Dr. Gabel opined that no further surgery or therapy would further benefit Claimant. Dr. Gabel placed Claimant on a ten pound weight limit and expected to release Claimant back to work in six weeks. (EX-14, p. 12). On August 8, 2007, Dr. Gabel referred Claimant to Dr. Kaldis for Claimant's complaints of neck and back pain, as Dr. Gabel performs procedures on shoulder injuries only. (EX-14, p. 13).

On September 18, 2007, Claimant saw Dr. Gabel after his initial visit with Dr. Kaldis. (EX-14, p. 14). Dr. Gabel noted that Dr. Kaldis had prescribed medications and therapy for Claimant. (EX-14, p. 14). Dr. Gabel stated that it would be necessary to clarify whether Claimant's back was part of his initial claim, and deferred to the treatment plan of Dr. Kaldis with regards to Claimant's neck. (EX-14, p. 14). Dr. Gabel further had Claimant remain with a 20 pound weight limit for two more weeks, contemplating a full release back to work around October 2, 2007. Dr. Gabel further contemplated that Claimant may be at maximum medical improvement at that date. (EX-14, p. 14). Dr. Gabel also noted Claimant's complaints about a full release, but believed that based on the FCE and the time since his surgery, Dr. Gabel believed a full release to work would be appropriate. (EX-14, p. 14).

On October 16, 2007, Claimant visited with Dr. Gabel, who noted that Claimant had been undergoing physical therapy for his back. (EX-14, p. 15). Dr. Gabel noted that Claimant had three weeks remaining in his physical therapy schedule and decided to maintain the 20 pound weight limit until November 2, 2007 and then a full release on November 3, 2007. (EX-14, p. 15). On November 2, 2007, Dr. Gabel placed Claimant at maximum medical improvement, gave Claimant a permanent lift restriction of ten pounds for his left arm and released Claimant back to work. (EX-14, p. 18). Dr. Gabel noted that Claimant had finished the therapy prescribed by Dr. Kaldis and planned to contact Dr. Kaldis to see if any more impairment treatment was necessary. Dr. Gabel did not expect any further treatment from Dr. Kaldis based on the diagnosis provided

to him. (EX-14, p. 18). Dr. Gabel gave Claimant a total body impairment rating of four percent for his left shoulder and a rating of zero percent for his back. (EX-14, p. 18).

F. Medical Records and Deposition of Dr. Michael G. Kaldis, M.D.

Dr. Kaldis is a Board Certified Orthopedic Surgeon who first saw Claimant for an evaluation on August 8, 2007, after Claimant was referred by Dr. Gabel. (EX-15, p. 4). Claimant initially complained to Dr. Kaldis of neck and back pain. Dr. Kaldis performed tests on Claimant's upper and lower extremities for flexion extension, abduction, adduction, internal rotation and external rotation. Through these tests, Dr. Kaldis found no abnormalities. (EX-19, p. 9, 13-14). Dr. Kaldis further conducted a Tinel test and a neurological sign test, finding no neurological injury to Claimant. (EX-19, p. 11). Dr. Kaldis further conducted a Phalen's test for carpel tunnel and found no symptoms for carpel tunnel syndrome. (EX-19, p. 9). Dr. Kaldis conducted muscle strength tests on Claimant and found no diminishment in the right or left shoulder. (EX-19, p. 10). Dr. Kaldis also found no restriction in Claimant's range of motion of his cervical spine and only found Claimant to have mild tenderness during the spine exam. (EX-19, p. 10). Dr. Kaldis concluded that there was no evidence of any neurological deficit or disc herniation in the back or neck that would require Claimant to have surgery. (EX-15, p. 4; EX-19, p. 15). Dr. Kaldis also observed that Claimant showed no signs of any muscle atrophy. (EX-19, p. 11). Dr. Kaldis deferred to Dr. Gabel with respect to the treatment of Claimant's left shoulder.

Dr. Kaldis ordered an MRI of Claimant's lumbar spine, and next saw Claimant on September 17, 2007 for a repeat exam. (EX-19, p. 19). Claimant's MRI revealed degenerative arthritis but no evidence of disc herniation. (EX-15, p. 5; EX-19, p. 19). Dr. Kaldis opined that Claimant's cervical spine was normal, and returned Claimant to the care of Dr. Gabel. (EX-15, p. 5). Dr. Kaldis testified that Claimant had a perfectly normal back examination on September 17, 2007, and saw nothing to require any sort of continued treatment. (EX-19, p. 21).

Dr. Kaldis performed an independent medical examination on Claimant at the request of Carrier on July 15, 2008. (EX-15, p. 6). Dr. Kaldis reviewed Claimant's MRI and myelograms, finding no evidence of disc herniation or change from his previous examinations. (EX-15, p. 6; EX-19, p. 22). Dr. Kaldis noted that no surgery had been recommended by any doctor and agreed with that assessment. Dr. Kaldis further agreed with Dr. Gabel's prior assessment of maximum medical improvement and saw no contradictions for Claimant to return to work at full duty without any restrictions. (EX-15, p. 10). Dr. Kaldis further opined that no additional physical therapy was needed for Claimant. Dr. Kaldis gave Claimant a total body impairment rating of four percent. (EX-15, p. 10).

Dr. Kaldis testified that he was not Claimant's treating physician but rather considered himself an independent medical examiner. (EX-19, p. 28). Dr. Kaldis testified that he was first asked by Dr. Gabel to give an opinion when he first saw Claimant and only saw Claimant again after he was asked by Carrier to perform an independent medical examination. (EX-19, p. 28). Dr. Kaldis was paid by Carrier to perform the independent medical examination. (EX-19, p. 29). Dr. Kaldis testified that he is asked to perform independent medical examinations twice or three times a month. (EX-19, p. 44).

Dr. Kaldis testified that he disagrees with Dr. Eidman regarding Dr. Eidman's finding of radiculopathy and neurological defects in Claimant's cervical area. (EX-19, p. 34). Dr. Kaldis further disagrees that injections are required to help treat Claimant's neck injuries and disagrees that Claimant has limits on his passive and active motion in his neck and his back. (EX-19, p. 34). Dr. Kaldis found no weakness in Claimant's grip during his tests and disagreed with Dr. Eidman with respect to the latter's diagnosis that Claimant possessed a limited range of motion in his lumbar, decreased sensation at his L4-5 disc and weakness in the bilateral of Claimant's ankles and bilateral straight leg raising. (EX-19, p. 37). Dr. Kaldis opined that Claimant's degenerative arthritis occurred over the past ten to fifteen years of Claimant's life, and testified that this type of arthritis is not limiting in this case. (EX-19, p. 38).

Dr. Kaldis based his interpretations of Claimant's injuries on the tests he conducted with Claimant and the experience he has in the orthopedic field. (EX-19, p. 40). Dr. Kaldis did not use any certain mechanical devices during his examination of Claimant. (EX-19, p. 40). Dr. Kaldis testified that he does not defer or agree with Dr. Eidman with respect to the treatment of Claimant in this matter. (EX-19, p. 45).

