



Issue Date: 14 November 2012

CASE NO.: 2012-LHC-00435

OWCP NO.: 07-188421

IN THE MATTER OF

**RYAN SMITH,
Claimant**

v.

**OFFSHORE ENERGY SERVICES, INC.,
Employer**

and

**LIBERTY MUTUAL INSURANCE CO.,
Carrier**

APPEARANCES:

Mark Garber, Esq.
On Behalf of Claimant

Scott Kiefer, Esq.
On Behalf of Employer

BEFORE: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.* brought by Ryan Smith (Claimant) against Offshore Energy Services (Employer or OES) and Liberty Mutual Insurance Co. (Carrier). The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on June 7, 2012, in Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their respective positions.

Claimant offered 12 exhibits, Employer/Carrier offered 52 exhibits which were admitted into evidence along with one Joint Exhibit.¹ Claimant called three witnesses and Employer/Carrier called four. This Decision is based upon a full consideration of the entire record.²

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. The Claimant injured his right shoulder on March 30, 2010.
2. The injury occurred at Parker Drilling Rig 50B/Turtle Bayou.
3. There existed an employer/employee relationship at the time of the injury.
4. The claim was timely filed.
5. The Employer/Carrier timely filed a Notices of Controversion on May 21, 2010 and November 19, 2010.
6. An informal conference before the District Director was held on October 18, 2011.
7. The Claimant has received Temporary Partial Disability benefits from March 31, 2010 through April 25, 2010 at a compensation rate of \$657.54.
8. Medical benefits for Claimant have been paid in the amount of \$3,624.80 pursuant to Section 7 of the Act for the stipulated shoulder injury.
9. The Claimant has not returned to his usual job.
10. The Claimant has engaged in alternative employment.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's injury.

¹ Both parties submitted as evidence the Memorandum of Informal Conference. Because formal hearings are *de novo*, the Memorandum of Informal Conference is not legally relevant evidence upon which I may base any decision.

² References to the transcript and exhibits are as follows: Transcript: Tr.__; Claimant's Exhibits: CX-__; Employer/Carrier Exhibits: EX-__; and Joint Exhibit: JX-__.

2. Whether Claimant has reached maximum medical improvement.
3. Whether Claimant is in need of further medical treatment.
4. Whether Claimant was and is capable of the modified duty job tendered by Employer and in which he initially worked.
5. Whether Employer has demonstrated suitable alternative employment.
6. Whether Claimant timely notified Employer/Carrier of the alleged cervical and lumbar injuries.
7. Claimant's average weekly wage.

III. STATEMENT OF THE CASE

This claim arises from an incident that occurred on March 30, 2010 while Claimant was working for Offshore Energy Services, Inc. on an inland drill barge operated by Parker Drilling Services, Inc. Claimant was injured when a section of pipe slipped in the derrick allegedly causing a sling or cable to break and fall on the drill floor, striking the Claimant.

A. Claimant's Testimony

Claimant was working as a floor hand on 50B running casing on the date of his injury, March 30, 2010. (Tr. 43). Claimant testified that before the crew started running casing they were having problems lining up the stabbing board and the rig. (Tr. 46). After several joints were run, the casing slipped for the first time; as it became heavier, it slipped again after placing seven or eight more joints. (Tr. 46). The casing slipped a third time as Claimant was boxing in the pipe; it slipped from his hands causing shackles and sling from the single joint elevator to fall and hit him in the head. (Tr. 46-48).

At the time of the accident, Claimant was wearing safety glasses, steel-toed boots, and a hard hat. (Tr. 49). Claimant identified his hard hat and where he was struck, noting that the blow caused the strap to come off and hit him in his left eye. (Tr. 49-51). Claimant testified that immediately after being hit, the only place he was experiencing pain was his shoulder. His neck and back were not bothering him then. (Tr. 52-53).

Following the accident on March 30, 2012, Claimant was evacuated from the rig by crew boat back to Amelia, LA and immediately transported to AHS (Acadian Health Services, Inc. Walk-In Clinic) where a drug screen was administered. (Tr. 54). Claimant was examined at this time and related that his shoulder hurt; he was instructed to return to see a doctor. (Tr. 55). Claimant states that he returned to AHS the next morning and was examined by physician's assistant, James Carruth. Mr. Carruth told Claimant that he might have a torn rotator cuff. (Tr. 58-59). Although he complained of shoulder pain at this time, Claimant states that he had no complaints of neck or back pain. (Tr. 60).

Claimant returned to AHS on April 1, 2010, where he alleges that he first stated to Mr. Carruth that he was experiencing neck and back pain. (Tr. 61). Claimant testified that Mr. Carruth did not write down these additional complaints but did classify them as “traveling pains.” (Tr. 61-62). Claimant was referred to Dr. Michael J. Duval for, what Claimant believed to be, further evaluation of his shoulder. (Tr. 62-63). Claimant admitted that he did not tell Dr. Duval of his neck and back pain at his appointment and only listed “shoulder” under “reasons for appointment” in his patient information form. (Tr. 63-64, EX-17). Claimant stated that he omitted mention of his neck and back pain because he was sent there for his shoulder and that his pride, and concern over possibly losing his job, made him hesitant to complain about it. (Tr. 63-64). Claimant testified that during his first visit, Dr. Duval examined his shoulder diagnosed “a Grade 3 AC separation” in his shoulder. (Tr. 64). Claimant stated that he complained about headaches to AHS. (Tr. 65).

Claimant chose to treat with Dr. John E. Cobb at the Lafayette Bone & Joint Clinic. (Tr. 130). An appointment was made with Dr. Cobb by Claimant’s Counsel. (Tr. 131). Claimant presented to Dr. Cobb on May 10, 2010, with complaints of AC joint separation, neck pains, headaches, arm pains, “tingliness” in arms, lower back pain, and legs hurt. (Tr. 66-67, EX-18, p. 9). Claimant reported that his symptoms began on March 30, 2010, the date of injury and described the accident as being the cause of the symptoms. (Tr. 67). Dr. Cobb prescribed pain, muscle relaxant, and anti-anxiety medication and told Claimant not to work. (Tr. 68). Claimant stated that Dr. Cobb recommended that Claimant start pain management and, as a result, Claimant began treating with Dr. Daniel Hodges. Prior to pain management treatment with Dr. Hodges, Claimant was traveling to Houston to see a pain management specialist. (Tr. 69-70). Since Claimant’s accident he has been prescribed pain medication including Percocet, Oxycontin, and Oxycodone. (Tr. 71). Claimant began to feel that he was becoming increasingly dependent upon his pain medications and has since started only taking them when needed. (Tr. 72).

Besides prescribing pain medication, Dr. Cobb recommended that Claimant attend physical therapy. (Tr. 73). Claimant also received an injection in his back that helped for about two to three weeks before wearing off. (Tr. 73). Dr. Cobb also recommended a discogram and discussed surgical options with Claimant. (Tr. 73-74).

