

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 November 2012

Case No.: 2011-LHC-2237

OWCP No.: 08-131230

In the Matter of:

**RUSSELL J. DESELLE, JR.,
Claimant**

v.

**CENTRAL GULF SHIPYARD, LLC.
Employer**

and

**LOUISIANA WORKERS' COMPENSATION CORP.,
Carrier**

APPEARANCES:

AARON J. ALLEN, ESQ.
On Behalf of the Claimant

DAVID K. JOHNSON, ESQ.
On Behalf of the Employer/Carrier

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act),¹ made by Claimant against Employer and Carrier.² The matter was referred to the Office of Administrative Law Judges for a formal hearing on 14 Sep 11. All parties were represented by counsel. On 25 Apr 12, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:³

Witness Testimony of
Claimant

Exhibits⁴

Joint Exhibit (JX) 1
Claimant's Exhibits (CX) 1-43⁵
Employer's Exhibits (EX) 1-4

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

FACTUAL BACKGROUND

On 20 Aug 08, Claimant was injured while working for Employer when he was struck by a hatch cover. He initially complained of lumbar and leg pain, underwent extensive treatment, including surgery, and has not worked since 23 Aug 08.

STIPULATIONS⁶

1. Claimant was acting in the course and scope of his employment when he injured his lower back on 20 Aug 08. There was an employer-employee relationship and the circumstances were such that any consequential injury would be within the coverage of the Act.
2. There was timely notice (as to a lumbar injury), claim, and controversion.
3. Since 23 Aug 08, Claimant has remained unable to return to his original job, or any other gainful employment.

¹ 33 U.S.C. §§901 *et seq.*

² Hereinafter collectively referred to as "Employer."

³ I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

⁴ Counsel were cautioned that since a number of exhibits (specifically CX-6, 30-31) appeared to be *en globo* collections of records or witnesses who also appeared live, counsel must cite during the hearing or in their post-hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision will be based. Tr. 5-6.

⁵ CX-44 contains digital copies of depositions also marked as CX-25-33.

⁶ JX-1; Tr. 8-12.

4. Claimant has not reached maximum medical improvement and has been temporarily totally disabled (TTD) since 23 Aug 08.
5. Employer paid Claimant weekly TTD benefits of \$504.79 from 23 Aug 08 to 6 May 11 and \$272.16 from 7 May 11 and continuing.
6. Informal conferences were held on 14 Jul 11 and 23 Aug 11.

ISSUES IN DISPUTE & POSITIONS OF THE PARTIES

Claimant argues that he also sustained cervical injuries in the accident on 20 Aug 08 and seeks reimbursement for medical expenses incurred in the treatment of those injuries, along with an order to provide future medical care as required by the Act. Employer counters that any cervical injuries were not sustained in the course of his employment and maintains it has no liability to provide medical treatment for that condition. Claimant and Employer also dispute the correct calculation of the applicable average weekly wage.

LAW

Causation

Section 2(2) of the Act defines “injury” as “accidental injury or death arising out of and in the course of employment[.]”⁷ In the absence of substantial evidence to the contrary, it is presumed the claim of an employee comes within the provisions of the Act.⁸ The presumption takes effect once a claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.⁹

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which *could have caused* the harm or pain.¹⁰ These two elements establish a *prima facie* case of a compensable injury supporting a claim for compensation.¹¹

⁷ 33 U.S.C. §902(2).

⁸ 33 U.S.C. §920(a).

⁹ *Gooden v. Dir., OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998).

¹⁰ *Id.*, citing *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 331 (1981), *aff'd sub nom. Kelaita v. Dir., OWCP*, 799 F.2d 1308 (9th Cir. 1986).

¹¹ *Id.*

A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption.¹² The presumption does not apply, however, to the issue of whether physical harm or injury occurred¹³ and does not aid the claimant in establishing the nature and extent of disability.¹⁴

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that the claimant's condition was not caused by his working conditions, nor aggravated, accelerated, or rendered symptomatic by them.¹⁵ "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion.¹⁶ The employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).¹⁷

When the claimant alleges aggravation of or contribution to a preexisting condition, the employer has to establish that the claimant's condition was not caused or aggravated by that employment.¹⁸ Employers accept their employees with the frailties and conditions that predispose them to bodily injury.¹⁹ The testimony of a physician that no relationship exists between an injury and claimant's employment, however, may be sufficient to rebut the presumption.²⁰ The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption.²¹

To establish the injury is work-related, the claimant does not have to prove the employment-related dangers or exposures were the sole or even predominant cause of his injury.²² "Under the 'aggravation rule,' where an employment-related injury combines with, or contributes to, a preexisting impairment or underlying condition, the entire resulting disability is compensable and the relative contributions of the work-related injury and the preexisting condition are not weighed to determine claimant's entitlement."²³

¹² See *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Dir., OWCP*, 681 F.2d 359 (5th Cir. 1982).