G. Medical Records and Deposition of Dr. Dan K. Eidman, M.D.

Dr. Eidman is a Board Certified Orthopedic Surgeon. Dr. Eidman first saw Claimant on March 10, 2008. Claimant complained of persistent neck pain and upper extremity pain. Dr. Eidman observed that Claimant had a numbness and weakness of grasp, a restrictive active motion and tenderness in the lower lumbar area with extreme pain. (CX-1, p. 3). Dr. Eidman also reviewed Claimant's MRI taken on January 24, 2007, at River Oaks Imaging, and observed a one to two millimeter broadbase disc bulge at the L4-5 disc. (CX-1, p. 4). Dr. Eidman diagnosed Claimant with cervical radiculopathy, a lumbar radiculopathy and a torn rotator cuff in Claimant's right shoulder. (CX-1, p. 4). Dr. Eidman scheduled a myelogram of Claimant's lumbar and a post-myelogram CT scan of Claimant's lumbar. (CX-1, p. 4). Dr. Eidman also fitted Claimant for an elastic back brace and prescribed Claimant pain medication (Robaxin, Mobic, and Lidoderm patches) and physical therapy. (CX-1, p. 4). Claimant's myelogram was taken by Dr. Scott Staewen at the Foundation Surgical Hospital, and showed no significant cervical or lumbar ventral extradural defects. (CX-1, p. 11).

Dr. Eidman next saw Claimant on March 31, 2008, to follow up with the myelogram and CT scan requested. Dr. Eidman testified that the myelogram showed a minimal bulging disc at L4-5 in the cervical spine. (CX-12, p. 12, 33-34). Dr. Eidman also testified that he felt that Claimant had a protrusion of the disc and a possible herniation at the L5-S1 disc of his lumbar. (CX-12, p. 12). Dr. Eidman noted that Claimant continued to suffer from the same pain and problems that were present at his first visit, and prescribed more pain medication to Claimant. (CX-1, p. 16). Dr. Eidman also suggested the possibility of a series of lumbar epidural steroid injections if Claimant's symptoms continued to persist. (CX-1, p. 16). Dr. Eidman opined that Claimant was unable to work at this time. (CX-1, p. 16).

Dr. Eidman next saw Claimant on April 30, 2008, as Claimant continued to complain of severe pain in his neck and upper extremities. (CX-1, p. 25). Dr. Eidman again suggested steroid

injections and prescribed the same pain medication to Claimant. Dr. Eidman further opined that Claimant was unable to return to work at this time. (CX-1, p. 25). Dr. Eidman again saw Claimant on June 13, 2008, and again on August 25, 2008. During both visits, Claimant complained of the same symptoms of pain and lack of motion. Dr. Eidman continued to prescribed pain medication and physical therapy, and opined that Claimant was still unable to return to work. (CX-1, p. 33, 38).

Dr. Eidman last saw Claimant on November 4, 2008, where Claimant complained of neck and upper extremity pain. Dr. Eidman prescribed a series of injections in the L4-5 and L5-S1 discs, which were to be conducted by Dr. Tom Cain at Foundation Surgery Hospital as soon as they were authorized by Carrier. (CX-1, p. 43). Dr. Eidman continued his opinion that Claimant was unable to return to work. (CX-1, p. 43).

Dr. Eidman testified that he did not diagnose any injuries to Claimant's left shoulder, and deferred to the opinion of Dr. Gable with respect to Claimant's left shoulder. Dr. Eidman further testified that throughout all the exams he had conducted with Claimant, he believed that Claimant suffered from cervical and lumbar radiculopathy. (CX-12, p. 18). Dr. Eidman has associated his pain with inflammatory responses in the upper extremities rather than any nerve root impingements that could be rectified by surgery. (CX-12, p. 39-40, 46). Dr. Eidman has recommended epidural steroid injections to cure these injuries. (CX-12, p. 19). Dr. Eidman testified that he believes Claimant cannot return to work at the present time and is not at medical maximum improvement for all of his conditions. (CX-12, p. 20). Dr. Eidman further testified that he did not believe Claimant could return to light duty work at this time. (CX-12, p. 21). Dr. Eidman opined that Claimant's lack of receiving injections and therapy has prolonged his overall recovery time. (CX-1, p. 23). Dr. Eidman testified that the restrictions that Claimant currently has that prevent him from working are not permanent, and once Claimant reached maximum medical improvement, his restrictions with regards to his neck and back should be non-existent. (CX-1, p. 40).

H. Vocational Report of Carla D. Seyler

Ms. Carla Seyler was scheduled to conduct a vocational examination on Claimant but Claimant was unavailable for evaluation. (EX-20, p. 1). Ms. Seyler based her examination on the medical records provided by the physicians and hospitals in which Claimant has been treated in this matter, the functional capacity evaluation of Concentra Medical Centers, and the employment records provided by Employer. (EX-20, p.1). Ms. Seyler conducted her vocational assessment on December 5, 2008.

Ms. Seyler assessed that it was with a reasonable vocational probability that Claimant would be or was currently capable of performing at least sedentary and light work at the time of the vocational assessment. (EX-20, p. 4). After conducting an analysis of Claimant's transferable skills and work abilities, Ms. Seyler documented that Claimant has an understanding of mechanical processes, equipment and tools and can use precision and diagnostic tools. (EX-20, p. 4). Ms. Seyler further documented that Claimant has the ability to solve problems and has the ability to direct and coordinate activities of a small number of subordinates. (EX-20, p. 4). Ms. Seyler further observed that Claimant has the capability to bid for jobs, to handle routine

recordkeeping and handle monetary transactions. Claimant's familiarity with the mechanic and oilfield industries allows him the ability to read mechanical diagrams, schematics and other written specifications. (EX-20, p. 4).

Ms. Seyler identified four light duty jobs and the perspective compensation rates of each in which Claimant would be able to work. (EX-20, p. 4-5). These jobs are documented below:

Counter Sales Attendant	$9.00-$10.00 per hour
Interchange Mechanic Clerk	$12.00 per hour
Repair Technician	$8.00-9.00 per hour
Service Advisor	$32,000-35,000 annually

Ms. Seyler also determined that Claimant demonstrated the ability to perform medium physical exertion during the Functional Capacity Evaluation. Based on this ability, Ms. Seyler opined that Claimant could work medium duty jobs, and identified three medium duty jobs and the perspective compensation rates of each in which Claimant would qualify. (EX-20, p. 5-6). These jobs are documented below:

Automotive Technician/Mechanic	$10.00-30.00 per hour
Hose Assembler	$9.00-$10.00 per hour with overtime
Packer/Assembler	$10.50 per hour

Ms. Seyler further opined that Claimant has the necessary and transferable skills to return to employment. (EX-20, p. 6). Ms. Seyler deferred to Dr. Gabel's determination that Claimant could return to his normal work. Ms. Seyler further noted that there were other sedentary and medium duty jobs available to Claimant that he could obtain. (EX-20, p. 6).

I. Deposition and Vocational Report of Dr. Larry Stokes

Dr. Larry Stokes performed a vocational assessment on Claimant on January 1, 2009 and was able to assess Claimant in person. (CX-13, p. 1). Dr. Stokes also based his assessment on the medical records provided by the physicians and hospitals in which Claimant has been treated in this matter, the vocational rehabilitation report of Ms. Carla Seyler and the records from the U.S. Department of Labor and the Office of Administrative Law Judges. (CX-13, p. 1-2).