Claimant stated that his back problem stems from a bulging disc in his lower back though it does not prevent him from walking, driving, or caring for his personal hygiene. (Tr. 75). Claimant has not been able to continue his normal weight-lifting routine that he engaged in prior to the accident, and he notes that the stress of losing his family has caused him to lose a lot of weight. (Tr. 76-77). Aside from trying to cut his lawn once, Claimant gets help in order not to aggravate the pain. (Tr. 78). Although Claimant has gone out fishing and hunting since the accident, he claims that he has only gone along for company and hasn’t engaged in either activity since that time. (Tr. 79-80). Claimant has a small inflatable pool for his son that he has cleaned leaves from since his injury. (Tr. 81). Claimant and his ex-fiancé exchange their son at a restaurant called Mimi’s; Claimant does pick up his son which can cause him back pain. (Tr. 77, 82, 106-07).

Claimant identified a number of photographs from his Facebook account all posted after the accident which included: a picture of Claimant, his son, and grandmother; a picture of Claimant in a friend's trunk; a self-portrait of Claimant with no shirt on; a picture of a catfish; a picture of the floor of Claimant's home; and a picture of Claimant's truck. (Tr. 82-87; EX-35). Claimant was also questioned about a number of entries made on his Facebook account and stated that he uses it to "joke and act stupid" and that his friend C.J. will occasionally assume Claimant's account as a joke. (Tr. 89).

Claimant testified that he had not worked since March 30, 2010 and that he could not have worked during that time. Claimant stated that he was making \$17.50 an hour working for Employer and that the pay was around the clock from the time of arrival to the time of departure. (Tr. 89-90). After he was hurt, Claimant did light duty work for a week filing paperwork for Employer. (Tr. 90). He discontinued work at that time because of pain. Claimant stated that he should have complained about the pain but that his pride prevented him from doing so. (Tr. 90). Claimant stated that he was hired by Employer full-time and had no intention of leaving OES before he was injured. (Tr. 91-92).

On cross, Claimant testified that he saw a doctor on the day of the incident and expressed that his shoulder was hurting. (Tr. 94). Claimant stated that although he does not have a driver's license, he had no trouble getting in and out of or operating an automobile. (Tr. 95). At the time of Claimant's deposition he was driving approximately 5 days a week. (Tr. 96). Since his accident Claimant saw a pain management doctor, Dr. Hector Tobon, in Houston 6 or 7 times driving the round-trip in a single day. (Tr. 97-98). Claimant's lawyer in his tort suit has been paying all medical bills. (Tr. 98).

Prior to his work for Employer, Claimant worked for Production Services Network, Expedited Productions Services, Island Operators, Pioneer Operators, and Prosper Operators. (Tr. 99). Claimant began working for Employer on March 25, 2010 and had worked for approximately 5 days at the time of the accident. (Tr. 100). Claimant was on the floating board and would be called out to work with a crew when the need for additional hands arose. (Tr. 101). Claimant stated that after his accident he performed the light-duty office job for employer for about a week. (Tr. 102). Claimant did not have any trouble filing paperwork and feels he could do that job today. (Tr. 103-04). He admits that he never told anyone at OES that he was not coming back after leaving the office position. (Tr. 105). Claimant has not applied for any other work since that time. (Tr. 105).

At the time of Claimant's hire by Employer he was having trouble with an abscess in his tooth. (Tr. 105). The abscessed tooth eventually had to be pulled and Claimant developed a dry socket. (Tr. 105). Claimant stated that before the accident he had problems with sinus headaches. (Tr. 106).

According to Claimant, Justin Jourden was the toolpusher and supervisor on the drill floor with Claimant at the time of the accident. Claimant could not be specific as to what actually hit him but he listed the slings and shackles as possibilities while he remained certain that it was not the pipe itself. (Tr. 108-09). Although Claimant was not knocked unconscious, he testified that he was dazed from the impact of the debris. (Tr. 110). He does not believe that

he told anyone in the rig locker room immediately after the incident that his neck and back were bothering him. (Tr. 111). Likewise, Claimant did not mention any neck or back pain to Anthony Bradner as he was being transported to AHS after coming onshore. (Tr. 111-12).

Claimant stated that he is able to walk but that he does experience days where he suffers from considerable back pain. (Tr. 113). Claimant admits that he has cut his lawn once and has cleaned an inflatable pool for his son since his accident. (Tr. 114).

When questioned about entries Claimant made on his Facebook page in reference to fishing; duck hunting; a trip to the casino; trips to a bar; attending parades; lifting weights; a trip to Las Vegas; cooking and cleaning; and installing a floor in his home, Claimant stated that he either wasn't the one engaged in those activities or was merely joking around.³ (Tr. 114, 115, 117, 118, 120, 121, 122, 123; EX-35). Claimant admits that he omitted mentioning at his deposition, an accident that involved him driving his truck into a ditch while sending a text message to his girlfriend. (Tr. 118-19).

B. Testimony of Anthony Bradner

Mr. Bradner is the HSE Manager for Employer charged with coordinating the safety program as well as accident investigation and incident response. (Tr. 142, 181). Claimant was making \$1,400.00 a week at the time of the accident. (Tr. 144). Mr. Bradner described the pay history of two other OES employees that were in the same or similar position as Claimant at the time he was hired. Casing hands, like the two selected by Mr. Bradner, can make anywhere from \$1,500.00 to \$2,500.00 or \$3,000.00 per week. (Tr. 145-46). The exact amount depends on experience. (Tr. 148).

When the March 30, 2010 accident was called into Mr. Bradner, only the injuries to Derek Bentley were initially reported. Mr. Bradner picked Claimant up from the dock in Amelia and drove him to Morgan City to meet Sam Harden in order to transport Claimant to the clinic. Upon picking up Claimant, Mr. Bradner testified that Claimant stated he was struck on his right shoulder and was experiencing pain there. Claimant did not complain of pain in or show any signs of injury to his head, neck, back, or legs. Mr. Bradner does not recall if Claimant told him he had been struck in the head or knocked to the ground. (Tr. 185-88).

Mr. Bradner next saw Claimant at a meeting a day or two after the accident. Claimant discussed his injured shoulder but made no mention of any back or neck pain at that time. (Tr. 189).

Mr. Bradner was in charge of arranging a modified duty position for Claimant at OES. Upon receiving Claimant's status report from AHS clinic releasing him for light duty work, Mr.

³ Some of Claimant's responses to cross-examination regarding his Facebook activity are as follows: entry: "nasty weather go away I have fish to catch," response: "we didn't fish...my dad was fishing"; entry: "On this black jack table bout to go hard," response: "we didn't even go [to the casino]"; entry: "bout to cook...clean and wash some clothes," response: "I...was acting stupid...I didn't cook and clean[.]"; entry: "the phone I'm on now says I'm near Jennings...I'm in Vegas," response: "it's a joke"; entry: "hunting" and "quack, quack, busting their ass," response: "no...we [weren't shooting], I lied"; entry: "took the carpet out the front room and put the wood look," response: "I paid a guy...I did not [do anything]." (EX-35).