¹³ *Devine v. Atl. Container Lines, G.I.E.*, 25 BRBS 15, 19 (1990).

¹⁴ *Holton v. Indep. Stevedoring Co.*, 14 BRBS 441, 443 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112, 119 (1979).

¹⁵ See *Gooden*, 135 F.3d at 1068; *Conoco, Inc. v. Dir. [Prewitt]*, 194 F.3d 684, 690 (5th Cir. 1999), citing *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986).

¹⁶ *Avondale Indus. v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1988), citing *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988); see also *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 287 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of the evidence").

¹⁷ See *Smith v. Sealand Terminal, Incl.*, 14 BRBS 844, 845-46 (1982).

¹⁸ *Rajotte v. General Dynamics Corp.*, 18 BRBS 85, 86 (1986).

¹⁹ *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-48 (D.C. Cir. 1967).

²⁰ See *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129-30 (1984).

²¹ *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 15, 20 (1995).

²² See *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966).

²³ *Johnson v. Ingalls Shipbuilding, Inc.*, 22 BRBS 160, 162 (1989), citing *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986).

The mere existence of a prior injury does not establish that the current condition is a result of that injury or that the preexisting condition was not aggravated by the work accident.²⁴ “Whether circumstances of...employment combined with [a claimant’s] disease so to induce an attack of symptoms severe enough to incapacitate him or whether they actually altered the underlying disease process is not significant. In either event his disability would result from the aggravation of his preexisting condition.”²⁵

Once an employer offers sufficient evidence to rebut the presumption, it is overcome and no longer controls the outcome of the case.²⁶ If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.²⁷

Medical Benefits

Section 7 of the Act provides that the employer shall furnish such medical treatment as the nature of the injury and process of recovery may require.²⁸ For a medical expense to be assessed against the employer, it must be reasonable and necessary.²⁹ A claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.³⁰

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant’s average annual earnings,³¹ which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed toward establishing a claimant’s earning power at the time of injury.³²

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage.³³ Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year.³⁴ Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

²⁴ *Banks v. Service Employers Int’l, Inc.*, (Unpublished) BRB No. 06-0486 (March 14, 2007).

²⁵ *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389 (1st Cir. 1981).

²⁶ *Noble Drilling Co. v. Drake*, 795 F.2d at 481.

²⁷ *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 262 (4th Cir. 1997).

²⁸ 33 U.S.C. § 907(a).

²⁹ *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).

³⁰ *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984).

³¹ 33 U.S.C. § 910(a)-(c) (2011).

³² *SGS Control Servs. v. Dir.*, *OWCP*, 86 F.3d 438, 441 (5th Cir. 1996).

³³ 33 U.S.C. § 910(a) (2011).

³⁴ 33 U.S.C. § 910(b) (2011).

If neither of these two methods “can reasonably and fairly be applied” to determine an employee’s average annual earnings, then Section 10(c) is appropriate.³⁵

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] can not reasonably and fairly be applied, such 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 the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.³⁶

According to the language of the Act, administrative law judges have broad discretion in determining annual earning capacity under subsection 10(c).³⁷ The objective of subsection 10 is to reach a fair and reasonable approximation of a claimant’s wage-earning capacity at the time of his injury.³⁸ Section 10(c) is used where a claimant’s employment is seasonal, part-time, intermittent, or discontinuous.³⁹

In calculating annual earning capacity under subsection 10(c), administrative law judges may consider: the actual earnings of the claimant at the time of injury,⁴⁰ the claimant’s earning capacity over a period of years prior to the injury;⁴¹ or may multiply claimant’s wage rate by a time variable⁴² and consider all other sources of income,⁴³ overtime,⁴⁴ vacation and holiday pay,⁴⁵ probable future earnings of claimant (in extraordinary circumstances),⁴⁶ or any other fair and reasonable representation of the claimant’s wage-earning capacity.⁴⁷ A worker’s average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year’s earnings if a calculation based on the wages at the

³⁵ *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

³⁶ 33 U.S.C. § 910(c) (2011).

³⁷ *Hicks v. Pac. Marine & Supply Co., Ltd.*, 14 BRBS 549, 550 (1981).

³⁸ *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244, 249 (1976).

³⁹ *Gatlin*, 936 F.2d at 822.

⁴⁰ 33 U.S.C. § 910(c) (2011); *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac’d in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-45 (1988).

⁴¹ *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58, 61 (1976) (all the earnings of all the years within that period must be taken into account).

⁴² *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 465 (1981); *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283, 287 (1980) (if this method is used, it must be one that reasonably represents the amount of work that normally would have been available to the claimant).

⁴³ *Harper v. Office Movers/E.I. Kane Inc.*, 19 BRBS 128, 130 (1986) (additional sources of income are properly considered when the claimant’s ability to earn wages in both the covered job and the other job was affected by the work-related injury); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052, 1057 (1978).

⁴⁴ *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981).