Dr. Stokes performed the following tests on Claimant: the Kaufman Brief Intelligence Test, in which Claimant achieved an average rating; the Kaufman Test of Educational Achievement, in which Claimant achieved an average rating; the Vocational Preference Inventory, in which it is suggested that Claimant is persistent, mechanically inclined, frank, sociable, persuasive and dependent; the Work Orientation and Value Survey; the Job Search Attitude Inventory, in which Claimant scored in the average range; and the Transferable Skills

Scale, in which Claimant scored a high rating on the Physical scale and an average rating on the Analytical, Interpersonal, Organizational and Information scales. (CX-13, p. 6-7). Based on these tests, Dr. Stokes concluded that Claimant has experience working in light to heavy occupations ranging from unskilled to skilled labor, and has gained skills which are transferable in the labor market. (CX-13, p. 8).

Dr. Stokes documented that Claimant's past work history demonstrates an above average aptitude in spatial and form perception and manual dexterity. (CX-13, p. 8). Claimant also demonstrated average aptitudes in general intelligence, verbal and numerical ability, clerical perception, motor conditions and finger dexterity. (CX-13, p. 8). Claimant can compare, copy, compute, compile, analyze and coordinate as well as take instructions, help, serve, speak, signal, persuade, divert and supervise. (CX-13, p. 8). Claimant demonstrated the ability to handle, feed, offbear, tend, manipulate, drive, operate, control and perform precision work. Claimant can accept responsibility for the direction, control and planning of an activity and can perform repetitive work or perform work continuously according to set procedures, sequence and pace. (CX-13, p. 8). Claimant can perform a variety of duties, changing from one task to another without losing efficiency or composure, and can work in situations that call for the precise attainment of set limits, tolerances and standards. Claimant can deal with people beyond giving and receiving instruction. (CX-13, p. 8).

Based on the information provided, Dr. Stokes opined that Claimant's vocational prognosis was poor at the time of his vocational assessment. (CX-13, p. 11). Claimant was currently removed from the labor market by a physician, Dr. Eidman, and was experiencing a complete wage loss of $1,174.42 in average weekly wages at the time of the assessment. (CX-13, p. 14). Dr. Stokes based this prognosis on the fact that Dr. Eidman, Claimant's current treating physician, had not released him back to work. (CX-13, p. 14). Dr. Stokes opined that it was unlikely that Claimant can return to medium or heavy duty, based on the lift restrictions placed on Claimant by Dr. Gabel. (CX-13, p. 10).

Dr. Stokes identified jobs that Claimant could return to work to perform, all of which were light duty. (CX-13, p. 10-11). These jobs and their perspective compensation rates are listed below:

Cashier	$302.00 average weekly wage
Bin Deck Operator	$554.80 average weekly wage
Tune-Up Mechanic	$608.40 average weekly wage
Service Station Attendant	$334.00 average weekly wage
Dispatcher	$692.80 average weekly wage
Service Writer	$705.60 average weekly wage
Parts Salesperson	$534.80 average weekly wage

Order Clerk $403.20 average weekly wage

Dr. Stokes also commented on the vocational report by Ms. Carla Seyler. (CX-13, p. 11). Dr. Stokes discounted the FCE used by Ms. Seyler in her report due to the fact that Dr. Gabel did not agree with the results of the FCE. (CX-13, p. 11). Dr. Stokes further noted that Ms. Seyler did not actively consider the medical opinion of Dr. Eidman. (CX-13, p. 11).

Dr. Stokes testified that all three doctors provided him with different opinions based on different injuries of Claimant. Dr. Stokes noted that Dr. Eidman stated Claimant could not return to work because of his neck, back and right shoulder injuries, and that Dr. Eidman's opinion was corroborated by Claimant's testimony. (CX-15, p. 31). Dr. Stokes further noted that Dr. Gabel placed restrictions on Claimant's left shoulder, and that Dr. Eidman and Dr. Kaldis both deferred their opinions regarding Claimant's left shoulder to Dr. Gabel's diagnosis. (CX-15, p. 31). Dr. Stokes further noted that Dr. Kaldis stated he could work in any occupation with respect to his back and neck injuries and that Dr. Gabel had deferred to Dr. Kaldis with regards to the neck and back injuries of Claimant. (CX-15, p. 31).

Dr. Stokes testified that he was unable to see the functional capacity evaluation that was performed on Claimant and received by Dr. Gabel. (CX-15, p. 24). Dr. Stokes noted that Dr. Gabel disagreed with the functional capacity evaluation because the evaluation diagnosed Claimant with the ability to perform medium duty work. This diagnosis was in exact contention with Dr. Gabel's lift restrictions, as Dr. Gabel gave Claimant a twenty pound lift restriction in his left arm in October, 2007 and then gave Claimant a ten pound permanent lift restriction in his left arm when he reached maximum medical improvement in November, 2007. Dr. Stokes explained that a ten to twenty pound lift restriction is normally associated with light and/or sedentary work. (CX-15, p. 27). Dr. Stokes further noted that Dr. Gabel giving Claimant a full release to work was contradictory to the lift restriction that Dr. Gabel placed on Claimant's left arm. (CX-15, p. 28). Dr. Stokes noted that with this ten pound lift restriction; Claimant would not be able to return to past employment that was classified as heavy duty. (CX-15, p. 30).

Dr. Stokes testified that if Dr. Eidman is considered Claimant's treating physician, then based on his opinion, Claimant would be unable to return to work, and thus the jobs indentified by both Carla Seyler and Dr. Stokes would not be applicable to this matter. (CX-15, p. 34). Dr. Stokes further testified that if Claimant was considered to be at maximum medical improvement with no other restrictions than his permanent lift restriction in his left arm, then many of the jobs identified would be appropriate. (CX-15, p. 36). Dr. Stokes opined that Claimant's employment opportunities are fully within the light to sedentary range, and partially in the medium range, depending on the job. (CX-15, p. 47-48). Dr. Stokes testified that Claimant could find employment at a medium duty job if he could perform the required twenty-five to fifty pound lifting with his right arm, which does not have a lift restriction. (CX-15, p. 47-48). Dr. Stokes testified that if Claimant could perform the lifting with his right arm, then Claimant could not be placed solely at light duty, and there would be no reason to exclude Claimant from some medium duty jobs. (CX-15, p. 49-50).

Dr. Stokes opined that based on the competing medical opinions and the different medical scenarios given by the doctors in this matter, it is impossible to restrict Claimant to any particular job category at this time. (CX-15, p. 55). Dr. Stokes further opined that given the three competing medical opinions, Claimant should probably be placed in light or sedentary work. (CX-15, p. 59, 106). Dr. Stokes testified that he did not think Claimant could complete the tasks for a full medium duty job, and that medium duty jobs being done with lifting by only the right arm were atypical and uncommon. (CX-15, p. 59). Dr. Stokes opined that the availability of these jobs and Claimant's ability to work in this type of employment would need to be determined on a case by case basis. (CX-15, p. 106). Dr. Stokes agreed that Claimant was not necessarily limited to light duty, but the determination of what he could do would always come down to the requirements of that particular job. (CX-15, p. 60).