Bradner called Claimant and made a verbal offer including a description of the position at OES. (Tr. 189). Mr. Bradner believed that both the AHS clinic and Dr. Duval placed Claimant on light duty work status. Claimant reported to the modified position as a data entry clerk. It is work that is given to an injured worker, the data entry is normally performed by Mr. Haden and the administrative assistants. (Tr. 191-92). The first paycheck that Claimant received while working at OES was issued on April 1, 2010, a day after the accident. (Tr. 193).

During the course of Claimant's modified duty work, he made a call to Mr. Bradner requesting some time off to recover from dental work performed prior to the accident. Claimant never expressed to Mr. Bradner that he was having physical problems performing in the modified duty position nor that there were aspects of the job he was incapable of doing or that he was experiencing any neck or back pain. When Claimant stopped reporting for the modified position it was still available to him. Claimant never notified Employer that he wasn't going to return for the modified job. (Tr. 194-96). Claimant never told Mr. Bradner that he believed he suffered neck and back injuries as a result of the March 30, 2010 accident. Mr. Bradner did not learn about Claimant's claim of neck and back injuries until months after. (Tr. 197).

The Total Recordable Incident Rate (TRIR) is an indication to contracting companies of a vendor's safety history. OES would like to be able to report continuing improvement to TRIR. (Tr. 198-200). If a claimant is able to return to work the day after an accident on full duty or some modified duty, OES does not need to report it as a lost time incident. Although any incident is recorded, a lost time incident is less desirable in terms of TRIR. (Tr. 201-02). Incidents reported to OSHA are based upon the medical records provided. (Tr. 205)

Claimant's injury was initially reported as a restricted work day, light duty case based on initial reports. That status is maintained until the case is resolved and is not included in lost time right now because the back and neck injury are disputed. (Tr. 202-03). Mr. Bradner believes that Employer was not made aware of complaints of neck or back pain until months after the accident. A few days following the accident, one of the patient status reports had a complaint of headache. Mr. Bradner approved the CT scan which Claimant refused to take. At that point Mr. Bradner believed there was nothing more he could do and passed the Claimant's information along to Carrier. (Tr. 206).

C. Testimony of Justin Atchision

Mr. Atchision, a.k.a. "Turtle," has been a tong operator with OES for five years and was present on the rig when the accident involving Claimant occurred. (Tr. 150). Mr. Atchision testified that the slips failed causing the joint they were picking up to get locked in and pulled down which blew out the cables. The single joint slid down the pipe to the bottom of the slips and the cables followed. Part of the cables stayed in the dirt and the other half came down. (Tr. 151). The shackles stayed up on the elevator. (Tr. 162). Mr. Atchision was standing five feet to Claimant's left at the time of the incident but did not see anything strike Claimant. (Tr. 151). Mr. Atchision saw Claimant immediately after the accident and testified that he did not see Claimant fall down or lose consciousness. (Tr. 152).

Mr. Atchision stated that the Claimant told him that a cable had hit his shoulder and displayed a red mark at the point of impact. (Tr. 153, 166). He does not remember whether Claimant said he was hit in the head, only that Claimant complained about his shoulder hurting. (Tr. 155). Claimant was able to walk around on his own and was applying an ice pack to his shoulder following the accident. (Tr. 156). Mr. Atchision did not hear Claimant complain about his neck or back. (Tr. 156).

D. Testimony of Justin Jourdan

Mr. Jourdan worked at OES for six years and was a tool pusher on the date of Claimant's accident (Tr. 168-69). Claimant was standing in front of Mr. Jourdan at the time of the accident. (Tr. 170). Mr. Jourdan did not see anything strike Claimant. (Tr. 171). Claimant told Mr. Jourdan immediately following the accident that he was struck in the shoulder but said nothing about being hit in the head or falling to the ground. (Tr. 171). He complained of shoulder pain but did not mention any pain to his head, neck or back. (Tr. 172). Mr. Jourdan stated that Claimant appeared fine when he left the rig. (Tr. 173). Claimant was present at the safety meeting concerning the incident the following day, appearing fine and with no complainants of injuries to his neck or back. (Tr. 174).

Mr. Jourdan testified that the cable is the only thing that fell from the derrick since everything else was still intact on the pipe. (Tr. 172). Claimant could not have been struck by the single joint because it was still attached to the pipe after the incident. (Tr. 173).

On cross-examination, Mr. Jourdan recounted the incident in question stating that the Claimant was the first person he looked at after the elevator came down because Claimant was immediately in front of him. (Tr. 179). Mr. Jourdan was sure that Claimant had his hard hat on at this time. (Tr. 179).

E. Testimony of Samuel Harden

Mr. Harden is a safety technician with OES and is tasked with safety compliance and training coordination. Additionally, when there are injuries to employees, it is Mr. Harden's responsibility to transport them to the clinic. (Tr. 209). On the night of Claimant's accident, Mr. Haden received a call from Mr. Bradner asking him to meet Mr. Bradner and the Claimant in Morgan City and transport Claimant the rest of the way to the clinic in Lafayette. (Tr. 210). Upon first meeting the Claimant, Mr. Haden stated that he appeared to have some pain in his shoulder which Claimant confirmed during their conversation. (Tr. 211). Mr. Haden did not recall Claimant complaining about pain in his head, neck or back. (Tr. 212).

Mr. Haden accompanied Claimant into the exam room where he noticed a red mark on Claimant shoulder. Claimant told the doctor or physician's assistant who saw him that his shoulder was bothering him. (Tr. 213). The doctor or physician's assistant treating Claimant diagnosed a bruise and listed Claimant's work status as light duty, according to Mr. Haden. (Tr. 214).

Mr. Haden was responsible for setting Claimant up in a modified duty position performing data entry and clerical duties at OES. The position included sitting for extended periods of time. (Tr. 215). Claimant did report to the modified duty position as a data entry clerk and never complained to Mr. Haden about neck and back pain or any aspects of the position that he felt he was unable to accomplish. (Tr. 216). Mr. Haden stated that Claimant never reported why he stopped coming or that he did not intend to continue in the modified duty position. When Claimant stopped appearing for the modified duty job, the position was still available to him. (Tr. 217).

F. Testimony of Brent Trahan

Mr. Trahan is a private investigator retained by Employer to conduct surveillance of Claimant. (Tr. 224-25). J. Bonner Thompson was the investigator who was assigned to Claimant's surveillance prior to Mr. Trahan. (Tr. 225). Employer's exhibits 33 and 34, surveillance report and surveillance footage, were compiled by Mr. Thompson before Mr. Trahan was assigned to observe Claimant. (Tr. 226-27). Mr. Trahan stated that upon review of the video footage, the subject in that footage appears to be Claimant. (Tr. 230). Of the three video segments contained in EX-34, Mr. Trahan testified that he did not notice any breaks in the footage. (Tr. 235). Mr. Trahan conducted separate surveillance of Claimant but none of that footage is included in exhibits introduced at hearing. (Tr. 232-34). Mr. Trahan attempted to contact Mr. Thompson and served a subpoena which was unanswered. (Tr. 231; EX-52).

