

**U.S. Department of Labor**

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**Issue Date: 15 June 2012**

**CASE NO.: 2011-LHC-1562**

**OWCP NO.: 07-186182**

**IN THE MATTER OF:**

**KENNETH L. DIXON**

**Claimant**

**v.**

**HUNTINGTON INGALLS INCORPORATED**  
*(Avondale Operations)*

**Employer**

**APPEARANCES:**

**ROBERT J. YOUNG, III, ESQ.**  
**For The Claimant**

**FRANK J. TOWERS, ESQ.**  
**For The Employer**

**Before: C. RICHARD AVERY**  
**Administrative Law Judge**

**DECISION AND ORDER**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.*, (herein the Act), brought by Kenneth L. Dixon (Claimant) against Huntington Ingalls, Inc. (Avondale Operations) (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing, which was conducted on March 5, 2012, in Covington, LA. Each party was represented by counsel, and each presented documentary evidence, examined and cross-examined the witnesses, and made oral and written arguments.<sup>1</sup> The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibit 1, and Employer's Exhibits 1-19.<sup>2</sup> This decision is based upon a full consideration of the entire record.

Based upon the stipulations of Counsel, the evidence introduced, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

### STIPULATIONS

The parties stipulated (JX-1), and I find:

1. The LHWCA, 33 U.S.C. § 901 *et seq.*, as amended, applies to this claim.
2. Claimant injured his chest on July 28, 2009.
3. The injury occurred at Huntington Ingalls, Inc., Avondale Facility.
4. The injury arose out of and in the course of Claimant's employment with Employer.
5. There was an Employer/Employee relationship at the time of the injury.
6. Employer was timely notified of the injury.
7. The claim was timely filed.
8. The Notice of Controversion was timely filed.
9. The Informal Conference was conducted on April 12, 2011.
10. Claimant's Average Weekly Wage at the time of the injury was \$856.04.

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<sup>1</sup> The parties were granted time to file post-hearing briefs.

<sup>2</sup> References to the transcript and exhibits are as follows: Claimant's Exhibits: EX-\_\_\_; Employer's Exhibits: EX-\_\_\_; and Joint Exhibit: JX-\_\_\_.

11. A total of \$28,045.35 has been paid to Claimant for temporary total disability intermittently between August 3, 2009 and September 24, 2010.<sup>3</sup>

12. Medical benefits have been paid in the amount \$11,961.53.<sup>4</sup>

## **ISSUES**

The unresolved issues presented by the parties are:

1. Claimant's disability status;
2. Claimant's ability to return to his occupation at the time of the injury;
3. Claimant's ability to earn wages equal to or greater than those he was earning at the time of his injury, assuming Claimant was incapable of returning to his occupation at the time of the injury;
4. Claimant's entitlement to past temporary total disability and/or loss of wage earning capacity benefits;
5. Claimant's entitlement to treatment with Dr. Vincent Shaw.

## **STATEMENT OF THE EVIDENCE**

### **I. Claimant's Testimony**

Born May 11, 1957, Claimant graduated from high school in 1975, served three years in the Army as a Communication Specialist, and after discharge received an associate's degree in electronics technology in 2001. (EX-17, p. 29). After other jobs he started working for Employer in September of 2006 as an electronic technician. In 2009 he became an electrician working with heavy high-voltage cables. Two weeks after being assigned this position, on July 28, 2009, Claimant was picking up heavy cable when he felt pain in the center of his chest.

Claimant first went to the ER in Baton Rouge, where a heart attack was ruled out, and he was diagnosed with a strained chest cavity. Next, Claimant saw his family physician, Dr. Shaw, who referred him to Dr. Boucree, an orthopedic surgeon. Dr. Boucree provided medication and ordered a functional capacity evaluation ("FCE"), after

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<sup>3</sup> See Exhibit A attached to JX-1.

<sup>4</sup> See Exhibit B attached to JX-1.

which he was of the opinion Claimant could return to work. Claimant returned to Dr. Shaw who added restrictions including no medication while Claimant was working.

Claimant said he tried to go back to work, but the pain was too great, and he was ultimately terminated. Claimant has looked for work since, but without success. He testified he has done numerous telephone inquiries and online job applications, but this has resulted in only three interviews in-person. After telling the prospective employers of his FCE restrictions, Claimant testified he was not offered any of the jobs. Having received no compensation since September 24, 2010, Claimant lives on unemployment and some food stamps. He drives, cooks, cleans, and concedes he could do light-duty work.