Dr. Stokes testified that if Dr. Gabel's restrictions are valid, and Claimant can return to work, Claimant could acquire employment in several opportunities including: tune-up mechanic, service station attendant, dispatcher, service writer, parts sales person and an order clerk. Dr. Stokes opined that Claimant would earn between $262.00 and $856.40 per week at any of these available jobs. (CX-15, p. 95). Dr. Stokes testified that if Claimant could do both light and medium work, then the list of available jobs would expand for Claimant. (CX-15, p. 96). Dr. Stokes further testified that if the search was expanded to include lower level medium duty jobs, Claimant would experience little to no effect on his prospective wages, as the light duty jobs provided would make the same, if not more wages per week, that the medium jobs that Claimant could find employment within. (CX-15, p. 97-98). Dr. Stokes explained that in his twenty eight years of experience, he has found that light duty, sedentary jobs pay more than heavy duty jobs, as these sedentary jobs required more skill and a higher education level. (CX-15, p. 97). Dr. Stokes further opined that the weight lifting restriction placed on Claimant's left arm did not necessarily reduce his wage earning potential. (CX-15, p. 98). Dr. Stokes testified that if Claimant had more training, he could enhance his wage earning potential. (CX-15, p. 99).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he is entitled to total temporary disability benefits from December 28, 2006 to the current date and continuing, as the presence of suitable alternative employment has not been shown by Employer/Carrier. Claimant also contends that he has not yet reached maximum medical improvements for his injuries that he sustained to his neck, back and right shoulder. Claimant further contends that he has been underpaid or not paid for past due compensation benefits, and requests that his compensation benefits be reinstated by the undersigned and that he receive any and all past due compensation. Claimant also contends that his average weekly wage should be paid according to Section 10(a) resulting in an average weekly wage of $1,174.42 and compensation rate of $782.95, or calculated by 10(c), resulting in an average weekly wage of $1,585.85 and compensation rate of $1,057.24. Claimant further contends that Dr. Eidman is Claimant's free choice of physician, and requests that the undersigned holds Employer/Carrier liable for reimbursements of all prescriptions, travel expenses and past medical treatment expenses associated with his neck, back and right shoulder

injuries. Claimant further contends that he is entitled to future medical treatment, interest, penalties and attorney fees.

Employer/Carrier contends that Claimant has reached maximum medical improvement according to his treating physicians, Dr. Gabel and Dr. Kaldis, and is owed no further compensation benefits. Employer/Carrier contends that Claimant freely chose Dr. Gabel and Dr. Kaldis, both of whom rendered treatment to Claimant and released him to work. Employer/Carrier further contends that according to both vocational experts in this matter, Claimant can return to work with no limiting effect on his wage earning capacity. As such, both vocational experts have identified suitable alternative employment opportunities for Claimant and Claimant is owed no past compensation benefits. Employer/Carrier further contends that Claimant's average weekly wage should be calculated under 10(a) of the Act, and that Claimant's average weekly wage for the 52 weeks preceding his injury was $804.89, with a compensation rate of $536.59. Employer/Carrier contends that no reimbursements or future medical treatment is owed to Claimant.

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

In this case, the undersigned finds Claimant to be credible with regards to his pain associated with his injuries and the complaints that he has made to his doctors based on the lack of contradiction to his testimony, the observations of Claimant at trial, and the corroborating medical records and treatments received by Claimant. The undersigned further credits both Dr. Eidman and Dr. Kaldis based on their medical expertise and experience in the orthopedic medical fields. However, the undersigned credits the testimony of Dr. Eidman over that of Dr. Kaldis with regards to Claimant's neck and back injuries, based on Dr. Eidman's treatment plan, the length of treatment and familiarity with Claimant, and Dr. Eidman's current medical examination techniques.

C. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staftex 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 a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

Section 2(2) of the Act defines injury as an accidental injury or death arising out of or in the course of employment. 33 U.S.C. § 902(2)(2003). Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. 920(a). 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.

In order to show the first element of harm or injury, a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C.Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer). A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980).

For an injury to compensable under the Act, it must have occurred "in the course of employment." 33 U.S.C. 902(2). "Course of employment" refers to the time and the place of the injury, as well as the activity in which the claimant was engaged when the injury occurred. *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593, 595 (1081). The general rule as established

by the Board is that an injury occurs in the course and scope of employment if it occurs within the time and space boundaries of employment and in the course of an activity the purpose of which is related to the employment. *Alston v. Safeway Stores*, 19 BRBS 86, 88 (1986), *citing Wilson v. WMATA*, 16 BRBS 73 (1984); *Willis v. Titan Contractors*, 20 BRBS 11 (1987). The Board further defined their position in the recent holding in *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997), holding that the employee's action would be found within the "scope of employment" if it were of some benefit to the employer.

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

In establishing that an injury occurred in the course and scope of his employment, a claimant is entitled to rely on the presumption provided by Section 20(a) of the Act. *Willis*, 20 BRBS at 12; *Mulvaney*, 14 BRBS at 595; *Wilson*, 16 BRBS at 75. The Section 20(a) presumption places the burden squarely on the employer to prove with substantial evidence that the activity which resulted in the claimant's injury was unrelated to his employment. *Willis*, 20 BRBS at 13. Substantial evidence is evidence which a reasonable mind might accept to support a conclusion. Therefore, the presumption may be dispelled by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event. *Mulvaney*, 14 BRBS at 597.

In *Boyd*, 30 BRBS at 220, the Board found the Administrative Law Judge incorporated an appropriate test for determining whether an employee's activities were related to his employment for the purpose of a course and scope analysis under Section 902(2) of the Act: Does an employee's activity carry out the employer's purpose or advance their interest either directly or indirectly? I find this test to be appropriate and applicable to the matter at hand. Finally, it should be noted that the credibility of the witness is clearly with the purview of the Administrative Law Judge as the finder-of-fact. *Bobier v. Macke Co.*, 18 BRBS 135 (1986).

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 out standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), aff'd 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, the Section 20(a) presumption applies to Claimant's injuries to his neck, back and both shoulders. Evidence has shown that Claimant complained of these injuries initially. Claimant testified that he complained of shoulder, neck and back injuries to doctors at Lake Charles Memorial Hospital. Claimant's first doctor, Dr. Vanderweide, discussed treatment options with regards to a cervical strain, a broad-based bulge at L4-5, possible upper left cervical radiculopathy and lower back pain. Dr. Vanderweide also referred Claimant to Dr. Gabel for his shoulder injuries. Claimant also complained of his neck, back and shoulder injuries to Dr. Gabel, who treated Claimant's left shoulder injuries and referred Claimant to Dr. Kaldis for his neck and back injuries. Claimant has also seen Dr. Eidman for these various injuries. Dr. Eidman has testified that these injuries were caused by Claimant's accident as described by Claimant during their visits. It is apparent that Claimant initially complained of his injuries immediately following his accident. Based on his complaints to the various doctors, his uncontradicted testimony and the facts surrounding his workplace accident, Claimant has shown that he has suffered a harm or injury.

It has also been stipulated that Claimant's injuries occurred during the course and scope of his employment with Employer. The evidence in this matter clearly shows that Claimant was involved in an accident while working on an offshore platform performing his employment duties for Employer. Employer has failed to provide substantial evidence to show that Claimant's injuries were unrelated to his employment. Based on Employer's failure to rebut the Section 20(a) presumption with substantial evidence, Claimant is entitled to a presumption that all of his injuries occurred in the course and scope of his employment.