G. Testimony of John Mahl

Mr. Mahl was called as a rebuttal witness and has been a private investigator for approximately 20 years. (Tr. 238). He was retained by Claimant to review Employer's surveillance video of Claimant and give his opinion concerning the authenticity of and surveillance practices used in the video. Mr. Mahl testified that the video was missing approximately 60 seconds of time from three separate occasions. (Tr. 240-41). He stated that it is standard industry practice for investigators tasked with performing surveillance to continue videotaping throughout the entire scene while the subject which is in view. (Tr. 241). Some exceptions are made when the view may be obstructed, there is a danger to the investigator, or the investigation may be compromised. (Tr. 241). Mr. Mahl stated it appeared on one of the three occasions that Claimant may have spotted the investigator, prompting him to cut off the recording. (Tr. 243). Although Mr. Mahl did not see any reason why the other two video breaks would be justified, he admitted that he did not speak with the investigator who took the video and that any observations he made were based strictly on his viewing of it. (Tr. 246-47). Otherwise, Mr. Muhl did not have any reason to believe that the video itself was altered or edited. (Tr. 244-45).

H. Medical Evidence

1. Deposition Testimony and Records of James Carruth, PA

James Carruth is a physician's assistant at the AHS clinic where Claimant was first taken for treatment following the accident on March 30, 2010. As a physician's assistant with

approximately thirty years of experience, Mr. Carruth engages in many of the same practices and procedures as medical doctors and his patient charts are routinely reviewed by a physician. (EX-40, pp. 10-11). Claimant was initially seen by Dr. Winston Riehl, Mr. Carruth's supervising physician, on March 30, 2010. Mr. Carruth examined Claimant for the first time on April 1, 2010. (EX-40, pp. 10-13).

The history provided by Claimant at the clinic indicated that he had been taking Lortab and an antibiotic following a dental procedure. Dr. Riehl's notes indicate that Claimant had an abrasion over the AC joint with reduced range of motion but no other complaints. The clinic records do not include any notes referencing a head, cervical, or lumbar injury or pain. (EX-40, pp. 14-16).

X-rays taken when Claimant first visited the clinic on March 30, 2010 were not clear so Mr. Carruth repeated the X-rays when Claimant came to the clinic on April 1, 2010. The original diagnosis from March 30th was a right shoulder injury, chip fracture. Mr. Carruth stated that the X-rays he obtained on April 1st did not reveal such a fracture. Mr. Carruth testified that Dr. Riehl released Claimant for light-duty work following his examination on March 30, 2010. (EX-40, pp. 16-18).

Mr. Carruth personally examined Claimant on April 1, 2010. Claimant's complaints were of right shoulder pain with no mention of cervical or back pain and no report of a head injury. According to Mr. Carruth's notes, Claimant's history on April 1st did not relate that he was struck on the hard hat. (EX-40, pp. 20-21). As stated previously, Mr. Carruth stated that the X-rays taken on April 1st did show any avulsion or chip fracture and that Claimant was again cleared for light-duty work. (EX-40, pp. 22-23). If Claimant had complained of cervical pain, Mr. Carruth stated that it should be recorded in the notes. (EX-40, p. 24).

Claimant's next appointment was scheduled for April 5, 2010. Claimant called the clinic to cancel stating that he was to have a tooth pulled but would come in on April 6, 2010. The clinic records indicate that Claimant had also informed his supervisor at OES, Anthony Bradner, of his dental appointment. (EX-40, pp. 25-26).

Claimant did appear at the clinic on April 6, 2010 and was examined by Mr. Carruth. Claimant reported experiencing headaches and Mr. Carruth noted that Claimant stated he was struck on the hard hat with no loss of consciousness and has been having dental procedures. Mr. Carruth's notes state that he is unsure whether there was a correlation between the headaches and the dental procedures. Mr. Carruth stated that Claimant's headaches were frontal, cluster-type headaches consistent with stress, anesthesia, injection, or pain. A neurological exam showed no issues and Mr. Carruth ordered a CT scan. (EX-40, pp. 26-27). Claimant refused the CT scan and Mr. Carruth stated that a CT scan was the only way to rule out pathology. Mr. Carruth acknowledged that Claimant's report of no lost consciousness is important in evaluating head trauma. Mr. Carruth's examination did not reveal any evidence of head contusions, abrasions, or trauma. (EX-40, pp. 28-31).

Claimant returned for a follow-up evaluation on April 16, 2010 with continued pain in the right shoulder, reduced range of motion secondary to pain, and tenderness to palpate at the

right rotator. Claimant made no complaints of headaches, cervical pain, or lumbar pain. Mr. Carruth continued Claimant on light-duty restriction and referred him to Dr. Duval since Claimant was having continued pain in his right shoulder with the inability to lift. Mr. Carruth stated it was highly questionable that Claimant's injury could be a rotator tear. The AHS clinic routinely refers patients with shoulder issues to Dr. Duval because of his expertise dealing with shoulder injuries. (EX-40, pp. 32-34). In all of the visits to the clinic, Mr. Carruth stated that Claimant never reported any lumbar or cervical pain, nor did he ever complain of numbness or tingling in his arms. (EX-40, pp. 34-35). Mr. Carruth's diagnosis on April 16, 2010 was right shoulder strain versus tear and no diagnosis with respect to any cervical or lumbar issues. (EX-40, p. 35). Claimant's restrictions would have allowed him to perform office work that did not involve the use of his right arm including filing, paperwork, data-entry, and answering phones. According to Mr. Carruth, Claimant would have been able to engage in this work throughout his course of treatment. (EX-40, pp. 35-37).

On cross-examination, Mr. Carruth was asked whether he has ever used the phrase "traveling pain." Mr. Carruth adamantly denied ever hearing or using the term and pointed out that the type of pain counsel was referring to is identified as referred pain or radiculopathy. (EX-40, pp. 45-46). Finally, Mr. Carruth emphasized that in recording a patient's complaints, any complaints of back or neck pain should be included. (EX-40, p. 50).

2. Deposition Testimony and Records of Dr. Michael J. Duval

Dr. Michael J. Duval is board-certified in orthopedic surgery and sports medicine. (EX-37, p. 6). Claimant first presented to Dr. Duval on April 19, 2010 on referral from the AHS clinic with complaints of right shoulder pain. (EX-37, p. 7). Claimant indicated on his "patient information form" that the reason for his appointment was his shoulder; no other reason was listed. Additionally, Claimant indicated that he was not suffering from frequent headaches at the time of the visit. (EX-37, pp. 9-11).