## **II. Vocational Rehabilitation**

Tara Milligan is a vocational rehabilitation counselor hired by Employer. She has never met with Claimant, nor any of his physicians, but bases her opinion on the records she was furnished. On August 26, 2011, Ms. Milligan identified a Respiratory Sanitizer position which was available short-term at Avondale; Ms. Milligan did not know the dates of availability. (EX-14, p. 11; Tr. 55, 76). It was sedentary level work requiring occasional lifting of a maximum of ten pounds, walking, standing, bending, twisting, reaching, and fine and gross hand manipulation. (EX-14, pp. 11-12). She also provided a list of jobs identified as available in 2010 including a position as a Driver/Courier, an Inventory Associate, a Buffet Cook, and as a Retail Sales Associate. (EX-14, pp. 14-15).

Ms. Milligan prepared another report on September 21, 2011. (EX-14, p. 16). She retroactively identified an electrician position, which was available at Avondale between August and September of 2010 when Claimant was released to return to work. (EX-14, p. 17; Tr. 56-58). She believed it was offered to Claimant while he was employed at Avondale. (Tr. 78). The job involved light to medium level work and required lifting a maximum of 50 pounds, carrying objects up to 20 pounds, walking, standing, pushing, pulling, bending, twisting, climbing, kneeling, reaching, and fine and gross hand manipulation. (EX-14, pp. 17-18; Tr. 58).

In the same report Ms. Milligan also identified four positions found in a job bank she believed suitable for Claimant, which had been available on or around March 31, 2010. (EX-14, p. 20; Tr. 59-60). She based her opinion on the FCE, Claimant's work history, educational background, and transferrable skills analysis done from the information provided to her. The September 2011 report also listed three positions Ms. Milligan believed suitable for Claimant that were available at the time of the report. (EX-14, pp. 28-35). Ms. Milligan conceded the requirements of these positions exceeded the restrictions suggested by the FCE. (Tr. 82-84). Claimant's physicians never signed off on any of the positions in Ms. Milligan's reports. (EX-14, pp. 13, 19, 33, 35).

### **III. Medical Evidence**

#### **a. Baton Rouge General Medical Center**

On July 30, 2009, Claimant presented to the ER complaining of chest pain. (EX-5, p. 3). The record notes the “clinical picture is consistent with a chest wall strain.” (EX-5, p. 6). He was discharged the same day with prescriptions for Flexeril and Naprosyn. (EX-5, p. 8). It was recommended that he resume full activity gradually as his pain improved. (EX-5, p. 17).

#### **b. Baton Rouge Cardiology Center**

Claimant presented to the Baton Rouge Cardiology Center on August 19, 2009, for a cardiac clearance due to his chest pain. (EX-7, p. 18). The stress echocardiogram performed was negative for ischemia. (EX-7, pp. 18-19). Dr. Clausen reported that Claimant required no work restrictions from a cardiac standpoint. (EX-7, p. 22).

#### **c. Vincent L. Shaw, Jr., M.D.<sup>5</sup>**

Dr. Shaw testified by deposition on September 16, 2011. (EX-1). He is board certified and specializes in family and sports medicine, and it was stipulated he is an expert in these fields. (EX-1, p. 5). Dr. Shaw first examined Claimant on August 6, 2009. (EX-1, p. 10). Claimant complained of chest pains occurring after his workplace injury and worsening pain with movement of the chest wall. (EX-1, pp. 10-11; EX-6, pp. 10-13).<sup>6</sup> Dr. Shaw ruled out any cardiac problems, and, based on objective findings, he diagnosed Claimant with costochondritis or inflammation of the chest wall. (EX-1, p. 12). Dr. Shaw opined that Claimant’s pulling the cable could have caused his costochondritis. (EX-1, p. 17). Claimant was prescribed Naprosyn and Flexeril and restricted to light duty work. (EX-1, p. 15; EX-6, p. 12).

Claimant presented to Dr. Shaw again on September 14, 2009, at which time he still complained of chest pain. (EX-1, p. 20; CX-1, pp. 23-25). Dr. Shaw completed a form allowing Claimant to return to work on September 15, 2009, but he was restricted to lifting and pulling less than 50 pounds. (EX-1, p. 23; EX-6, p. 21).

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<sup>5</sup> Claimant completed a Choice of Physician form selecting Dr. Vincent Shaw for treatment of his job related injury. (EX-4, p. 4). However, he had to continue his care for his workplace injury with Dr. Boucree as Dr. Shaw does not provide treatment for worker’s compensation patients. (Tr. 21).