D. Nature and Extent of Injury

Disability under the Act is defined as incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902 (10). 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 Act does not provide standards to distinguish between classifications or degrees of disability. However, case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d at 1038; *P&M Crane Co. v. Hayes*, 930 F.2d at 429-30; *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). Claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984) (emphasis added). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

A disability is classified as temporary if the injury is one in which recovery merely awaits a normal healing period. *SGS Control Services v. Director*, OWCP 86 F.3d 438, 444 (5th Cir. 1996). If a disability has any residual effects after the Claimant reaches the date of maximum medical improvement, the disability is considered permanent. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask v. Lockheed Shipbuilding Const. Co.*, 17 BRBS 56, 60 (BRB)(1985). Therefore, any disability suffered by the Claimant before reaching the maximum medical improvement date is considered temporary in nature, as the maximum medical improvement date is the date by which a disability becomes permanent. *SGS Control Services*, 86 F.3d 443.

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235, n. 5 (1985); *Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989)*. The date of maximum medical improvement is a question of fact based upon the medical evidence of

record. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). An employee reaches maximum medical improvement when his condition becomes stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Limited*, 14 BRBS 395, 401 (1981). A claimant's condition can be deemed permanent even though an employee may require surgery in the future. *Morales v. General Dynamics Corp.*, 10 BRBS 915, 918 (1979). A claimant's condition may also be considered permanent when the claimant is not receiving medical treatment. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982).

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

Once the claimant makes this *prima facie* showing, the burden shifts to employer to show suitable alternative employment. *Turner*, 661 F.2d at 1038. The Fifth Circuit has developed a two-part test by which an employer can meet its burden of showing suitable alternative employment:

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

Id. at 1042. The employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." *P & M Crane Co.* 930 F.2d at 431; *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).

A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). To establish suitable alternative employment, the employer must show the existence of realistically available job opportunities within the geographical area where the claimant resides which he is capable of performing, considering his age, education, work experience and physical restrictions, and which he could secure if he diligently tried. *Turner*, 661 F.2d at 1038. The employer has the burden to establish the precise nature, terms and availability of suitable alternative employment. *Thompson v. Lockheed Shipbuilding and Construction Co.*, 21 BRBS 94, 97 (1988). Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for special skills which the claimant possesses and there are few qualified workers in the local community. *P & M Crane Co.*, 930 F.2d at 424, 430.

The ALJ must allow the employer to present evidence as to the availability of suitable alternative employment, even if the employer does not have information as to the job's previous availability. *Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994). If the testimony relied upon by the judge provides substantial evidence to support his finding that post-injury work was available which constitutes suitable alternative employment, and the claimant has not presented any evidence of a reversible error, the Board will uphold the judge's evaluation of conflicting evidence and credibility. *Mendoza v. Marine Personnel Co*., 46 F.3d 498, 500, 29 BRBS 79, 80-81 (CRT) (5th Cir**.** 1995); *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994).

If the employer has established suitable alternate employment, the employee can nevertheless establish total disability if he demonstrates that he diligently tried and was unable to secure employment. *Turner*, 661 F.2d at 1042-43; *P & M Crane Co.* 930 F.2d at 430. The claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. *Turner*, 661 F.2d at 1043, 14 BRBS at 165. If an employee does not meet this burden, then at most, his disability is partial. 33 U.S.C. § 903(c); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

In this case, Claimant is temporarily totally disabled with respect to his back, neck and right shoulder injuries. This determination is based on the opinion of his treating physician, Dr. Eidman and the fact that Claimant cannot return to his former heavy duty, maritime employment at this time. Claimant has not been released back to work by his treating physician and based on his medical reports, Dr. Eidman opines that Claimant is still currently temporarily totally disabled and unable to return to work based on the severe pain that Claimant experiences on an everyday basis and the amount of prescription medication Claimant is currently taking to treat the pain in his back and his neck. As Dr. Eidman has treated Claimant for a longer period of time than Dr. Kaldis, and is more familiar with the level of Claimant's current injuries, the undersigned has placed more weight on the determination of Dr. Eidman that Claimant cannot return to work in any fashion at this present time. Claimant has further testified that he does not believe he can work at any juncture right now, based on the amount of pain he feels on a daily basis and the amount of pills he takes. As both Claimant's and Dr. Eidman's respective testimonies are credible and have been given great weight, the undersigned finds that Claimant is temporarily totally disabled from the date of the accident, December 27, 2006, to the present date and continuing.

Based on the vocational evidence provided, the undersigned finds that suitable alternative employment has not been shown. At the outset, Dr. Eidman has determined that Claimant is currently removed from the labor market due to pending medical treatment. As such, Claimant would be unable to diligently search for any job at this time without a release to work from Dr. Eidman. Claimant has also been given a ten (10) pound permanent lifting restriction on his left arm by Dr. Gabel. Therefore, in order for Claimant to be able to be employed in medium duty work, Claimant must be able to do the required lifting with only his right arm, if the lifting requires is more than ten (10) pounds. Most of the jobs provided by Ms. Seyler in her Labor Market Survey require lifting objects ranging from twenty (20) to fifty (50) pounds. It has not yet been proven that Claimant can perform this required lifting with only his right arm, as the lifting required exceeds the restriction placed on his left arm. Further, Ms. Seyler has not taken into

account the opinion of Dr. Eidman in her vocational report, and has not shown that, based on the restrictions and/or disability ratings that he may provide to Claimant, that Claimant would be able to perform any of these jobs. Therefore, these jobs do not yet constitute suitable alternative employment without more medical information provided.

While the showing of a single employment opportunity may result in the showing of suitable alternative employment, Ms. Seyler has also failed to provide any contact information or listings for the one job provided in her Labor Market Survey that does not require lifting greater than ten (10) pounds. The employer has the burden to establish the precise nature, terms and availability of suitable alternative employment. Without this information, suitable alternative employment has yet to be shown through Ms. Seyler's Labor Market Survey.

With respect to the Labor Market Survey of Dr. Stokes, Dr. Stokes provides light duty jobs that Claimant could possibly be able to perform, but does not provide the precise nature, terms and availability of these jobs. Dr. Stokes further notes that Claimant's employment prognosis is poor at this time, as Dr. Eidman has not released Claimant to return to any sort of employment. Dr. Stokes testified that Claimant could possibly perform medium duty work if he could perform the required lifting with his right arm, but has not shown any information regarding whether prospective employers would be willing to hire Claimant to perform medium duty work with a lifting restriction on one of his arms. As such, it remains unproven that Claimant could acquire medium duty employment. Based on all the evidence provided, the undersigned finds that suitable alternative employment has not been shown in this matter, and Claimant remains temporarily totally disabled at this present time. Claimant will remain temporarily totally disabled until such time that Dr. Eidman releases Claimant to some form of work, and the precise nature and terms of these available jobs are made known to Claimant as such to constitute a showing of suitable alternative employment.

E. Maximum Medical Improvement

Total disability is defined as a complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. A disability is classified as temporary if the injury is one in which recovery merely awaits a normal healing period. *SGS Control Services v. Director*, OWCP 86 F.3d 438, 444 (5th Cir. 1996). If a disability has any residual effects after the Claimant reaches the date of maximum medical improvement, the disability is considered permanent. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask v. Lockheed Shipbuilding Const. Co.*, 17 BRBS 56, 60 (BRB)(1985). Therefore, any disability suffered by the Claimant before reaching the maximum medical improvement date is considered temporary in nature, as the maximum medical improvement date is the date by which a disability becomes permanent. *SGS Control Services*, 86 F.3d 443.