Dr. Duval's records reflect that Claimant provided a history of the accident indicating he was struck only in the shoulder. Claimant's only complaint on that day was shoulder pain and he did not report pain in any other part of his body. (EX-37, pp. 12-13). Dr. Duval stated that a patient can often have difficulty distinguishing whether pain is originating from the neck or shoulder. Upon physical examination, Dr. Duval believed Claimant was suffering from an AC joint separation since Claimant described a mechanism of injury (being struck on the shoulder) consistent with an AC separation. Further, nothing in Dr. Duval's exam produced a result consistent with a cervical or lumbar injury at that time. Claimant did not complain of lumbar pain at that time. (EX-37, pp. 14-15).

Dr. Duval opined that to a reasonable medical probability, three weeks after a traumatic event is far enough out from the event where one would expect that physical complaints resulting from the event would have surfaced. (EX-37, p. 16). Claimant demonstrated no positive neurologic findings and reflexes were normal. Dr. Duval noted that a patient who has ongoing cervical radiculopathy or something going on in their neck will exhibit changes in reflex. Dr.

Duval diagnosed a Grade 2 AC separation and recommended an MRI and physical therapy. (EX-37, p. 17, 19).⁴

Dr. Duval released Claimant to limited/light duty work on April 19, 2010. He stated that a position involving filing and clerical work would not have been a problem. (EX-37, p. 20).

Dr. Duval next saw Claimant on March 15, 2011 at which time a new history was taken. Claimant reported shoulder, neck, and back pain. Upon physical examination Claimant continued to show AC joint symptoms as well as limited motion of his lumbar spine but motor sensory and reflex tests were normal. Claimant reported receiving an injection in his back and that discography had been recommended. Claimant had not performed any physical therapy. (EX-37, p. 21; EX-17, pp. 9-10).

Dr. Duval noted that Claimant had an abnormal MRI that showed some central stenosis at L3/4 and a small bulge at L4/5. Dr. Duval did not agree that surgery/discography would be appropriate treatment for a 26 year old who had not yet tried treating conservatively with physical therapy. (EX-37, pp. 22-23). Dr. Duval believed that a lumbar fusion would be inappropriate for Claimant considering he was exhibiting mechanical pain symptoms with the absence of any disc herniations or high-grade disc pathology. (EX-37, p. 23). Further, Dr. Duval did not believe that the cervical or lumbar MRIs revealed signs of trauma since there were no traumatic lesions such as a compression fracture or disc herniation. (EX-37, p. 39).

Concerning Claimant's shoulder X-ray Dr. Duval noted that the spurring of the AC joint is degenerative. Based on the joint pain that Claimant was experiencing, Dr. Duval would have listed light duty restrictions. Claimant was not reporting cervical complaints at the March 15th examination. (EX-37, p. 24). Dr. Duval explained that without documentation of Claimant's complaints of neck and back pain at the AHS clinic it would be hard to relate that to his work injury. Dr. Duval went further to state that if there is no documentation in the three weeks following the injury then it would be difficult to relate the pain to the work injury. Dr. Duval continued to recommend physical therapy which he stated was standard care for a patient with mechanical back pain and who has not had any formal treatment. (EX-37, pp. 27-28).

On March 15, 2011, Dr. Duval believed that Claimant was nearing MMI for his shoulder and he would have sent Claimant for an FCE. Absent an FCE, Dr. Duval opined that he would release Claimant for modified-duty with some overhead lifting restrictions. If the Claimant's lumbar complaints were factored in, Dr. Duval believed that he would be capable of the light-duty work described in his April 19, 2010 report. (EX-37, pp. 29-32).

Dr. Duval last saw Claimant on April 19, 2012. Claimant presented with a complaint of back pain and, for the first time, indicated to Dr. Duval that he had been hit on the head as well as the shoulder. (EX-37, p. 33; EX-17, p. 13).

Claimant reported axial back pain, localized along the spinal cord. Claimant stated that he never had therapy for his neck or back. He walked with normal gait with no atrophy in his

⁴ Dr. Duval referred Claimant to physical therapist for shoulder. Claimant attended for therapy sessions and had no complaints of neck or back pain. (EX-26).

upper or lower extremities and his strength exam was normal. Claimant did report some residual discomfort of AC joint and while some limitation in lumbar motion; he had full motion of his shoulder. (EX-17, p. 14; EX-37, p. 34). Dr. Duval explained the significance of the absence of atrophy is an objective finding and that patients with an active disc pathology with radiculopathy generally develop atrophy.

Dr. Duval believed that on April 19, 2012, there was no functional limitation connected to Claimant's shoulder and that he had reached MMI with respect to that right shoulder. (EX-37, pp. 36-37). However, Dr. Duval did not believe, as it concerned his lumber and cervical spine, that Claimant was fully recovered and would not release him for anything other than light or medium duty work with restrictions of lifting 20-30 pounds. (EX-37, p. 42-43). The only treatment that Dr. Duval would recommend for Claimant's cervical and lumbar spine is physical therapy. (EX-37, p. 44).

Dr. Duval opined that he is in a better position to evaluate Claimant than a physician who has only seen Claimant once since the duration of his treatment over a number of years provides some perspective concerning Claimant's condition. (EX-37, p. 47).

On cross examination Dr. Duval clarified that he did not believe Claimant's back to be normal. He stated that the MRI shows shortening of pedicles with central stenosis which is congenital and the bulging at L4/5 is not high grade and may be the cause of mechanical back pain. Further, that desiccation is not normal in a person Claimant's age. (EX-37, p. 59). Dr. Duval stressed he would not defer to Claimant's treating physician's recommendation of discography since Claimant had not yet undergone physical therapy for his back. Dr. Duval opined that due to discrepancies as far as Claimant's relationship of pain, a FCE following physical therapy would be appropriate before considering surgery. (EX-37, pp. 61-62).

3. Deposition Testimony and Records of Dr. John B. Sledge, III and Records of Dr. John Cobb

Dr. John B. Sledge became Claimant's treating physician after his original treating physician, Dr. John Cobb passed away. Dr. Sledge examined Claimant once, on April 2, 2012 and provided testimony concerning Claimant's treatment with Dr. Cobb. (EX-38). Dr. Cobb's records indicate that he saw Claimant a total of eight times. (EX-18).

Claimant first presented to Dr. Cobb at the Lafayette Bone & Joint Clinic on May 10, 2010, approximately five weeks following his accident. (EX-38, p. 7). Claimant was referred to Dr. Cobb by his attorney, Grady Abraham. (EX-38, p. 9). Claimant's chief complaints included his neck, back, and right shoulder. Dr. Cobb's interpretation of X-rays showed that the AC joint demonstrated some minimal calcification present which would be post traumatic but no significant separation of the AC joint was exhibited. Additionally, cervical views demonstrated straightening of the normal lordosis, but otherwise no abnormality while the lumber views demonstrated no significant abnormality but that some adaptive wedging of the lower thoracic vertebra was visible. (EX-18, p. 19). Dr. Sledge noted that the adaptive wedging can be a congenital development. (EX-38, p. 15). Dr. Cobb diagnosed grade 1 AC joint injury, possibly representing an injury to the AC joint meniscus. He also diagnosed cervical and lumber

strain/sprain but ruled out a disk related condition in both cases. Dr. Cobb ordered an MRI of the shoulder, cervical and lumbar spine as well as recommended physical therapy. (EX-18, pp. 17-18).