<sup>6</sup> EX-6 is largely duplicative of CX-1; where identical records were included in both exhibits, only CX-1 will be referenced.

On October 13, 2010, Claimant complained to Dr. Shaw of some back pain associated with the chest pain. (EX-1, p. 24). Claimant reported that only the muscle relaxant medication helped alleviate his pain. At that time, Claimant was out of work due to recurrent pain and concerns for his safety as the pain medication caused him to become drowsy or lose attention. (EX-1, pp. 25, 32; CX-1, p. 10). Dr. Shaw changed Claimant's medication to one with lessened sedative side effects. (EX-1, p. 28).

Claimant returned to Dr. Shaw on November 15, 2010, complaining of sharp chest pain. (EX-1, pp. 33-34; CX-1, pp. 28-29). Dr. Shaw testified that while costochondritis typically clears up within six to eight weeks, it can result in a degenerative change causing chronic pain. (EX-1, pp. 34-35). Dr. Shaw opined that it was unusual that Claimant's complaints of pain had persisted for so long in the absence of any cardiac problems. (EX-1, p. 37). Dr. Shaw explained that the chest pains Claimant was having in his sternum muscles and bone would be aggravated by twisting and pulling motions causing compression of the joint. (EX-1, p. 39). Claimant was also limited at work by the sedative side-effects of his pain medications. (EX-1, p. 39; CX-1, p. 11). Dr. Shaw did not change Claimant's work restrictions at this point. (EX-1, p. 41). He diagnosed Claimant with localized osteoarthritis. (EX-1, p. 37). On November 17, 2010, Dr. Shaw wrote a letter noting that Claimant should refrain from working as his job duties caused his condition and were continuing to exacerbate it. (CX-1, p. 12; EX-4, p. 8).

Dr. Shaw completed a medical information form for Employer on December 13, 2010. (EX-4, p. 7). He listed diagnoses of chest pain and chronic degeneration of the costosternal junction. He did not indicate a date for Claimant to return to work but assigned work restrictions of no reaching overhead for more than 10 to 15 minutes, no twisting motions, and limited claimant to lifting 15 pounds or less.

On December 14, 2010, Claimant still complained of chest pains, but Dr. Shaw characterized his condition as stable while he was on medication. (EX-1, p. 41; EX-6, p. 37). Dr. Shaw completed a physician's statement form for Employer on February 8, 2011, indicating that Claimant was unable to work in a safe manner when taking his pain medication because it caused significant drowsiness; a similar note was written to Employer by Dr. Shaw on March 14, 2011. (CX-1, pp. 13-14). Claimant's reported pain level had increased to 7 out of 10 when he presented to Dr. Shaw on March 7, 2011. (EX-1, p. 45; CX-1, pp. 30-32). Dr. Shaw's diagnosis of osteoarthritis remained unchanged. (EX-1, p. 46). He opined that Claimant's condition was not going to improve much from that point. (EX-1, p. 47). Dr. Shaw instructed Claimant to refrain from heavy lifting, twisting, or pushing; Claimant was limited to medium duty. (EX-1, pp. 47-48; CX-1, p. 32). Dr. Shaw opined that Claimant had reached maximum medical improvement ("MMI") as of March 7, 2011. (EX-1, p. 48).

Dr. Shaw's next appointment with Claimant was on April 18, 2011, when he reported his chest pain level was unchanged at level 7. (EX-1, p. 48; CX-1, pp. 33-35). He reported a new pain with climbing stairs and certain other rotational motions. Dr. Shaw attributed these new pains with an exacerbation of the degenerative changes in Claimant's chest wall. (EX-1, p. 49). At that point, Dr. Shaw had not seen any diagnostic studies confirming the arthritis diagnosis. Dr. Shaw completed a physician's statement form for Employer on April 18, 2011, indicating that there had not been any significant overall improvement of Claimant's condition, and that Claimant should not work while on his medication. (CX-1, p. 15). On May 23, 2011, Claimant's pain and the sedative side effects of his medication were continuing to prevent him from working. (EX-1, p. 50; CX-1, p. 36).

On July 6, 2011, Dr. Shaw opined that Claimant's condition was not likely to improve, but the biggest factor limiting Claimant was the sedative side effect of his pain medication. (EX-1, pp. 52-54). Dr. Shaw attributed the chronic nature of Claimant's condition to the motions involved in his job which aggravate his symptoms. (EX-1, p. 53).