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235, n. 5 (1985); *Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989)*. The date of maximum medical improvement is a question of fact based upon the medical evidence of record. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). As stated previously, an employee

reaches maximum medical improvement when his condition becomes stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Limited*, 14 BRBS 395, 401 (1981). A claimant's condition can be deemed permanent even though an employee may require surgery in the future. *Morales v. General Dynamics Corp.*, 10 BRBS 915, 918 (1979). A claimant's condition may also be considered permanent when the claimant is not receiving medical treatment. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982).

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

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

The Board has held that where no physician concludes that a claimant's condition has reached maximum medical improvement and further surgery is anticipated, permanency is not demonstrated. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983). The mere possibility of future surgery, by itself, however, does not preclude a finding that a condition is permanent. *Worthington v. Newport News Shipbuilding & Dry Dock Co*., 18 BRBS 200, 202 (1986). In fact, a physician's opinion that a condition will progress and ultimately require surgery, but also giving a percentage disability rating, will support a finding that maximum medical improvement has been reached, if the disability will be lengthy, indefinite in duration, and lack a normal healing period. *Morales v. General Dynamics Corp*., 16 BRBS 293, 296 (1984). If there is any doubt as to whether the employee has recovered, such doubt should be resolved in favor of the claimant's entitlement to benefits. *Fabijanski v. Maher Terminals*, 3 BRBS 421, 424 (1976)

In this case, Claimant's treating physician, Dr. Eidman, has testified that Claimant is not at maximum medical improvement for his neck, back and right shoulder. Dr. Eidman has not provided Claimant with a disability rating for his neck, back and right shoulder injuries and there is an anticipation of further necessary medical treatment for these injuries. While Dr. Eidman has stated that surgery is not a viable option at this time, the treatment options that he would like to have Claimant undergo, including the injections and possible discogram, may provide for a surgical option at a later date. Through his medical reports and testimony, Dr. Eidman expects that with some form of treatment, Claimant's injuries will improve, but the delay in obtaining authorizations from Carrier has stalled Claimant's recovery. Dr. Eidman has further noted in his medical reports that future visits and re-evaluations of Claimant's condition are necessary for the progression of Claimant's treatment for his various injuries. Based on the medical evidence, the

undersigned finds that Claimant has yet to reach maximum medical improvement with regards to his neck, back and right shoulder injuries.

Employer has argued that Dr. Kaldis and Dr. Gabel have placed Claimant at maximum medical improvement for all of his injuries. While both Dr. Gabel and Dr. Kaldis have placed Claimant at maximum medical improvement, the evidence shows that both doctors refused to provide Claimant with necessary medical treatment. Dr. Gabel only treated Claimant's left shoulder, and Dr. Kaldis only provided a medical opinion with regards to Claimant's neck and back. Medical records have shown that Claimant has injuries to his neck, back and right shoulder from his initial accident that were not completely treated by Dr. Gabel and Dr. Kaldis prior to his release back to work. Dr. Eidman has opined that Claimant was not at maximum medical improvement when released by Dr. Gabel and Dr. Kaldis. Based on the medical evidence provided, it appears that Dr. Gabel and Dr. Kaldis did not provide Claimant with a valid disability rating or maximum medical improvement date with regards to Claimant's neck, back or right shoulder. Claimant is only at maximum medical improvement for his left shoulder and has not yet reached maximum medical improvement with regards to his neck, back and left shoulder injuries.

F. Choice of Physician

In general, an employer whose worker was injured on the job is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. 33 U.S.C. §907(a); *Ingalls Shipbuilding Inc. v. Director, OWCP*, 991 F.2d 163, 165-66 (5th Cir. 1993)(holding an injured worker was entitled to medical benefits despite the fact that the worker had no discernable impairment); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140-41 (1978)(finding that if compensation is payable then so are related medical benefits). An employee has a right to choose an attending physician authorized by the Secretary to provide medical care. 33 U.S.C. §907(b). When a claimant wishes to change treating physicians, the claimant must first request consent for a change, and consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406(a); *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303, 309 (1992) (Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8, 11 (1988). Otherwise, an employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent upon a showing of good cause for change. 33 U.S.C. §907(c)(2).

The plain language of Section 7(c)(2) states that the employer may consent to a change of physician for good cause but is not required to do so. *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 665 (1982)(stating that even if the claimant had established "good cause" for change the employer was not required to authorize the change). In such cases, the district director of the appropriate compensation district may order a change of physicians when a change is "necessary or desirable." 20 C.F.R. § 702.406(b). Jurisprudence has established several instances where the claimant failed to even demonstrate "good cause" for change. *See Lyles v. Stevedoring Services of America*, 34 BRBS 303, 305-06 (ALJ)(2000)(denying the claimant a right to change physicians for "good cause" when the claimant was already being treated by a specialist and only

sought to change specialists after being released to return to work); *Mull v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 739, 741-43 (ALJ)(1995)(no "good cause" to change physicians exists when the claimant consciously chose a treating physician, that physician treated her for seven months, she chose another specialist in the same field without gaining approval from the employer, and when she only sought to change physicians after the first physician opined that her injuries were not work related). *Cf. Baily v. Palmetto Shipbuilding & Stevedoring Co.*, 27 BRBS 370 (ALJ)(1993)(finding that the death of the claimant's prior treating physician constituted "good cause" to change treating physicians); *Gaudet v. New Orleans Shipyard*, 24 BRBS 31 (1990) (ALJ) (finding the employer was required to consent to a change in physicians for "good cause," and labeling the change as a "referral" when the claimant sought a change of orthopedist for a specific purpose, namely that the second orthopedist was a "leading spine surgeon" who was more capable of performing the particular operation). The decision to change the claimant's physician under Section 7(b), and Section 702.406(b) is relegated to the discretion of the district director alone, and not the administrative law judge. *Jackson v. Universal Maritime Services Corp.*, 31 BRBS 103, 107 (1997).

Normally, an employer is not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization for a change in physicians. *Slattery Assocs. v. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C. Cir. 1984); *Swain*, 14 BRBS at 664. Failure to obtain authorization for a change of physician can be excused, however, where the evidence shows that claimant has been effectively refused further medical treatment. *Lloyd*, 725 F.2d at 787, 16 BRBS at 53 (CRT); *Swain*, 14 BRBS at 664; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982); *Washington v. Cooper Stevedoring Co.*, 3 BRBS 474 (1976), aff'd, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977); *Buckhaults v. Shippers Stevedore Co.*, 2 BRBS 277 (1975).

It has been held that a claimant has not made his initial free choice of physician when he visits a physician upon a referral by Carrier, never specifically agreed to any treatment by the referred physician, and was unaware of his ability to initially choose a physician at the outset of his treatment for his injuries. *Yon v. Milcom Systems Co.*, 2004 WL 2331324 (DOL Ben.Rev.Bd. 2004). In *Yon*, it was further found that four months of treatment with a referred physician was not long enough to amount to an acquiescence of treatment with the physician. *Id.; see also Mull v. Newport News Shipbuilding & Dry Dock Co.*, 1995 WL 848054 (DOL O.A.L.J. 1995); *Shaver v. Cascade General, Inc.*, 33 BRBS 268, 273 (ALJ)(1999)(an employee exercises his choice of physician under the Act when he desired that physician, he was aware of his rights under the Act to choose another physician but waived them, or was dilatory in asserting his rights to choose a different physician).