The MRI of the right shoulder showed degenerative changes. The impressions of the cervical MRI note mild multilevel cervical spondylosis which are degenerative changes within the cervical spine. (EX-38, p. 17). The cervical MRI did not show any herniations, however, the impressions note central annular bulging at C5-6. (EX-38, p. 20). As for the lumbar MRI, the impressions note secondary to shortened pedicles at L3/4 which Dr. Sledge identified as a congenital condition. (EX-38, p. 23). At L4/5 the impression notes mild ligamentum flavum hypertrophy bilaterally which Dr. Sledge explains is degenerative changes that are present greater than a year. (EX-38, p. 24).

Claimant returned to Dr. Cobb on June 7, 2010 to review the MRI results. Dr. Cobb was in agreement with the MRI impressions put forth by the radiologist. (EX-38, p. 25). Dr. Cobb recommended physical therapy and diagnosed degenerative changes at C5/6 with some irritation in the left upper extremity and degenerative changes in the lumbar spine with bulging and symptoms consistent with instability, dessication stenosis at L3/4 and to a lesser degree L4/5. (EX-38, p. 26). Dr. Cobb was not recommending surgery at that time. (EX-38, p. 30).

When Claimant returned to Dr. Cobb on August 16, 2010, he complained of slight neck pain but no problems with his shoulder. At this time Dr. Cobb recommended discography at L3/4 and L4/5 with a control at L2/3. Dr. Cobb's assessment of Claimant at the time included numerous degenerative changes to the cervical and lumbar spine. (EX-18, p. 31).

Claimant saw Dr. Cobb on November 10, 2010 with complaints of neck, shoulder, and back pain. Dr. Cobb's assessment remained unchanged with the exception of diagnosing carpal tunnel syndrome on the right with possible retrograde pain and also C6 involvement. (EX-18, p. 34).

Dr. Cobb saw Claimant on December 22, 2010 with complaints of lower back and leg pain but no shoulder pain was noted. Dr. Cobb's notes state that "after review of the history and mechanism of injury, it is my opinion that the carpal tunnel syndrome" is the result of the accident that occurred on March 30, 2010. Dr. Cobb's recommendation of discography remained unchanged. (EX-18, p. 36). Claimant subsequently saw Dr. Cobb again on February 23, 2011; May 16, 2011; and August 22, 2011 with complaints of neck and/or back pain but no complaints of shoulder pain. (EX-18, pp. 39, 41, 42). On each of these occasions, Dr. Cobb's assessment and recommendation remained unchanged. In his notes on August 22, 2011, Dr. Cobb states that "it appears that there is some question as to the causation of the problem that Mr. Smith is having." He went on to opine that Claimant's symptoms and the treatment "are a product of the accident that occurred" on March 30, 2010. (EX-18, p. 42).

Dr. Sledge saw Claimant once, on April 2, 2012. At that time, Claimant was not complaining of shoulder pain. (EX-38, p. 49). Claimant's current symptoms at that time included center lower back pain with bilateral leg pain, radiating to the knees posteriorly. Claimant was ambulatory and walked with normal gait and cadence. Dr. Sledge's

recommendation was the same as Dr. Cobbs. (EX-19, pp. 2-3). Dr. Sledge stated that he did not believe that Claimant was capable of a sedentary or light-duty position given his medications and physical limitations. (EX-38, pp. 53-54). Dr. Sledge could not specify when Claimant's shoulder reached MMI since he did not treat Claimant until April 2, 2012 but opined that at that time it was. (EX-38, p. 56).

4. Deposition Testimony and Records of Dr. Daniel L. Hodges

Dr. Daniel Hodges is a board certified physical medicine and rehabilitation physician practicing with the Lafayette Bone and Joint Clinic in Lafayette, Louisiana. Dr. Hodges first examined Claimant on October 4, 2010 upon referral by Dr. Cobb. (CX-11, p. 7). Addressing the patient information form filled out by Claimant, Dr. Hodges notes that Claimant did not indicate that he was experiencing neck pain. (CX-11, p.8). Claimant did check sections asserting back, knee, leg, ankle, and foot pain and indicated experiencing pain with walking, bending and stooping. (CX-11, p. 8-9). Further, Claimant's response noted experiencing pain 12-18 hours a day at a pain level of 8 on a 1 to 10 scale. (CX-11, p. 9). Dr. Hodges stated that such pain would be close to very, very severe pain. (CX-11, p. 10).

On examination, Claimant had some tenderness into the trapezius levator group in the upper neck and shoulder region as well as the rhomboid musculature between the shoulder blades. Claimant reported pain on extension, flexion and lateral bending of his lumbar spine. He also could not perform a squatting maneuver without pain in the lower lumbar region although he appeared to be neurologically intact in his lower extremity exam. Claimant also was not exhibiting any range of motion limitations during his cervical spine exam. (EX-39, pp. 13-14). Claimant's lumbar spine evaluations are subjective according to Dr. Hodges. (EX-39, p. 15). Dr. Hodges recommended an EMG/NCV study of the right upper extremity to rule out entrapment neuropathy. (EX-39, p. 15; EX-20, p. 19).

The EMG was performed on October 26, 2010 by Dr. Hodges. Dr. Hodges noted that Claimant had significantly prolonged median motor latency of platform from six milliseconds and that these problems related to Claimant's carpal tunnel issues. Dr. Hodges said the results may be an indication of C5/6 cervical issues but that the EMG testing was not conclusive. (EX-39, pp. 17-18).

Dr. Hodges next saw Claimant on November 15, 2010, noting that Claimant continued to have positive Tinel's over the right wrist indicative of carpal tunnel. Claimant was neurologically intact through the lumbar region and otherwise did not indicate any pathology with respect to the cervical region itself. (EX-20, p. 23; EX-39, pp. 18-19).

Claimant's subsequent visit on March 21, 2011 showed no positive findings as to the cervical or lumbar regions. Dr. Hodges ordered no changes to Claimant's treatment regimen. Claimant's last visit to Dr. Hodges on May 23, 2011 remained unchanged from his prior visit. (EX-20, p. 31; EX-39, pp. 19-20).

Due to the amount of time since Dr. Hodges has seen Claimant, he believes that it is clear that he is no longer actively following Claimant's treatment. (EX-39, p. 27).

I. Vocational Evidence

The deposition testimony of Angeliki Bountovinas was submitted by Employer. (EX-42).