⁴⁵ *Sproull v. Stevedoring Servs. of Am.*, 25 BRBS 100, 105 (1991).

⁴⁶ *Walker v. Wash. Metro. Area Transit Auth.*, 793 F.2d 319, 321, (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987).

⁴⁷ *See generally, Flanagan Stevedores, Inc. v. Gallagher, Dir. OWCP*, 219 F.3d 426, 434 (5th Cir. 2000).

employment where he was injured would best reflect his earning capacity at the time of the injury.⁴⁸

EVIDENCE

*Claimant testified at hearing in pertinent part:*⁴⁹

He has lived in New Iberia, Louisiana approximately ten years. He was born in July of 1971 and finished the twelfth grade. After school, he started working as a welder and has done that just about all his life. The last two companies he worked for were R & R Electric and Employer. At R & R Electric he was a welder/fitter. It was the same at Employer, except it was off-field work compared to boat work. He had to have his own equipment on those jobs. It included all his personal hand tools, welding machines, torches, and anything that had to do with welding or the completion of these jobs. Welding requires a lot of awkward positions and awkward lifting no matter what. He had to wear a welding hood and keep his head fixed in the same position watching the weld for long periods of time. He had to do heavy lifting. He is right-handed.

Since 2000, there were periods when he was a regular W-3 wage employee, but for the bulk of that period of time, he worked as an independent contractor. He would say that he worked for one or two hundred employers during that period of time.

The opportunity to work depends on the employer's workload. If an employer ran out of work, he could go straight from them to someone else, depending on how worn out he was. He didn't file his tax returns for 2000 to 2008 until 2011. They show that his income varied. That could be because there's no work, but it can also be because cash jobs don't show up on his taxes. He was affiliated with enough people that he had no problems getting work and never had a situation where he couldn't get work. If there is no income in the tax records, either he was taking time off because he didn't want to work or he was on a cash job. There's no record of the cash jobs. He can't say how many cash jobs he has been on or how much he made off those jobs. He doesn't know about the formalities of filling out the tax forms. He just gave his documents to the advisor and picked them up completed. She knew how to do taxes. He obviously hadn't filed them and wasn't aware that it was such an important thing. Now he realizes how important it is.

He was a contract worker for Employer. When he got a check, they didn't take any taxes out. Employer would give him an invoice for each day's job. There are about eight from the last week he worked for them. The last several days don't have any kind of equipment rental. The reason for that is when those invoices were filled out, they were in a hurry and just filled them out. They didn't require him to break down his equipment rental. That's something that they did as contract laborers for tax purposes. Part of what he got paid was for the personal equipment he was using. They were required to have tools to do the job. He had to have all that equipment and be ready to go. He normally figured something

⁴⁸ *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882, 886 (1981).

⁴⁹ Tr. 21- 53.

like about three-quarters for equipment and one-quarter for wages. Employer let him break it up anyway he wanted.

He could work when he wanted to work and if he got tired he could go to another job because of the type of work. It's not very clean, strenuous work. He couldn't miss work on a regular basis and just disappear without letting anybody know because he wouldn't have a job when he came back. But it was up to him when he wanted to work. When he wanted to go to work or needed a job, he'd go ask them if they needed a welder and if they did, he started to work. He worked until he got enough of it and then would go somewhere else and continue working. He could come and go as he pleased.

Before his accident, he was in good health and had no problems with his low back, leg, shoulder, or neck. He did suffer from diabetes.

The last job he had was in Galveston at the dock for Laredo. He did not bring his own welding unit for that particular job. He was paid \$34.00 per hour, \$40.00 with per diem. The \$34.00 an hour required him to use some of his own equipment. He did not get sick leave, vacation pay, 401K, or life insurance.

He had been on the Dularge four or five days before he got hurt. He thinks they got there on a Monday and went home on Thursday or Friday. It happened in August of 2008, and he hasn't worked since then. He was moving out of the rain, carrying a piece of pipe moving from one area to another. The wind started blowing harder and harder. A hatch door flew up and he twisted so it wouldn't hit him in the face. The hatch struck him in the middle back and the right shoulder. He did not immediately seek medical treatment after the accident.

It happened on a Friday and when the job was completed the following day, he proceeded home. When he got to work on Monday, he informed the foreman that he was hurting and needed to go to the doctor. They sent him to Dr. Bernard. He was hurting in the lower back, in the leg quite a bit, and at the impact spot. He just thought that was from being bruised, from being hit at that particular time. His lower back and leg were hurting him a lot worse. He didn't mention anything about his shoulder, neck, or arm to Dr. Bernard. He thought it was from just the impact. He didn't fully understand what was going on, but had been hit several times before, and thought that this pain was from being struck. Dr. Bernard prescribed medication that helped to reduce the symptoms all over his body. He treated for a while with Dr. Bernard and then went to Dr. Cobb. The doctors prescribed conservative treatment, medications, and therapy for his back and leg.