Dr. Shaw never found evidence of Claimant's subjective complaints of pain being out of proportion to objective findings. (EX-1, p. 57). Results of resistance tests were consistent with Claimant's reports, and Dr. Shaw found him cooperative during examinations. (EX-1, pp. 58-59). Dr. Shaw's plan for Claimant's future care is to continue to manage his pain with muscle relaxers and limit his physical activity at work; Dr. Shaw opined that physical therapy was not appropriate for Claimant's particular condition. (EX-1, pp. 59-62). He noted that Claimant expressed frustration regarding his recovery and stated several times that he wanted to go back to work. (EX-1, p. 62).

On cross-examination, Dr. Shaw examined a CT scan taken at Bluebonnet Imaging Center on October 15, 2009. (EX-1, p. 68; EX-9, p. 2). The impression states Claimant has degenerative changes in the top part of his sternum. Dr. Shaw could not say with certainty whether the arthritis shown in the CT scan was present prior to Claimant's July 2009 workplace accident. (EX-1, pp. 72-73). However, Dr. Shaw opined that the work Claimant was doing could have aggravated any pre-existing condition, bringing it to the current state. (EX-1, pp. 73-74). He found the results and recommendations from the March 16, 2010 FCE report show Claimant at the same functional level as Dr. Shaw had indicated in his recommendations. (EX-1, pp. 60-71).

Dr. Shaw testified that his records show Claimant never mentioned that he was in an automobile accident. (EX-1, p. 54). Dr. Shaw stated that this omission would not necessarily have bearing on his treatment of Claimant; the severity of the accident would affect the significance of such an event, however. (EX-1, p. 56).

Subsequent to giving his deposition, Dr. Shaw examined Claimant on September 21, 2011. (CX-1, pp. 16-17). Dr. Shaw completed a physician's statement form for Employer stating that Claimant's problems were continuing, and he advised Claimant to refrain from working while symptomatic. Claimant presented to Dr. Shaw again on January 17, 2012. (CX-1, p. 7). Claimant complained of sharp chest pains precipitated by exertion and movement. Dr. Shaw observed pain with palpation of Claimant's sternum and costosternal junction. (CX-1, p. 8). He also noted that the pain was "more extensive" that day. Dr. Shaw added an anti-inflammatory to Claimant's medications and planned a follow-up appointment in two to three weeks. (CX-1, p. 9).

**d. Joseph Boucree, M.D.**

Dr. Boucree, a board-certified orthopedic surgeon specializing in spine surgery, testified by deposition on October 5, 2011. (EX-2). Claimant first presented to Dr. Boucree on September 25, 2009, seeking treatment for anterior chest pain. (EX-2, p. 7; EX-8, pp. 1-6). Upon examination Dr. Boucree observed tenderness along the sternoclavicular region towards the breastbone. He diagnosed Claimant with sternoclavicular strain and a contusion to his manubria and prescribed anti-inflammatory medication and muscle relaxants. (EX-2, p. 8; EX-8, pp. 4-5). Dr. Boucree took Claimant off work for an indefinite period of time. (EX-8, p. 6). A CT scan was performed of the affected area in October 2009, and from it Dr. Boucree observed some degenerative changes at the costal manubrial junction indicative of "wear and tear, arthritis." (EX-2, p. 8; EX-8, p. 8). He stated that while the condition observed was degenerative, a trauma could have aggravated it causing it to become symptomatic. (EX-2, p. 9). On October 16, 2009, Dr. Boucree continued Claimant on previously prescribed medications; he also recommended physical therapy and allowed Claimant to do progressive activities as tolerated. (EX-2, p. 10; EX-8, p. 8).

Dr. Boucree found Claimant at MMI on December 23, 2009. (EX-8, p. 9). Dr. Boucree then allowed Claimant to return to work. On January 22, 2010, Dr. Boucree noted overall improvement in Claimant's condition along with some aggravation with increased activity. (EX-2, p.12; EX-8, p. 10). He reiterated the MMI determination. Dr. Boucree completed a form returning Claimant to light/moderate duty with restrictions of no lifting or carrying over 20 pounds, no sitting or standing over 20 minutes without changing positions, no repetitive bending or twisting, and no working at unprotected heights. (EX-8, p. 11).<sup>7</sup> Claimant was also restricted from climbing, kneeling, or squatting.

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<sup>7</sup> Dr. Boucree completed a form for employer dated January 25, 2010, with similar work restrictions outlined. (EX-4, p. 6). However, he checked the box "cannot work with restrictions," which contradicts the form completed three days before stating Claimant could return to light/moderate duty work. (EX-4, p. 6; EX-8, p. 11).