Ms. Bountovinas has been a senior vocational rehabilitation counselor for approximately 19 years. (EX-42, p. 6). She met with Claimant on April 23, 2012 to perform a vocational evaluation. (EX-42, p. 10). Ms. Bountovinas's evaluation included an interview to obtain information concerning Claimant's education, work history, medical status, and other background information. Claimant was also put through a series of tests to evaluate achievement levels. (EX-42, pp. 13-14). Based on Claimant's history, achievement scores, and the work restrictions placed on Claimant by the AHS clinic and Dr. Duval, Ms. Bountovinas conducted a labor market survey on May 7, 2012 and identified four open positions Claimant could be considered for that fell within his restrictions.⁵ (EX-42, pp. 18-19). Those positions included positions for dispatcher, customer service coordinator, assembler, and general manager. Ms. Bountovinas contacted the employers directly and confirmed that, based on the criteria mentioned above, Claimant would be suitably situated to work these positions. (EX-42, p. 20). Ms. Bountovinas also reviewed the modified-duty data entry position that Claimant was assigned to following his release by the AHS clinic. It was her opinion that the modified position was appropriate for Claimant on March 30, 2010, the date he was placed on light duty. (EX-42, pp. 22-23).

J. Surveillance Video

The surveillance video submitted by Employer was taken on July 21, 2010. (EX-34). It shows Claimant skimming the surface of a small inflatable pool. Claimant is using an extended pole net with both hands, bending at the waist. The video also depicts Claimant getting into and out of a pick-up truck. Claimant is also seen lifting a small child and bag out of the truck. Claimant does not appear to be experiencing significant pain. (EX-34).

K. Claimant's Earnings and Employer's Payroll Records

Claimant's tax records reflect that Claimant earned \$32,050.08 in 2008, \$33,370.06 in 2009, and \$15,505.00 in 2010. (EX-4). Employer's payroll records for similarly situated employees show that one had an average weekly wage of \$985.36 (\$13,795.00 (excluding overtime)/14 weeks) and the other had an average weekly wage of \$602.02 (\$13,760.05 (excluding overtime)/20 weeks). (CX-12).

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144

⁵ Ms. Bountovinas noted that at the time of drafting her vocational assessment, Claimant's treating physician, Dr. Sledge, had not addressed the issue of work status in his latest report. Accordingly, she relied on the physical capabilities outlined by Dr. Duval. (EX-15, p. 16).

(D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g*. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that 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. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). These two elements establish a *prima facie* case of a compensable "injury" supporting a claim for compensation. *Id.*

1. Claimant's Prima Facie Case

Claimant argues that his *prima facie* case was proven by stipulation of the parties as it concerns Claimant's shoulder injury and that the only remaining question is whether Claimant also injured his neck and back during the accident. Claimant contends that medical evidence produced demonstrates that he sustained injuries to his neck and back and still suffers some level of disability from same. Claimant also asserts that Employer received timely notification of the injuries to his neck and back through complaints of pain made to Mr. Carruth at AHS, two days

after the accident at Claimant's follow-up examination. Claimant contends that the medical evidence shows that he has not yet reached MMI and that he is in need of further medical treatment in order to reach MMI. Further, that the nature and extent of Claimant's injuries cannot be determined before further evaluation and treatment is conducted. Claimant argues that based on the medical evidence and testimony, Employer has not demonstrated suitable alternative employment and Claimant's injuries exclude him from performing the duties required for the modified position tendered by Employer. Finally, Claimant contends that his average weekly wage while working for Employer was \$1,600.00 and even though he only worked for a few days prior to his accident, he was hired as a full time employee and had no plans to leave that job.

Employer contends that any neck and back injuries sustained by Claimant are not related to the March 30, 2010 accident. Employer asserts that Claimant failed to report to any physician any alleged neck or back injuries for over a month or ever report such injuries to Employer. It is Employer's contention that Claimant has failed to establish a *prima facie* claim for those alleged injuries. Employer argues that even if additional injuries were sustained, Claimant's failure to comply with § 912 prejudiced Employer. Employer contends that if indemnity is due it is for temporary partial disability only and that the average weekly wage should be based on Claimant's prior annual earnings and cannot be based on any Offshore Energy Services payroll records.

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. See *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982).

In the present matter, I credit Claimant as it concerns his complaints of neck and back pain. Although I believe Claimant's testimony not to be entirely forthcoming with regards to his explanations of his Facebook entries, his reasons for failing to mention his neck and back to Mr. Carruth or Dr. Duval, or some inconsistencies between his deposition and trial testimony, I am not willing to dismiss his subjective complaints of pain. Further, it is undisputed that the accident on March 30, 2010 could have caused the harm to Claimant since it is agreed that he was struck by something after a string of casing slipped.

Thus, Claimant has established a *prima facie* case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on March 30, 2010, and that the working conditions and activities on that date could have caused the harm or pain for causation sufficient to invoke the Section 20(a) presumption. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's *prima facie* case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *Avondale Industries v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1998); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (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 evidence").

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). See *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

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. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Director, OWCP v. Greenwich Collieries, supra*.

In the instant case, I find that Employer has successfully rebutted Claimant's *prima facie* case by substantial evidence. Specifically, the testimony of Justin Atchison and Justin Jourdan stating that they did not see Claimant struck by the cables or other debris is persuasive. Additionally, none of the witnesses that came into contact with or treated Claimant noted any complaints of neck or back pain until Claimant was examined by Dr. Cobb on May 10, 2010, over a month after the incident. Mr. Carruth testified that Claimant never complained of head, neck or back pain. Further, Dr. Duval stated and his notes reflect that Claimant only complained of shoulder pain at his initial examination. This finding is bolstered Dr. Duval's opinion that physical complaints of neck and back pain would have surfaced in the three weeks following a traumatic event such as the incident on March 30, 2010 and that absent any initial documentation of pain in that time, it would be difficult to relate such pain to the work injury.

3. Weighing of the Evidence

In finding that Employer has successfully rebutted the Section 20(a) presumption, I must weigh all the evidence and determine causation based upon the entire record. Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. *Black & Decker Disability Plan v. Nord*, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (*citing Pietrunti v. Director, OWCP*, 119 F.3d 1035

(2d. Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability “unless contradicted by substantial evidence to the contrary”); *Loza v. Apfel*, 219 F.3d 378 (5th Cir. 2000); (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

The parties have stipulated that Claimant sustained a right shoulder injury while in the course and scope of his employment with Employer on March 30, 2010. Therefore, the only injuries at issue are those to Claimant’s back and neck.

Claimant was examined once by Dr. Sledge on April 2, 2012 with continued complaints of low back pain, in the center, with bilateral leg pain, radiating to the knees posteriorly. Claimant related that activity worsens his pain and although he gets slight relief with rest, he always has pain. On physical examination, Dr. Sledge noted that Claimant complains of increased pain with flexion of his back. Dr. Sledge recommended a discography at the L2-3, L3-4, and L4-5. (EX-19).

The records of Dr. Cobb, Claimant’s previous treating physician, demonstrate similar complaints of back pain. Claimant was seen by Dr. Cobb on eight occasions starting on May 10, 2010.⁶ Dr. Cobb first recommended the discography and, based mainly on Claimant’s subjective history, related his neck and back pain to the March 30, 2010 incident.