The physical therapist pushed him too hard. It was hurting more than it was doing good. In his physical therapy they were working on his legs and back and never proceeded past that. When he was getting a massage, he would ask the lady to rub his neck, but didn't say it was injured in the accident. His neck, shoulder, arm, lower back, and leg were all hurting. He was carrying himself in a crooked, bent position to accommodate his back and leg. He thought his upper back was hurting from not being able to hold his posture correctly. The lower pain was ten out of ten and the upper pain was a four out of ten.

It's hard to say how consistent the neck pain was before the surgery because his lower back and leg were hurting and he was taking pain medication. It was hurting so bad that he wasn't worrying about anything else except that lower back and that leg. He was always bent over and crooked, not standing up in a straight position. The neck pain was always there.

When he had his functional capacity evaluation, he told them his neck, leg, back, and arm were hurting. The functional capacity evaluation was before his surgery. He did not come out and say his neck was hurting. His whole body was hurting from the things they were making him do.

He ultimately had surgery by Dr. Cobb in March 2010. After the surgery, his leg and lower back didn't hurt nearly as much. He was able to straighten up. It became apparent something was wrong in his upper extremities and it just hasn't gone away. He has minimum usage of his left arm and his left arm is smaller and weaker than his right arm. There's no comparison of what he can do with his right arm compared to his left arm.

He has not been involved in any other accident that caused or increased any pain in his shoulder or shoulder blade since the work accident. He was in a traffic accident, but it didn't affect the pain in his neck, back, or shoulder. It didn't affect anything.

It is hard for him to get comfortable, and to sleep or sit in one spot for a long time in a fixed position. He has loss of strength, loss of usage, severe headaches, and is grouchy and mean to people that don't deserve it.

He last saw Dr. Bernard in September or October of 2011. He is taking two different types of pain medication, Lortab and Paxil. He has been taking Lortab since just about accident. There were times in between doctors he didn't have a prescription, but for the most part, he has been taking it since the accident. The first time he mentioned the neck and shoulder and arm pain was to Dr. Cobb, after the lower back surgery. He explained the same he has done today. That was a little time after the surgery. He doesn't know exactly, but four, five, or six months might be fair.

Since the back surgery, he is paying attention to the neck pain. Dr. Cobb instructed him to do all he can and said the best therapy was self-therapy.

He saw Dr. Cuadra at the Headache and Pain Center before the surgery. After the surgery the Carrier sent him to see Dr. Paul Fenn. The Department of Labor sent him to see Dr. Stanley Foster.

Employer's records state in pertinent part:⁵⁰

Claimant applied to work for Employer on 18 Jul 07 and stated he had last worked there 3 to 4 years before. On 20 Aug 08, wind reportedly had picked up a plywood hatch and struck him on the right shoulder.

Doctor Douglas Bernard testified at deposition and his records and reports state in pertinent part:⁵¹

He is a board-certified orthopedic surgeon. On 26 Aug 08, Claimant came to his clinic and was seen by his physician's assistant (PA). His complaint was low back pain. There was no complaint of cervical pain. X-rays taken showed degenerative changes at L4-5 and degenerative changes with spurring at L5-S1. Claimant was given medication and told to return in a week. A week later Claimant returned to see the PA, but there was no change.

On 9 Sep 08, Claimant presented and reported that his lower back had been injured when he was struck and twisted by windblown plywood. Claimant also related that initially he was okay, but by a few days later, the pain was unbearable. Claimant complained of lower back pain, a cold feeling, and pain in his left thigh. He conducted a physical examination, drew the impression that Claimant had lower back pain with longstanding degenerative disc disease, prescribed pain medication, and recommended an MRI. Claimant expressed no cervical complaints. He did not note any restricted cervical motion.

A MRI on 12 Sep 08 showed degenerative disc disease, but no indication of significant canal or foraminal stenosis at any level. He believed the best thing was for Claimant to try to go back to work and see how he did.

On 13 Oct 08, Claimant returned and said he had not returned to work, although the work boots he was wearing were sandy. Claimant said he went to camp for the weekend, but everything was the same. He believed Claimant should try to go back to work, but Claimant said he was going to be seen elsewhere. That was the last time he saw Claimant.

He never observed anything to indicate a cervical problem. Based on the absence of any complaints and the description of the accident, he does not think the accident caused a cervical injury. He thinks it is unlikely that the lumbar problems and treatment would have masked a cervical injury.

⁵⁰ CX-1-2.

⁵¹ CX-8, 14, 28.

Doctor Adolfo Cuadra testified at deposition and his records and reports state in pertinent part:⁵²

He is board-certified in pain management and anesthesiology. On 16 Oct 08, Claimant presented on referral from Dr. Cobb complaining of excruciating lower back pain radiating into the left leg after having been struck and twisted by flying debris at work. Claimant did not indicate any complaints of headaches or neck, shoulder, or arm pain. He did provide a history of diabetes and depression. He reviewed Claimant's 12 Sep 08 MRI and noted foraminal stenosis at multiple levels. He drew the impression of symptomatic lumbar radiculopathy and performed a steroid injection.

On 23 Oct 08, 11 Nov 08, 20 Nov 08, 4 Dec 08, 5 Feb 09, 3 Mar 09, and 4 Apr 09, Claimant complained of lower back and leg pain, but not of neck pain. Claimant underwent a total of four steroid injections that gave him short-term relief. In March 2009, Claimant was off medications and said he was ready to return to work. He recommended Claimant have a functional capacity evaluation (FCE) and cleared Claimant for maximum lifting. He reviewed the FCE report and believed it was an accurate assessment.

An EMG showed evidence of lumbar and diabetic neuropathy and he recommended a blood test to see if there were any issues with diabetic control. On 12 May 09, Claimant reported that the blood test had not been done, but that Dr. Cobb would be performing a foraminotomy.

The last time he saw Claimant was on 19 May 09. Claimant never made any cervical or upper extremity complaints. It is possible that during the period that Claimant was taking pain medication for his back pain, the medication may have also diminished any other body part pain, including the neck. Diabetic neuropathy would be expected to be bilateral and classically in the feet and ankles. Claimant did have peripheral neuropathy that is associated with diabetes along with bilateral findings on EMG.

Doctor John Cobb's records and reports state in pertinent part:⁵³

On 1 Apr 09, Claimant complained of lower back and leg pain. On 20 Jul 09, Claimant complained of lower back and leg pain, for which he recommended surgery.

On 19 Jul 10, at a follow-up visit after lumbar spine surgery, Claimant reported neck pain associated with occipital headaches that radiated into his left arm. He noted significant atrophy of Claimant's left arm. Claimant explained that the pain had been present off and on for some time, but had recently significantly worsened. He recommended a cervical MRI.

⁵² CX-9, 26.

⁵³ CX-6 (as cited, see n.4), 14, 18.

On 2 Mar 11, Claimant continued to report neck and left shoulder pain. A 14 Feb 11 MRI showed narrowing and bulging of the disc at C3-4 and central spondylosis with annular disruption at C4-5. He recommended steroid injections. The injections were not authorized by the Employer

On 13 Apr 11, Claimant complained of continuing neck and shoulder pain, with the left beginning just recently. Claimant also reported depression because of the inability to work. He prescribed Paxil for depression.

On 6 Jun 11, Claimant returned unchanged and he recommended injections and then surgery if they did not provide adequate relief.

On 21 Sep 11, Claimant reported that an injection on 26 Jul 11 did not help much and he recommended cervical surgery.

Doctor Louis Blanda testified at deposition and his records and reports state in pertinent part:⁵⁴

He is a board-certified orthopedic surgeon and took over care for Claimant from Dr. Cobb, with whom he shared a practice. He had a chance to review all of Dr. Cobb's notes and Claimant's history.

Claimant started treating with Dr. Bernard for low back pain, but when he was told he should go back to work, he wanted to see a different doctor. He retained an attorney, who sent him to Dr. Cobb.

Claimant presented to Dr. Cobb with complaints of low back and leg pain. Dr. Cobb reviewed MRIs, diagnosed disc disease, and recommended steroid injections, which did not provide lasting relief. Eventually, in March 2010, Dr. Cobb did lumbar surgery on Claimant. The normal recovery time for that surgery would be six months to a year and he thinks Claimant would have reached maximum medical improvement for the lumbar condition between September 2010 and April 2011.

In July 2010, Claimant began complaining of headaches and pain in his neck, shoulder and left arm. Dr. Cobb noted atrophy of the left arm and ordered an MRI. Claimant continued to complain of cervical pain. An MRI was eventually done and showed disc protrusion with narrowing at C3-4 and 4-5. Claimant reported symptoms of depression and was prescribed Paxil. The last time Dr. Cobb saw Claimant was on 21 Sep 11, when he recommended anterior cervical discectomy and fusion at C3-4 and 4-5.

He took over and saw Claimant for the first time on 9 Dec 11. He reviewed Claimant's history and MRI and then performed a physical examination. He believed Claimant's low back was doing well and the neck problems were related to trauma, but wanted more imaging studies. He agreed with Dr. Cobb's assessment. The cervical disc problems, even if preexisting, could have been aggravated or made symptomatic by the accident

⁵⁴ CX-7, 25.

Claimant described and the cervical symptoms could have been minimized by the pain medications Claimant was taking for the low back. Two years would have been a long time for the cervical pain to be masked, but, depending on the patient, not impossible. The atrophy detected by Dr. Cobb would have taken place long before Claimant reported the symptoms. It was a little unusual that the first note of any muscle spasm in the neck was in December 2011, but it may have been there, but not reported. If Claimant really had no symptoms until 2009 and they truly were of recent origin, then he would not connect the symptoms and the accident at work.