On March 31, 2010 Claimant returned for a follow-up visit after completing an FCE. (EX-2, pp. 12-13; EX-8, p. 16). The results put Claimant at a low to medium level of work. (EX-2, p. 13). Dr. Boucree believed Claimant could do a higher level of work so he ordered further physical therapy. (EX-2, pp. 13-14; EX-8, p. 16). On April 19, 2010, Dr. Boucree noted Claimant's overall condition was still improved. (EX-2, p. 14; EX-8, p. 17). Dr. Boucree allowed Claimant to return to work within the restrictions identified by the FCE. On a form completed for FARA on April 28, 2010, Dr. Boucree noted Claimant was at MMI on April 19, 2010. (EX-8, p. 14). On June 3, 2010, Dr. Boucree reiterated that Claimant was at maximum medical improvement. In a letter to FARA, Dr. Boucree amended his previous restrictions and noted claimant was capable of performing frequent squatting, stair climbing, and ladder climbing; and he assigned a lifting restriction of a maximum of 50 pounds. (EX-8, pp. 18-19). Claimant had not returned to work since his previous appointment. (EX-8, p. 14).

Claimant continued to complain of chest pain on July 26, 2010, and reported the pain increased when he returned to work manipulating cables. (EX-8, p. 21). Dr. Boucree referred Claimant Dr. LaMotte, a cardiologist. Claimant was allowed to return to work but was limited to lifting no more than 50 pounds and could not manipulate cables as in his previous position. On August 13, 2010, Dr. Boucree allowed Claimant to return to work with the same weight restriction, but he was allowed to go back to twisting and manipulating cables. (EX-8, p. 24). Claimant was continued on muscle relaxants and anti-inflammatory drugs. Claimant's condition and work restrictions remained unchanged on August 18, 2010. (EX-8, p. 26). At his visit on September 8, 2010, Claimant reported that he had returned to work but still had intermittent chest pain while working. (EX-2, pp. 17-18; EX-8, p. 32). Dr. Boucree did not amend the previously assigned work restrictions. (EX-2, p. 18; EX-8, p. 33).

In a letter from December 1, 2010, Dr. Boucree noted that Claimant remained at MMI. (EX-2, p. 21). Dr. Boucree testified that there was not anything else he could do at that time to help Claimant. (EX-2, p. 22). Claimant presented to Dr. Boucree on December 10, 2010. (EX-2, p. 23; EX-8, p. 37). Dr. Boucree reported that Claimant was still at MMI and that cardiovascular problems had been ruled out by Dr. LaMotte. Claimant did not return to see Dr. Boucree until April 20, 2011. (EX-2, p. 23; EX-8, p. 38). Dr. Boucree allowed Claimant to return to work manipulating cables within the 50-pound lifting limit. (EX-2, pp. 24, 30). Dr. Boucree agreed it was not necessary for Claimant to see both himself and Dr. Shaw. (EX-2, p. 26).

On cross-examination, Dr. Boucree agreed with Dr. Shaw's diagnosis of costochondritis, or degenerative changes in the costomanubria junction. (EX-2, pp. 33-34). Dr. Boucree opined that this condition pre-existed Claimant's workplace injury even though Claimant never had any problems with his chest area before. He was concerned that the symptoms Claimant complained of were out of character with the injury so he referred Claimant to the cardiologist, Dr. LaMotte. (EX-2, p. 35). Dr. Boucree based his

opinions on the objective findings of tenderness and the results of the CT scan. (EX-2, p. 36). He never doubted Claimant had pain, although he also believed Claimant was capable of more than the restrictions in the FCE allowed. (EX-2, pp. 36-37). Dr. Boucree recommended Claimant take anti-inflammatory medications rather than muscle relaxants while he was working and return to see him as needed. (EX-2, pp. 24, 30, 38-42).

#### **e. Physical Therapy**

Dr. Boucree prescribed physical therapy. (EX-10, p. 1). On October 28, 2009, Kerry Lamkin, MSPT, wrote a report regarding evaluation of Claimant. (EX-10, pp. 2-3). Claimant reported pain in his sternum, greater on the left than right. His left upper extremity strength and range of motion were reportedly limited by pain complaints. The physical therapist noted that these diagnoses respond well to physical therapy. (EX-10, pp. 2-3).

Claimant attended 12 therapy sessions between October 28, 2009, and December 9, 2009. (EX-10, pp. 4-5). On December 2, 2009, a progress report was sent to Dr. Boucree. (EX-10, p. 15). Not all of the therapy goals had been met, and further therapy sessions were recommended. The notes from the sessions consistently described Claimant as “guarded” in completing the exercises. (EX-10, pp. 6-19). The highest pain level he reported was a six, the lowest was a four. At his last session, it was noted that he had improved his range of motion but remained guarded. (EX-10, p. 19).

#### **f. James M. Todd, III, M.D.**

At the request of Employer, Dr. Todd examined Claimant.<sup>8</sup> (EX-11). Dr. Todd also reviewed records of Dr. Boucree, Baton Rouge General Medical Center Emergency Department, Dr. Shaw, and the CT scan. (EX-11, p. 1). Claimant reported improvement in his pain to Dr. Todd. (EX-11, p. 2). Dr. Todd diagnosed Claimant with costochondritis. Claimant reported to Dr. Todd that he had been in an automobile accident “years ago when he was rear-ended affecting his low back but not the chest wall.” Dr. Todd noted Claimant’s examination was “essentially within normal limits.” He opined that the treatment Claimant had received thus far was appropriate. Dr. Todd also stated that he did not believe Claimant had reached MMI at that point as he was still experiencing significant pain in his chest wall. (EX-11, p. 3). He estimated that Claimant would attain MMI in two to three months. He did not recommend Claimant return to full duty at that time.

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<sup>8</sup> While the report was not dated by Dr. Todd, it was stamped as received by FARA on February 26, 2010.

#### **g. Functional Capacity Evaluation**

On March 16, 2010, Claimant underwent an FCE. (EX-12). The report noted Claimant was unable to meet the demands of his job as an electronic technician, which consisted of a medium level of work, because he was found to be functioning at a low-medium level of work. (EX-12, p. 3). He was found able to lift 35 pounds occasionally from waist to floor, 30 pounds from waist to shoulder, and up to 50 pounds only rarely if positioned at waist level. (EX-12, p. 5). Claimant was reported to be a cooperative participant in the FCE, yet self-limited the amount of weight he would lift because of complaints of pain in his anterior chest. (EX-12, p. 4). The report also indicated Claimant is deconditioned and can only occasionally perform repetitive squats, stair climbing, and ladder climbing. (EX-12, p. 6).

#### **h. Dr. Lance LaMotte**

On August 5, 2010, Claimant first presented to Dr. LaMotte. (EX-13, p. 2). Claimant reported occasional chest pain in the left chest area. Dr. LaMotte recommended an echocardiogram and blood work. (EX-13, p. 3). The echocardiogram showed that most portions of Claimant's heart were normal. (EX-13, p. 10).

#### **IV. Other Evidence**

A police report from September 14, 2009 describes that Claimant's vehicle was hit by another vehicle on the right side as he was making a right turn into his driveway. (EX-19). Claimant testified that the impact gave him a "jolt" to his chest, but that the accident did not make his chest condition any worse than it had felt after the workplace accident. (Tr. 26).

A surveillance report from March 11, 2011, described Claimant's activities as recorded on March 1, 2011, and March 3, 2011. (EX-18, pp. 1-5). A second report was created on May 19, 2011, regarding recorded observations from April 19, 2011, and April 20, 2011. (EX 6-10). Claimant was observed conducting activities such as driving, walking quickly, and climbing steps on those four days with no noticeable difficulties. (EX-18, pp. 2, 7).

### **FINDINGS AND CONCLUSION OF LAW**

The following findings of fact and conclusions of law are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. My evaluation has been guided by the principle that the proponent of a rule bears the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277-78 (1994) (citing *Steadman v. SEC*, 450 U.S. 91, 95 (1981)).

As trier of fact, I may accept or reject any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). The “true doubt rule,” which resolves conflicts in favor of the claimant when the evidence is balanced, violates Section 566(d) of the Administrative Procedures Act, and thus has not been employed in my review of this claim. *Greenwich Collieries*, 512 U.S. at 281.

### **I. Compensable Injury**

In this case, the parties have stipulated that Claimant injured his chest wall in a work related accident on July 28, 2009. However, Employer suggests that the automobile accident Claimant was involved in on September 14, 2009, is an independent intervening injury.

If there has been a subsequent non-work-related injury or aggravation, the employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury; however, where the second injury is the result of an intervening cause, the employer is relieved of liability for that portion of the disability attributable to the second injury. *Plappert v. Marine Corps Exchange*, 31 BRBS 13, 15 (1997), *aff'd* 31 BRBS 109 (en banc), *citing Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987). Where there is no evidence of record which apportions the disability between the two injuries it is appropriate to hold employer liable for benefits for the entire disability. *Plappert v. Marine Corps Exchange*, 31 BRBS 13, 15 (1997), *aff'd* 31 BRBS 109 (en banc); *Bass v. Broadway Maintenance*, 28 BRBS 11, 15-16 (1994).