Dr. Duval has examined Claimant each year since the accident which caused Claimant’s shoulder injury. Dr. Duval’s records from his initial examination of Claimant do not indicate any neck or back injuries. It is Dr. Duval’s opinion that without documentation of neck and back pain in the three weeks following the accident it is difficult to relate any neck or back injuries to the March 30, 2010 accident. Further, Dr. Duval opined that any lumbar conditions are degenerative in nature and are not indicative of trauma as Claimant contends.

In this instance however, I find that the substantial evidence supports a determination that any neck or back problems suffered by Claimant are not causally related to the March 30, 2010 incident and are therefore not compensable injuries. Although I credited Claimant’s testimony concerning his reports of neck and back pain, I find his explanations regarding his failure to address these alleged injuries to his initial healthcare providers incredible. Overall, I am unimpressed with Claimant’s candor and forthrightness presented throughout his testimony. Specifically, I do not find Claimant’s excuses and reasons for not reporting his alleged neck and back injuries credible in light of the testimony presented by Dr. Duval, Mr. Carruth, Mr. Bradner, Mr. Atchison, Mr. Jourdan, and Mr. Harden. Claimant testified that he was worried that complaining to Dr. Duval about his neck and back pain for fear of losing his job while also admitting that he stopped working his modified duty position without explanation or notice. Claimant’s reasoning is inconsistent and, though I credit his complaints of neck and back pain, I cannot credit Claimant’s testimony relied upon to causally relate this pain to the injury he sustained on March 30, 2010.

⁶ The dates of Claimant’s appointments with Dr. Cobb are May 10, 2010; June 17, 2010; August 16, 2010; November 10, 2010; December 12, 2010; February 23, 2011; May 16, 2011; and August 22, 2011.

B. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of his disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968)(*per curiam*), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask, supra*, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services v. Director, OWCP, supra*, at 443.

The question of extent of disability is an economic as well as a medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991).

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994). Once a claimant establishes that he is unable to perform his usual work, the burden shifts to the employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden by offering a job in its facility, including a light-duty job, so long as it does not constitute sheltered employment. *Darby v. Ingalls Shipbuilding, Inc.* 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); *Darden v. Newport News Shipbuilding & Drydock Co.*, 18 BRBS 224 (1986). Light-duty work is not sheltered employment if the employee is capable of performing it, it is necessary to the

employer's operations, it is profitable to employer, and several shifts perform the same work. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

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

An employee reaches maximum medical improvement when his condition becomes stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Ltd.*, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication. As stated *supra*, the weight of the evidence shows that Claimant's neck and back conditions are not compensable injuries.

Due to the gaps presented in Claimant's treatment timeline, it is necessary to look at all the medical testimony to determine if and when Claimant reached MMI for his shoulder injury. Dr. Seldge testified that Claimant had reached MMI for his shoulder on April 2, 2012. Dr. Duval testified that Claimant was close to MMI of his shoulder when examined on March 15, 2011 but had no functional limitation and had certainly reached MMI by April 19, 2011. Dr. Cobb's records reflect that Claimant did not complain of shoulder pain upon examination on February, 23, 2011; May 16, 2011, or August 22, 2011. None of the doctors placed restrictions on Claimant's shoulder at that time. Based on the records and testimony of Dr. Cobb and Dr. Duval, I find that Claimant's shoulder condition became stabilized and he reached MMI on May 16, 2011. As it relates to Claimant's shoulder, the only compensable injury, Claimant was capable of performing his usual employment, suffered no loss of wage earning capacity, and was no longer disabled under the Act as of May 16, 2011.

Employer submitted a labor market survey to Claimant's attorney on May 7, 2012 which establishes suitable alternative employment. However, this issue is moot because on May 16, 2011, Claimant could perform his former job and was no longer suffering economic disability.

Employer argues that any disability is partial in nature given Claimant's ability to perform the modified-duty position offered by Employer. While I believe Claimant to be physically capable of performing the light-duty position offered, I am unconvinced that the position was necessary to Employer. Mr. Bradner testified that there was enough work for Claimant but there is nothing in the record to suggest that an employee would necessarily be replaced if his job were terminated. It appears that Employer is fully capable of handling the duties included in Claimant's modified position with the staff already on hand and that the position itself is merely sheltered employment.

Accordingly, I find that Claimant's condition was both temporary and total until he reached MMI on May 16, 2011.

E. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. *SGS Control Services v. Director, OWCP, supra*, at 441; *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sum nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

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 U.S.C. § 910(a). 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. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. *Empire United Stevedore v. Gatlin*, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

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.

In *Miranda v. Excavation Construction Inc.*, 13 BRBS 882 (1981), the Board held that 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 because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.

In addition, Claimant worked as a floor hand for only five days for the Employer in the year prior to his injury, which is certainly not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See *Lozupone v. Stephano Lozupone and Sons*, 12

BRBS 148 (1979)(33 weeks is not a substantial part of the previous year); *Strand v. Hansen Seaway Service, Ltd.*, 9 BRBS 847, 850 (1979)(36 weeks is not substantially all of the year). *Cf. Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 136 (1990)(34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his 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.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). *Hayes v. P & M Crane Co.*, *supra*; *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. *Barber v. Tri-State Terminals, Inc.*, *supra*. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. *Empire United Stevedores v. Gatlin*, *supra*, at 822.

I conclude that because Sections 10(a) and 10(b) of the Act cannot be applied. Claimant has not worked in the same employment for substantially the whole of the year immediately preceding the injury under Section 10(a). Additionally, evidence submitted with regards to earnings of similarly situated employees vary greatly and are based on scheduling factors that are difficult to reconcile under Section 10(b). Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter. Claimant's average weekly wage in the year prior to his accident, 2009, was \$641.73 (\$33,370.06/52 weeks). This figure constitutes Claimant's average weekly wage.

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

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, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1980); *Wendler v. American National Red Cross*, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 103 (1997); *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988); *Rieche v. Tracor Marine*, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. *See generally* 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. *Id.*

The parties stipulated that Claimant has received medical benefits, as it relates to his shoulder injury sustained on March 30, 2010, in the amount of \$3,624.80. Since the disputed injuries to Claimant's neck and back are non-compensable and Claimant has fully recovered from the work-related shoulder injury, no additional benefits under Section 7 are due.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount

of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.⁷ A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

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

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from March 31, 2010 through May 16, 2011, based on Claimant's average weekly wage of \$641.73, in accordance with the provisions of Section 8(b) of the Act, with credit for all compensation previously paid. 33 U.S.C. § 908(b).
2. Employer/Carrier shall receive credit for all compensation heretofore paid, if any, as and when paid.
3. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28, U.S.C. § 1961 (1982); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).

⁷ 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 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after April 29, 2011, the date this matter was referred from the District Director.

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

SO ORDERED this 14th day of November, 2012, at Covington, Louisiana.

**CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**