He doesn't believe diabetic neuropathy is the cause of Claimant's cervical or lumbar pain. Unless a myelogram and CT scan do not show any additional problems, he believes Dr. Cobb's recommendation of an anterior cervical discectomy and fusion at C3-4 and 4-5 is reasonable. However, depending on what the problem ultimately turns out to be, that surgery might not improve Claimant's symptoms. He would want to see the myelogram and rule out a nerve problem to the biceps before doing the cervical surgery. He doesn't think the triceps atrophy is related to the cervical levels they are considering for surgery.

Claimant had bilateral hand numbness, which a fair number of diabetics report. Claimant's blood sugar levels were out of control for almost a year and that would weigh in favor of finding that the numbness was related to diabetic neuropathy. He tends to believe theories that say that smoking and diabetes can cause early disc degeneration because they impact circulation. The MRI finding of mild disc bulging and many cervical levels would suggest a medical condition causing degeneration, but would also have been more susceptible to aggravation by trauma. The degeneration also can make recovery more difficult.

Claimant complained of bilateral shoulder pain and there was indication of impingement syndrome and bursa inflammation. Neither of those would have been related to cervical disc problems or his 2008 work accident.

He might be a little surprised to hear that Claimant had not missed a season of hunting deer since his work accident in 2008, but then some handicapped people in wheelchairs go deer hunting.

Iberia Therapy forms and reports state in pertinent part:⁵⁵

Claimant completed a total of nine visits for lower back pain.

Doctor Paul Fenn testified at deposition and his records and reports state in pertinent part:⁵⁶

He is a board-certified orthopedic surgeon. On 2 Mar 11, he conducted a medical evaluation of Claimant at the request of Employer. He obtained a history from Claimant; reviewed records from Dr. Bernard, Dr. Cuadra, and Dr. Cobb; reviewed Claimant's

⁵⁵ CX-16.

⁵⁶ CX-13, 32.

X-rays and MRIs; and conducted a physical examination, including X-rays. Claimant reported a history of lumbar and cervical pain after a work accident on 20 Aug 08. The examination was generally normal and he noted no atrophy in the hands or arms. His assessment was that Claimant had lumbar and cervical spondylosis, bulging cervical discs, and diabetic peripheral neuropathy. He thought Claimant had had an excellent result from the lumbar surgery and recommended physical therapy and possible steroid injections for the cervical problems. He also recommended tobacco cessation and better diabetes management, since he believed Claimant's current condition was related to a chronic degenerative process that was in turn related to his diabetes and tobacco use, rather than specific trauma or herniation. He did not believe surgery was indicated.

He understands both Dr. Cobb and Dr. Foster found atrophy, but he did not. Atrophy would not have come and gone and can't be faked. He would have expected weakness to accompany atrophy and noted no weakness. Even if there was atrophy, the biceps do not necessarily relate to the nerve levels being considered for decompression. He would have expected to see involvement at C5-6.

He agrees with Dr. Cobb in the diagnosis of cervical spondylosis and degenerative disc changes and that the diabetes Claimant clearly has may or may not be contributing to the cervical problems. He agrees with Dr. Foster's and Dr. Cobb's diagnoses of cervical degenerative disc disease with multilevel changes; left side stenosis; and narrowing at C4-5 with associated bulging, possible nerve irritation, and annular destruction. He found nothing inconsistent with a foraminal narrowing at C3-4 due to disc bulging facet joint hypertrophy.

He does not see instability or any absolute indicators that call for surgery and notes that the pain complained of does not match the cervical level of stenosis. He thinks the fact that the cervical changes are mild and similar from level to level is an indication of degeneration rather than trauma. He saw no indication of trauma and would have expected Claimant to report the cervical problems within a couple of weeks of the accident. Being struck as Claimant described could have caused his cervical condition to become symptomatic. It is possible for minor symptoms to be masked by pain medications for another condition. It is also possible for a pathology, particularly in a diabetic, to progressively become more serious.

He would think it would be reasonable to try injections at C3-4, and if they afforded temporary relief, then surgery at C3-4 and C4-5 would be a possible course of treatment. The most common presentation of diabetic neuropathy is in the feet and legs and Claimant did not report that. However it can be present anywhere.

Although many things are possible in regards to an aggravation by the accident in 2008, he would have expected a fresh complaint and he believes the accident did not result in a traumatic cervical injury.

Doctor W. Stan Foster testified at deposition and his records and reports state in pertinent part:⁵⁷

His is a board-certified orthopedic surgeon. At the request of the Department of Labor, he conducted an independent medical examination of Claimant on 18 Jul 11. He took a history from Claimant, who said he had been struck between the shoulders by a piece of plywood on 20 Aug 08. Claimant reported a history of lumbar back pain and surgery, but complained that his biggest problem was in his neck and shoulders. Claimant reported the problems had existed on and off since the accident, but become more severe when his lumbar problems diminished. He reviewed Claimant's medical records and conducted a physical examination. He noted weakness and atrophy in the left biceps and triceps. He concluded that Claimant was doing well following lumbar surgery, but had cervical degenerative disc disease with multi-level changes and left side stenosis with involvement at C3-4, 4-5, and to a lesser extent 5-6. He recommended EMGs to identify specific levels before undertaking surgery. He thought it was possible based on Claimant's reported history, the cervical pain was off and on since the accident and the accident could have been a cause, but it also could be the progression of his normal degenerative changes over time.