The Fifth Circuit has established two tests for determining whether a claimant has sustained an independent intervening injury. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312 (5th Cir. 1997). A “worsening” could give rise to an intervening cause, if it is shown that the subsequent progression of the claimant’s condition is due to the independent injury. *Mississippi Coast Marine v. Borsage*, 637 F.2d 994, 1000 (5th Cir. 1981). Another test requires that the independent intervening cause “overpower and nullify” the causal effect attributable to the initial workplace injury. *Voris v. Texas Employers Ins. Ass’n.*, 190 F.2d 929 (5th Cir. 1951).

There is no evidence presented that Claimant suffered a worsening of his chest wall pain after the automobile accident, nor that it overpowered or nullified the chest condition resulting from Claimant’s July 28, 2009 workplace accident. Claimant complained of pain at the automobile accident scene, according to the police report. However, in Dr. Shaw’s reports before and after the car accident, Claimant did not complain of worsened pain, only a continuation of his already-existing symptoms. At most Claimant experienced a temporary exacerbation of his pre-existing chest wall

injury. He never complained of or sought treatment for any additional injuries as a result of this car accident. Therefore, it has been established that Claimant suffered a compensable workplace injury on July 28, 2009, for which Employer remains liable.

## **II. Nature and Extent**

### **a. Nature of Disability**

A claimant bears the burden of proving the nature and extent of his work-related injury. *Trask v. Lockheed Shipbldg. & Constr. Co.*, 17 BRBS 56, 59 (1986). A claimant's disability is permanent in nature if he has any residual disability after reaching MMI. *Id.* at 60 (citing *McCray v. Ceco Steel Co.*, 5 BRBS 537, 540 (1977)). The date of MMI is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask*, 17 BRBS at 60. The date of MMI is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994). If MMI has not yet been reached, the disability is temporary.

Dr. Boucree first found Claimant to be at MMI on December 23, 2009. However, the physical therapist reporting on Claimant's treatment on December 2, 2009, recommended that Claimant continue with physical therapy, and Dr. Boucree subsequently ordered such therapy. Dr. Boucree found Claimant to be at MMI again on April 19, 2010. This is in line with Dr. Todd's suggestion in the February 2010 report that Claimant would reach MMI in about two to three months. While Dr. Shaw did not find Claimant at MMI until March 7, 2011, he did not offer any treatment to Claimant that improved his condition after April 19, 2010. Dr. Shaw was only able to provide Claimant with medications to temporarily alleviate his pain. Therefore, I find Claimant reached MMI and his disability became permanent on April 19, 2010.

### **b. Extent of Disability**

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). A claimant must first make a *prima facie* case of disability by showing he is unable to return to his former job due to his work-related injury. Once he has done so, the burden shifts to the employer to show the existence of suitable alternative employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Company*, 21 BRBS 94, 97 (1988). The claimant remains entitled to total disability compensation until the date upon

which the employer establishes the availability of such employment, at which point the disability becomes partial. *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128, 131 (1991).

The March 16, 2010 FCE report noted Claimant was unable to meet the demands of his previous electronic technician position requiring a medium level of work. Claimant was found to be functioning at a low-medium level of work. He was restricted to lifting 35 pounds occasionally from waist to floor, 30 pounds from waist to shoulder, and up to 50 pounds only rarely if positioned at waist level. He can only occasionally perform repetitive squats, stair climbing, and ladder climbing. Dr. Boucree believed Claimant was able to perform functions beyond these restrictions, but I find that the restrictions of the 2010 FCE report are the controlling limitations for Claimant. Therefore, Claimant was totally disabled as of March 16, 2010, as he could not return to his regular employment duties which exceeded the restrictions of the FCE.

On August 26, 2011, Ms. Milligan identified a Respiratory Sanitizer position which was available short-term at Avondale. However, Ms. Milligan could not identify when this position was available. While it does not need to be shown that positions identified were available at the time a labor market survey was conducted, the positions need to have been available during the “critical period’ during which the claimant was able to seek work.” *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Therefore, it is not possible to determine if the Respiratory Sanitizer position was truly available to Claimant during the period when Claimant was looking for work and does not constitute suitable alternative employment.

Ms. Milligan’s retroactive job survey identifying four positions that were available in 2010 is also insufficient to establish suitable alternative employment. (EX-14, pp. 14-15). The report fails to allow for comparison of the jobs’ requirements identified with Claimant’s physical restrictions outlined in the FCE report. Specifically, weight lifting requirements are not listed in any of the job descriptions provided by Ms. Milligan. Therefore, this report does not establish suitable alternative employment either.

Furthermore, the Electrician position identified on September 8, 2011, does not constitute suitable alternative employment. The job description indicates that frequent lifting and carrying up to 50 pounds would be required, but Claimant was limited to lifting 50 pounds and only rarely. Ms. Milligan also identified four positions found in a job bank she believed suitable for Claimant available on or around March 31, 2010. (EX-14, p. 20; Tr. 59-60). The report fails to allow for comparison of the jobs’ requirements identified by Ms. Milligan with Claimant’s physical restrictions based on the FCE of record. No weight lifting requirements or other physical activity requirements are listed in any of the job descriptions. The three other positions she identified were available at the time of the report, but Ms. Milligan conceded that the requirements of these positions exceeded the restrictions suggested by the FCE.

None of the labor market surveys provided by Employer establish suitable alternative employment. Therefore, I find Claimant remains totally disabled.

### **III. Medical Benefits**

Where a claimant has established that he has suffered from a compensable injury under the Act, the employer is liable for “medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require.” 33 U.S.C. § 907(a). For medical expenses to be assessed against the employer, the expense must be reasonable, necessary, and appropriate for the injury. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979); 20 C.F.R. § 702.402.

The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). The employer is liable for all medical expenses that are the natural and unavoidable result of the work injury, and not due to an intervening cause. *See Atlantic Marine v. Bruce*, 661 F.2d 898 (5th Cir. 1981). However, an employee cannot receive reimbursement for medical expenses under Section 7 of the Act unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curiam), *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

Having found that Claimant suffered a compensable injury to his chest wall, he is entitled to, and Employer is responsible for, reasonable and necessary medical care, which is a natural and unavoidable result of the work-related chest wall injury. While Claimant began treating with Dr. Shaw, he had to continue his care for his workplace injury with Dr. Boucree as Dr. Shaw does not provide treatment for worker's compensation patients. (Tr. 21). Dr. Boucree then became Claimant's treating physician. Claimant testified he returned to Dr. Shaw once Dr. Boucree told him he could not do anything further for his pain. (Tr. 22). Dr. Boucree testified that he did not believe it was necessary for Claimant to see both himself and Dr. Shaw. (EX-2, p. 26). Despite the fact that he has a different specialty, Dr. Shaw stated that Dr. Boucree's treatment of Claimant was essentially the same as his treatment of Claimant. (EX-1, p. 73). While Dr. Shaw was initially authorized to treat Claimant, both physicians agree that they were providing the same treatment to Claimant. Therefore, the additional care provided by Dr. Shaw after Claimant switched to treating with Dr. Boucree was not necessary as it was redundant of the care provided by Dr. Boucree. While Claimant is entitled to medical

benefits for treatment provided by Dr. Boucree, he did not receive authorization by Employer to return to Dr. Shaw and cannot receive compensation for Dr. Shaw's treatment.

### **ORDER**

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

- (1) Employer shall pay Claimant compensation benefits for permanent total disability from September 24, 2010,<sup>9</sup> and continuing, based on a stipulated average weekly wage of \$856.04, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).<sup>10</sup>
- (2) Employer shall pay Claimant all reasonable and necessary medical expenses arising out of his work-related injury to the chest wall, pursuant to 33 U.S.C. § 907.
- (3) Employer shall pay Claimant interest on any sums determined due and owing at the rate provided by 28 U.S.C. § 1961.
- (4) Employer shall receive a credit for all compensation payments previously made to Claimant.
- (5) All computations of benefits and other calculations provided in this ORDER are subject to verification and adjustment by the District Director.

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<sup>9</sup> At trial, Claimant agreed that benefits had been properly paid from the time of the accident through September 24, 2010. (Tr. 88).

<sup>10</sup> This excludes any periods after this date that Claimant may have worked for Employer. It is unclear from the record the last day Claimant worked for Employer. Payroll records were only provided through July 26, 2009, but Claimant's personnel file suggests Claimant may have worked with Employer subsequent to September 24, 2010. (EX-16; EX-17, p. 41). Claimant testified that he last had a job in November 2010 working at Avondale. (Tr. 33).

- (6) Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

**So ORDERED** this 15<sup>th</sup> day of June, 2012, at Covington, Louisiana.

**A**

**C. RICHARD AVERY**  
**Administrative Law Judge**