In this case, the undersigned finds that Claimant's initial free choice of physician with regards to Claimant's left shoulder was Dr. Gabel, based on Claimant acquiescing to surgery and treatment with Dr. Gabel. The undersigned further finds that Claimant's initial choice of physician with respect to his neck, back and right shoulder injuries was Dr. Eidman, based on the fact that, as explained further below in this decision, Claimant was effectively refused treatment by Dr. Kaldis and Dr. Gabel with respect to his neck, back and right shoulder injuries.

The evidence shows that Claimant was not aware of his ability to freely choose a physician for his injuries at the outset of his treatment. The evidence further shows that Claimant did not acquiesce to treatment with Dr. Kaldis based solely on two visits with Dr. Kaldis on referral from Dr. Gabel and a third examination with Dr. Kaldis based solely on the request of Carrier. No choice of physician form identifying that Claimant chose Dr. Gabel or Dr. Kaldis as his choice of physician has been presented to the undersigned in the evidence. Based on his medical reports, Dr. Kaldis did not perform any major treatment for Claimant, apparently only prescribing some form of short term physical therapy and conducting an MRI. Dr. Gabel further performed no treatment on Claimant's right shoulder, and deferred to the opinion of Dr. Kaldis with respect to Claimant's back and neck injuries, releasing Claimant back to work shortly after Claimant's second consultation with Dr. Kaldis.

The evidence surrounding the relationship between Claimant and Dr. Kaldis further contributes to the fact that Dr. Kaldis was not Claimant's choice of physician. Claimant has testified that he saw Dr. Kaldis based solely on Dr. Gabel's referral and did so out of the spirit of cooperation. Claimant did not seek out Dr. Kaldis for treatment of his neck and back injuries. After two visits with Dr. Kaldis, Claimant decided he did not want to fully treat with Dr. Kaldis, because he believed Dr. Kaldis did not have his best interests in mind.

The testimony provided by Claimant and Dr. Kaldis further proves that Dr. Kaldis was not Claimant's choice of physician. Claimant testified that he never specifically agreed to treat with Dr. Kaldis. Claimant further testified that he informed Carrier promptly of this refusal to treat with Dr. Kaldis. Dr. Kaldis testified in his deposition that he was not at any time Claimant's treating physician. Dr. Kaldis considered himself more along the lines of an independent medical examiner, and that he was asked to provide an opinion by Dr. Gabel and Carrier at different times.

After obtaining counsel, Claimant was made aware of his right to choose a physician. Claimant initially chose Dr. Waguespack, a physician located in New Orleans, as his initial choice of physician for his injuries to his neck, back and right shoulder. The DOL refused to allow Claimant's first choice of Dr. Waguespack due to locality differences, as Claimant was living in Houston at the time. After this refusal, Claimant chose Dr. Eidman, a physician in Houston. This choice of physician by Claimant was made after Dr. Gabel and Dr. Kaldis released Claimant back to work against Claimant's claims of constant pain, effectively refusing Claimant necessary medical treatment for his back, neck and right shoulder injuries. Claimant has treated with Dr. Eidman for some time now, and has done so since his first visit. Based on the evidence provided, the undersigned finds that Claimant's choice of physician and treating physician for his neck, back and right shoulder injuries is Dr. Eidman.

G. Medical Expenses and Reimbursements

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima

facie case when a qualified physician indicates that such medical treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). The test of whether medical treatment is necessary 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 medical 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). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. General Dynamics Corporation*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978).

The presumptions of Section 20 apply in a determination of the necessity and the reasonableness of medical treatment. 33 U.S.C. 920 (stating that "it shall be presumed in the absence of substantial evidence to the contrary - (a) That the claim comes within the provisions of this chapter. . ."); *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert denied*, 528 U.S. 809 (1999)(finding a difference of opinion among physicians concerning treatment and deciding the issue based on the whole record); *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). *Cf. Schoen v. United States Chamber of Commerce*, 30 BRBS 112, 113-14 (1996)(finding that the Section 20(a) presumption did not apply in determining whether the charges incurred for self procured reasonable and necessary medical treatment were reasonable, and a claimant has the burden of proving the elements of the claim for medical benefits). Once a claimant has established a *prima facie* case that medical treatment is reasonable and necessary, the employer must produce contrary evidence, and if that evidence is sufficiently substantial, the presumption dissolves and claimant is left with the ultimate burden of persuasion. *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

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). Thus, one of Claimant's treating physicians recommended a specific procedure for recovery from a workplace accident and Claimant is willing to undergo that treatment, Claimant establishes a *prima facie* case that the treatment is both reasonable and necessary.

Once a claimant establishes a *prima facie* case, 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). The Fifth Circuit uses a substantial evidence test in determining if an employer

presented sufficient evidence to overcome a Section 20 presumption. *See Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999)(stating that "[o]nce the presumption in Section [20] is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related.")(citing *Bridier v. Alabama Dry Dock & Shipbuilding Corp.* , 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated on the substantial evidence test in the context of causation:

> . . . [T]he employer [is] 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, Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a ruling out standard).

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

If an employer has no knowledge of the injury, it cannot have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen v. Horne Bros., Inc.*, 16 BRBS at 16. An employer is considered to have knowledge when it knows of the injury and has facts that would lead a reasonable person to conclude that it might be liable for compensation and should investigate further. *Harris v. Sun Shipbuilding & Dry Dock Co.*, 6 BRBS 494 (1977), *rev'd* on other grounds *sub nom. Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3rd Cir**.** 1978). An employer has not, however, neglected to provide or authorize treatment after the employer is aware of the injury if the claimant never gave employer the opportunity to refuse or authorize treatment. *Marvin v. Marinette Marine Corp*., 19 BRBS 60 (1986).

When an injured employee has been told by physicians furnished by an employer that he is recovered from his injury and requires no further treatment, he has, in effect, been refused treatment by the employer, and he needs only to establish that treatment he subsequently procures on his own initiative, was necessary treatment for the injury in order to be entitled to such treatment at the expense of the employer. *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *see also Kilson v. Sun Shipbuilding & Dry Dock Co.*, 2 BRBS 172,

(1975); *Buckhaults v. Shippers Stevedore Company*, 2 BRBS 277 (1975); *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982). Further, case law has provided that to relieve the employer of the liability for necessary employment related medical expenses merely because a claimant has failed to request permission to change physicians after effectively being refused any further medical treatment is not within the spirit of the Act. *Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780 (D.C. Cir. 1984).

Under 20 C.F.R. §702.401, medical care includes both medicines and the necessary cost of travel. Travel expenses incurred for medical purposes under Section 7 are recoverable by a claimant. *Day v. Ship Shape Maintenance Co.*, 16 BRBS 38 (1983).

In this case, Dr. Gabel and Dr. Kaldis determined that Claimant recovered from all his injuries associated with his accident on December 27, 2006, and that no more treatment was needed. The medical reports indicate that Claimant continued to complain of pain and worried about a release to work after Dr. Gabel placed Claimant at maximum medical improvement. After his release, Claimant procured the services of counsel and then tried to obtain a free choice of physician for these injuries. This search resulted in the selection of Dr. Eidman after Claimant's first choice of physician was denied by the DOL based on the location differences. Claimant's choice of physician and treating physician, Dr. Eidman, has requested authorizations for medical treatment that have been denied by Carrier. Based on the evidence, Claimant was refused medical treatment by Dr. Gabel and Dr. Kaldis, and has been refused medical treatment by Carrier under case precedent. Upon such refusal, Claimant must only show that the treatment he received upon his own initiative was necessary for Employer/Carrier to shoulder the financial burden of the associated medical expenses.