He does not believe that Claimant has carpal tunnel syndrome. If Claimant had no cervical problems until two years after the accident, then he would not think the cervical problems were related to the 2008 accident. The accident as described by Claimant could have caused the degenerative condition to become symptomatic and pain medications for the lumbar could have masked cervical pain. The left arm atrophy and weakness correlate with the imaging studies. C3-4 and 4-5 surgery is reasonable, but he would include C5-6.

In April, 2012, he opined that even though his review of the EMGs do not show any radicular findings or anything to explain the left side atrophy and weakness, based upon Claimant's description of the 2008 accident, he relates the upper extremity and cervical pain to that trauma.

Paul Fontana testified at deposition and his records and reports state in pertinent part:⁵⁸

On 14 Apr 08, he conducted a functional capacity evaluation of Claimant at the request of Dr. Cuadra. Claimant reported a dull ache in the center of his low back and pain in his left leg. Claimant did not report any cervical pain or indicate he was limited in cervical movements. Claimant demonstrated full range of motion and did nothing to indicate he had any cervical or left upper extremity problems. Left side limitations were related to his back and leg.

⁵⁷ CX-10, 44; EX-4.

⁵⁸ CX-12, 27.

Rory Hebert testified at deposition and Employer's payroll records show in pertinent part:⁵⁹

He works as the superintendent of the yard for Employer. The employees working on the job Claimant was assigned to on 20 Aug 08 were paid a \$40 per diem and an hourly rate. The rate varied with the specific task and included an equipment rental reimbursement. He was injured in the same accident, but did not see Claimant struck by the plywood. CX-3 shows all of the money Claimant earned working for Employer.

Claimant worked for about a month in 2005, but not again until for about month in September 2007. Claimant did not work again until February, 2008. Contract welders' work is intermittent and some periods are slower than others. He does not know what Claimant was doing during the gaps with Employer.

In the year leading up to his injury, Employer paid Claimant \$30,706.13.

Theresa Latiolais testified at deposition and Claimant's tax and social security records show in pertinent part that:⁶⁰

She is an IRS-registered tax preparer. In the summer of 2011, Claimant came into her office and told her he needed to do taxes from 2000 to 2008. He had some sort of printed document, but had no 1099s, W-2s, or expense documentation. She told him to get earnings information from the IRS sent to her. IRS did send her his account transcripts to work with. He had no documents to help calculate his expenses, but said he needed the returns as quickly as possible, so he just gave her expense information to use. She does not know if the expense information was accurate. She basically tried to build expenses to zero out the part of the amounts he was paid that were identified as rental expense reimbursement. She would say that had he actually tracked his expenses his actual net income would have been lower, which would have helped him, tax-wise. Normally, employers pay more in rental reimbursement than in nonemployee compensation. They do not have to pay workman compensation premiums on rental reimbursement.

For tax purposes, in 2007, Claimant reported gross business earnings of \$66,769 and a net business income of \$51,787. In 2006, it was \$62,831 and \$51,124, and in 2008, \$31,827 and \$21,693.

Claimant's Social Security earnings for 2006 were \$18,911 and for 2007, \$51,283.

⁵⁹ CX-3, 29. This deposition was taken in a companion suit in district court and although with attachments it consumed hundreds of pages, it offered only a few scattered pages of any probative value as to any contested issue. The fact that it may have taken little of counsel's time to copy, mark, and offer, rather than identify and extract the relevant information, does not justify the judicial resources it took to review the entire document.

⁶⁰ CX-4-5, 33; EX-1.

ANALYSIS

Causation

The parties' primary dispute is whether or not Claimant's cervical and upper extremity problems are causally linked to his August 2008 accident. In order to establish a *prima facie* case and invoke the presumption of causation, Claimant needs to establish the fact of an injury and accident, and offer evidence that his injury could have been caused by the accident. The record leaves no doubt that Claimant has a cervical injury and that he was struck in the back by plywood while working for Employer on 20 Aug 08. Dr. Blanda's opinion that the accident could have aggravated or made Claimant's preexisting cervical problems symptomatic is sufficient to establish the presumption and place upon Employer the burden of offering rebuttal evidence.

Dr. Fenn conceded that many things are possible in regards to an aggravation by the accident in 2008, but would have expected a fresh complaint and testified that he believes the accident did not result in a traumatic cervical injury. He believed Claimant's current condition was related to a chronic degenerative process that was in turn related to his diabetes and tobacco use, rather than specific trauma or herniation. That is sufficient to rebut the presumption and place the burden on the Claimant to establish causation by a preponderance.

The most significant factor weighing against a finding of causation is the absence of any cervical complaint for an extended period. However, the doctors all noted with varying degrees of confidence that the cervical pain could have been masked by the lumbar pain and systemic pain medications Claimant was taking for it. The medical evidence also established that Claimant's cervical problems could be a result of degenerative disease combined with diabetes and tobacco use. There are inconsistencies with each of the alternatives. The absence of a fresh complaint, the symptoms that did not present as classic diabetic neuropathy, and the unilateral atrophy were factors that the doctors had to consider.

Dr. Bernard and Dr. Cuadra did not find any reason to believe Claimant suffered a cervical injury, but their assessments are marginally less probative because they never saw Claimant after he began to complain of his cervical pain. Dr. Cobb never really directly addressed causation. As primary treating physician, Dr. Blanda allowed that if Claimant really had no symptoms until 2009 and the cervical problems truly were of recent origin, then he would not connect the symptoms and the accident at work. Nonetheless, he appears to arrive at the probability that there was some aggravation. Dr. Fenn rejects that relation of the upper extremity and cervical pain to that trauma, but he is not a treating physician and saw Claimant only one time, as did Dr. Foster, who conducted an independent medical evaluation for the DOL. Dr. Foster ultimately reported that he relates the upper extremity and cervical pain to that trauma.

The evidence is very close on the issue but given the very minimal aggravation standard of the Act, I find that the record shows that, more likely than not, the trauma of 20 Aug 08 played some role in the aggravation or symptomizing of Claimant's cervical condition.

Medical Benefits

Setting aside the issue of causation, there is not a major disagreement in the medical opinions as to what care is reasonable, appropriate, and necessary. Given Dr. Blanda's status as treating physician, I find reasonable his recommendations that Claimant first undergo a myelogram and CT scan to determine if any additional problems contraindicate anterior cervical discectomy and fusion at C3-4 and 4-5. If not, then that surgery is also appropriate.

Average Weekly Wage

Contrary to Claimant's argument, he was not a five- or six-day worker whose AWW is properly calculated under Section 10(a). His testimony and the pay records from Employer demonstrate that his work was intermittent. Due in large part to Claimant's efforts to evade taxes for the better part of a decade, an accurate and detailed earning and expenses record is not available.⁶¹ Based on the tax returns he signed and submitted, he earned \$21,693 in the 33 weeks leading up to his injury in 2008. He earned \$51,787 in the 52 weeks of 2007. Under Section 10(c), taking the year before his injury seems to be a reasonable approximation of his earning capacity at the time. Prorating the 2007 earnings in order to capture a total of 52 weeks yields \$18,922.17,⁶² which, when combined with his 2008 earnings, equals \$40,615.17 of earnings for the 52 weeks leading up to his injury. That in turn results in an average weekly wage of \$781.06.

ORDER AND DECISION

1. Claimant injured his lumbar and cervical spine while working for Employer on 20 Aug 08.
2. His average weekly wage (AWW) at the time of his injury was \$781.06.
3. As a result of the injury, Claimant has been temporarily totally disabled from 23 Aug 08 to the present and continuing.
4. Employer shall pay Claimant temporarily total disability (TTD) benefits for that period, based on his AWW.
5. Employer has paid Claimant weekly TTD benefits of \$504.79 from 23 Aug 08 to 6 May 11 and \$272.16 from 7 May 11 and continuing.
6. Employer shall receive credit for any compensation heretofore paid, as and when paid. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.⁶³

⁶¹ Claimant is correct in observing that his failure to file or pay taxes is not a basis for decreasing disability benefits to which he is otherwise entitled. On the other hand, his disingenuous explanation that he did not realize filing tax returns was important certainly indicates that financial gain is a significant factor to consider in assessing his honesty. In any event, he is fortunate that his credibility was not a significant factor in the case, given the other evidence and comprehensive stipulations.

⁶² $19/52 \times \$51,787$.

⁶³ 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

7. Employer is responsible for all past and future necessary, reasonable, and appropriate medical expenses related to Claimant's work injury according to Section 7 of the Act, to specifically include reimbursement for past medical expenses related to his cervical injuries as well as future care as recommended by Dr. Blanda.⁶⁴
8. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorneys' fees.⁶⁵ 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. In the event Employer elects to file any objections to said application, it must serve a copy on Claimant's counsel, who shall then have fifteen (15) days from service to file an answer thereto.
9. The parties have 30 days from the receipt of this order to submit any other issues for adjudication or to request a remand for the resolution of those matters at the District Director's level.

ORDERED this 16th day of November 2012 at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267, 271 (1984).

⁶⁴ That includes the Paxil prescription, which the record shows was for treatment of depression related at least in part to his spinal injuries.

⁶⁵ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524, 527 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 823 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director.