The undersigned finds that the medical treatment acquired by Claimant after being released is both reasonable and necessary to treat his neck, back and right shoulder injuries. Employer is responsible for the payment of these forms of medical treatment and all future medical treatment provided by Dr. Eidman. Claimant has further paid for prescriptions prescribed by Dr. Eidman, for treatment visits with Dr. Eidman and has paid travel expenses for visits to Dr. Eidman. As Dr. Eidman is Claimant's current treating physician and Dr. Eidman's treatment of Claimant is both reasonable and necessary to treat Claimant's injuries, Employer is liable for the reimbursement of out of pocket medical expenses to Claimant.

J. 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).

1. Section 10(a)

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a); *See also Ingalls Shipbuilding, Inc., v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000)(stating Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker." 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co., v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp., v. Wright*, 155 F.3d 311, 327 (4th Cir. 1998). In this case, Claimant did not work a substantial portion of the year preceding his injury, and thus Section 10(a) cannot be used to calculate his average weekly wage.

2. Section 10(b)

If Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. §910(c); *Bunol*, 211 F.3d at 297; *Wilson*, 32 BRBS at 64. Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id.* To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id.* at 130; *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991). In this case, the record is devoid of wage records of similar employees and thus Section 10(b) cannot be utilized.

3. Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly, then a determination of a claimant's average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297-98; *Gatlin*, 936 F.2d at 821-22; *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

> "[S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee."

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher,* 219 F.3d 426 (5th Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock,* 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Gatlin,* 936 F.2d at 823; *Cummins v. Todd Shipyards,* 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner,* 600 F.2d 1288, 1292 (9th Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.,* 12 BRBS 410, 413 (1980).

In this case, Claimant has worked "substantially the whole of the year immediately preceding his injury" for Employer within the meaning of Section 10(a). Both Claimant and Employer in their respective briefs agree that Claimant has worked substantially the whole of the year offshore with Employer preceding the accident. Claimant worked 189 days offshore or twenty-seven (27) weeks. Claimant received fourteen (14) weeks of Employer-mandated break during the 52-week period that preceded his injury. Claimant could have only possibly worked a total of approximately eight (8) more weeks in the preceding 52-week period. Claimant was unable to work in the months of January and part of February of 2006 based on Hurricane Katrina and was unable to work part of March, 2006, due to the lack of work for Employer. Thus, Claimant was employed by Employer for substantially the whole of the year immediately preceding his injury.

However, Claimant's work schedule is different than one contemplated under Section 10(a) of the Act. Claimant had a work schedule with Employer that consisted of fourteen (14) days of work offshore and then a seven (7) day period of leave. Section 10(a) should be used when an employee works a five (5) or six (6) day work schedule, and does not presume use under the work schedule in which Claimant was employed prior to his injury. Based on Claimant's work schedule with Employer, Section 10(a) cannot fairly be applied in this matter, and is not the most efficient way to calculate Claimant's average weekly wage.

The undersigned finds that Claimant's average weekly wage should be determined by Section 10(c). According to the evidence, Claimant had total wages of $41,854.79 in the 52-week period preceding his injury. (EX-1, p.1-2; EX-8; CX-8, p. 19). Claimant argues that bonuses have not been included in this wage amount, and that $3,015 in bonuses should be added

to the amount for a more reflective annual wage. However, the undersigned has found no evidence in the exhibits reference by Claimant of the presence of these bonuses and Claimant's unsubstantiated testimony that he received these bonuses is not enough to allow for a raise in his annual earnings. Based on this evidence, the undersigned finds that Claimant had an average weekly wage of $804.89 for the 52-week period prior to his injury.

Claimant worked a total of forty-one (41) weeks in the preceding 52-week period prior to his injury. This forty-one (41) week figure includes Employer-mandated breaks, as to only divide Claimant's earnings by weeks he was actually on the rig would unjustly inflate Claimant's earning capacity. As Claimant did not work for eleven (11) weeks due to factors that were not under his immediate control, the undersigned finds that Claimant's annual earnings should be divided by the number of weeks that Claimant worked and was on a break while employed by Employer in that preceding year. Thus, Claimant's annual earnings of $41,854.79 should be divided by forty-one (41) weeks, resulting in an average weekly wage of $1,020.85 and a corresponding compensation rate of $680.57.

K. Interest and Penalties

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.

Section 14(e) of the Act provides:

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

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

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

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

In this case, Employer/Carrier has paid temporary total disability benefits for 28.7 weeks beginning December 28, 2006 and ending July 16, 1007, at an average weekly wage of $1,053.95, with a corresponding compensation rate of $702.63. The undersigned has found that Claimant's average weekly wage is $1,020.85, with a corresponding compensation rate of $680.57. Employer/Carrier also paid two weeks of temporary partial disability at a compensation rate of $275.96. Therefore, Employer/Carrier is owed a credit for any benefits that remain owed for overpayment of benefits for that 30.7 week period.

The undersigned finds that Claimant is owed temporary total disability benefits from the date of his accident, December 27, 2006 until present and continuing. The undersigned further finds that Employer/Carrier owes reimbursements for mileage, prescriptions and medical treatment. The undersigned finds that based on the unpaid compensation owed and medical benefits, interest should be applicably applied to all compensation and medical benefits thus owed and shall be determined by the District Director.

The undersigned further finds that a Section 14(e) penalty should be assessed on past due compensation benefits owed by Employer based on Employer's failure to timely controvert the claim. As stipulated, Employer did not file an initial notice of controversion until November 25, 2008. Employer stopped paying benefits on August 14, 2007. An informal conference in this matter was held on November 27, 2007. As such, the applicable penalty shall be assessed on

Employer under Section 14(e) from fourteen days from the date of last payment, August 28, 2007, until the date of the informal conference, November 27, 2007, as Employer's compliance with Section 14(d) and the filing of a notice of controversion, November 25, 2008, came after the date of the informal conference.

J. Attorney Fees

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

V. ORDER

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

1. Claimant suffered injuries to his left shoulder, right shoulder, neck and back during the course and scope of his employment on December 27, 2006.

2. Employer/Carrier shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act from the date of injury, December 27, 2006 to present and continuing until the date of maximum medical improvement and/or suitable alternative employment is shown based on an average weekly wage of $1,020.85 and a corresponding compensation rate of $680.57.

3. Claimant's initial choice of physician for his injuries to his neck, back and right shoulder is Dr. Eidman. Claimant's initial choice of physician for his injuries to his left shoulder is Dr. Gabel.

4. Employer/Carrier shall reimburse Claimant for all past out of pocket medical expenses, travel expenses and prescription expenses as a result of his work-related injury on December 27, 2006, pursuant to Section 7(a).

5. Employer/Carrier shall pay all future medical expenses of Claimant as a result of his work-related injury on December 27, 2006, pursuant to Section 7(a).

6. Employer/Carrier shall be entitled to a credit for all compensation previously paid to Claimant for indemnity benefits and medical expenses.

7. Employer/Carrier shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. Section 1961.

8. Employer/Carrier shall pay a penalty for unpaid compensation benefits as determined by Section 14(e) of the Act, for the period from fourteen days from the last date of payment of benefits, August 28, 2007, until the date of informal conference, November 25, 2007, for failure to comply with Section 14(d) of the Act.

9. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge