U.S. Department of Labor

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Issue Date: 17 January 2006

CASE NO.: 2005-LHC-00883

In the Matter of

MARINO AMADO,
Claimant

v.

UNIVERSAL MARITIME SERVICES CORPORATION
Employer

And

SIGNAL MUTUAL INDEMNITY ASSOCIATION
Carrier

Appearances:
Jorden N. Pedersen, Esq., for Claimant
Christopher J. Field, Esq., for Employer

Before: PAUL H. TEITLER
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S. § 901 et seq. ("the Act"), and the regulations promulgated there under. A hearing was held before me in New York City on June 20, 2005.

At the hearing, Claimant's exhibits 1-16 and Employer's exhibits 1-17 were admitted into evidence. Post-hearing, Claimant submitted the deposition of Dr. Alan Schultz, marked as CX 17 and the deposition of Dr. Enrique Hernandez, marked as CX 18. Employer submitted the deposition of Thomas Paglio, marked as EX 18, the deposition of Dr. Michael Bercik, marked as EX 19, and the deposition of Darryl Vetro, marked as EX 20. Post-trial briefs were submitted on behalf of both parties.

STIPULATIONS

The parties have stipulated to the following:

1. This claim is subject to the Act;
2. An accident occurred on August 8, 2004;
3. Claimant and Employer were in an employee-employer relationship at the time of the accident and injury;
4. Employer was timely notified of the injury;
5. Employer timely filed a notice of controversion with the United States Department of Labor;
6. Medical benefits were paid pursuant to Section 7 of the Act;
7. Claimant's average weekly wage is $1,175.45; and
8. Claimant was paid total temporary disability from August 9, 2004 to October 10, 2004.

ISSUES

The issues presented for decision in this case are:

1). The nature and extent of Claimant's disability
2) The payment of medical benefits under Section7

SUMMARY OF THE EVIDENCE

Claimant's Testimony

Claimant, Marino Amado, testified at the hearing on June 20, 2005 with the help of an interpreter. He stated that on August 8, 2004, at approximately 6:30 a.m., he was involved in an accident at work in which the person operating the top loader, Darryl Vetro, struck the cab of his hustler driver. (T 35-36). He was shaken about in the cab and immediately felt pain in his right side and right shoulder. (T 36). He stated that he also hit his head on the side of the cab. He sat in the seat of the cab for a while before getting out holding his head. He then yelled a few words at Mr. Vetro, whom he felt was to blame for the accident. (T 36). After the accident, Claimant took one more container in his hustler driver and then went to the marine building where he filled out the accident report and spoke to the Port Authority police.

Claimant was then transported by ambulance to Trinitas Hospital Emergency Room. The doctor at the emergency room said that Claimant had a general spasm in his back and neck. No x-rays were conducted that day. Claimant then took a taxi home. (T 39). He returned to the hospital the following day, Monday, to inquire about the company's doctor. The hospital told him they did not know where the company's doctor was located. On Tuesday, Claimant went to Newark Airport Medical Office ("NAMO"). The doctors there sent him for x-rays and performed physical therapy. Claimant was treated there approximately five or six times, but was not satisfied with the level of care. Therefore his lawyer at that time, Mr. Solomon, recommended he see Dr. Patel. (T 39-40).

Claimant was treated by Dr. Patel two times. (T 41). Dr. Patel ordered an MRI, but Claimant stated that he did not receive it because the insurance company refused to pay for it. Claimant was not satisfied by the level of care provided by Dr. Patel, either, and therefore Mr. Solomon recommended he see Dr. Hernandez in Newark, New Jersey. (T 41). His complaints to Dr. Hernandez consisted of dizziness, blurry vision, neck and shoulder pain, and lumbar pain that extended down his leg. (T 43). Dr. Hernandez treated Claimant with biofeedback. (T 53). Claimant felt that he was receiving good care at this office. (T 53). Dr. Hernandez referred Claimant to Dr. Schultz, an orthopedist, for treatment of Claimant's shoulder. Dr. Shultz injected Claimant with steroids and sent him for therapy. He also suggested an exploratory type of surgery on the right shoulder. (T 44).

Eventually Claimant obtained MRIs of his neck and right shoulder. He also began seeing Dr. Kramer for depression. (T 42). Currently, Claimant's medication consists of Tylenol Arthritis and Motrin 800, if he is not having stomach pain. (T 45). Claimant stated that his current complaints were: headaches, dizziness, blurry vision, pain in his neck and right shoulder, and pain in the lumbar region of his back. (T 45-46). Claimant denied prior injury to these areas. (T 47). Claimant never returned to work following the accident. (T 46).

Claimant admitted that he never asked for authorization from his Employer before seeing Dr. Patel, Dr. Hernandez or Dr. Schultz. (T 51). He stated that his lawyer at the time, Mr. Solomon, referred him to both Dr. Patel and Dr. Hernandez. (T 40-41). Claimant could not explain the discrepancies between ambulatory and hospital records that indicate he was in no distress at the time of the accident, and do not indicate any right shoulder pain, and his recount that he told medical personnel that he was in pain from the waist up and could not lift his right arm. (T 55-60).

Francisco Fernandez' Testimony

Mr. Fernandez testified at the hearing on June 20, 2005. At that time he was working as a hustler driver for Universal at Port Elizabeth. (T 10). On the date of Claimant's accident, August 8, 2004, Mr. Fernandez was working as a hustler driver approximately 50-200 feet from Claimant. (T 11). Mr. Fernandez had worked through the evening and remembered it being early morning when he heard a loud noise. He turned around and saw Claimant's cab rocking back and forth. (T 12, 21). Mr. Fernandez stated that he did not "witness an accident," in that he did not see what caused the cab to rock in such a way, only that he heard the noise and saw the cab rocking. (T 21). When he was about to leave work for the day, he was asked to come into the marine building and tell the Port Authority police officer what happened. Mr. Fernandez saw Claimant in the building at that time.

The following day, a co-worker, Darryl Vetro, approached Mr. Fernandez and physically abused him, calling him an "F rat." (T 14). Mr. Fernandez stated that Mr. Vetro was the employee who was operating the top loader that put the container onto Claimant's hustler.

Thomas Paglio's Testimony

Mr. Paglio is a checker assigned to the Universal Maritime facility where Claimant worked. He was deposed on August 11, 2005. (Deposition Transcript of Thomas Paglio identified as EX 18). His job entails checking the containers that are being taken down to the ship from the yard or coming off the ship. (EX 18 at 8).

On the day of the accident, Mr. Paglio was working approximately twenty feet away from Mr. Amado. (EX 18 at 22). At the time, Mr. Paglio was checking the numbers on the containers against a list. (EX 18 at 23). After recording the number on the container Claimant had, Mr. Paglio turned to speak to a co-worker. After hearing the container land, Mr. Paglio watched the hustler and the top loader complete the operation. (EX 18 at 26). Mr. Paglio categorized the landing of the container as neither the hardest, nor the softest landing he had seen. He also stated that Mr. Amado may have been jostled inside the cab of the hustler. (EX 18 at 27). Mr. Paglio did not believe that Claimant appeared injured, however he did not ask Claimant if he was injured or not. (EX 18 at 27).

Statement of Darryl Vetro

Darryl Vetro wrote a statement on May 12, 2005 relaying what he remembered from the date of the accident. (EX 17). Mr. Vetro was operating a top loader that day, but could not recall if he worked with Mr. Amado that day. He stated that he did not remember "anything out of the ordinary happening." He was asked to go to the Marine Building where someone told him that he had shaken Mr. Amado's hustler. Mr. Vetro was asked to give a statement, which he does not recall whether he actually gave or not.

Medical Evidence

CT scan dated August 21, 2004

A CT scan of the brain produced normal results. (CX 4).

MRI of the right shoulder dated November 8, 2004

An MRI of the right shoulder revealed (1) large joint effusion with tears of the anterior and posterior glenoid labrum, (2) complete tear of the long head of the biceps tendon, and (3) a full thickness tear of the anterior fibers of the supraspinatus muscle with muscle tendon retraction. Fluid in the rotator cuff was also noted.(CX 6).

MRI of the cervical spine dated November 8, 2004

An MRI of the cervical spine revealed (1) disc osteophyte complex and probable left foraminal herniated disc at C3-C4 and (2) left central herniated disc at C5-C6. (CX 7).

Electrodiagnostic testing dated November 11, 2004

This test revealed right cervical radiculopathy at the C7 level and bilateral upper dorsal radiculopathy. (CX 8).

MRI of the lumbar spine dated March 17, 2005

An MRI of the lumbar spine revealed mild to moderate osteoarthritic changes at L4-L5 with loss of disc space height desiccation and central bulge. There was no evidence of spinal stenosis and normal lumbar lordosis was maintained. (CX 10).

Trinitas Hospital

On the date of the accident, Claimant was taken via ambulance to Trinitas Hospital in Elizabeth, N.J. Records reveal that at the time he was alert and oriented and had chief complaints of head and neck pain. (CX 1). Claimant told staff that he was in an accident at work and hit his head and neck against the window of the truck. He also stated that he had a mild headache. He was treated with Motrin and given a prescription for Flexeril for neck pain upon discharge. Claimant was discharged at 9:13 a.m. on the same day, August 8, 2004, and told to follow up with his company doctor. (CX 1).

Newark Airport Medical Offices

On August 10, 2004, Claimant began treatment at Newark Airport Medical Offices. (CX 2). Records show he complained of pain in his left side, neck and shoulders, and lower back, and of headaches, dizziness, and blurry vision. He was diagnosed with a neck sprain with spasm and a lumbosacral strain.

Claimant returned the next day. He stated that he was suffering from almost continuous headaches. Patient was instructed to only take Flexeril at home as it causes drowsiness. Patient was treated at NAMO five times. His diagnoses consisted of a cervical spine sprain with spasm, a lumbosacral strain, post concussion syndrome, headaches with dizziness. (CX 2).

Dr. Aruna Patel

Claimant treated with Dr. Patel on two dates, August 18 and August 26, 2004. Claimant complained of pain in his neck and low back and of ringing in his head. Dr. Patel indicated a full range of motion of Claimant's neck. The diagnosis was of post-concussion syndrome, cervical strain, and lumbosacral strain. Dr. Patel recommended a CT scan of the head, x-rays of the spine and physical therapy three times a week. (CX 3).

Dr. Michael Bercik

Mr. Amado met with Dr. Bercik, board certified in orthopedic surgery, on September 13, 2004. (EX 5). Claimant stated that he had pain in his neck and shoulder with radiating pain into the arm and lower back and into the left leg.

Dr. Bercik examined the Claimant and found a full range of motion in the cervical and lumbosacral spine, no deformity of the spine, and a mild spasm in the trapezius and paravertebral muscles. The patient noted pain on forward bending. Neurological examinations of the upper and lower extremities yielded normal results with reflexes and extension. An examination of the right shoulder revealed no deformity and a range of motion of 0 to 120 degrees of forward flexion, and full range of motion of internal and external rotation.

Dr. Bercik's diagnosis was of a cervical sprain, lumbosacral sprain and right shoulder sprain. He wrote that there were mild objective findings that correlated with the Claimant's complaints. Dr. Bercik recommended physical therapy three times a week, and an MRI to each area to rule out disc injuries. He also recommended consultation with a neurologist. Dr. Bercik stated that the Claimant was unable to perform regular work at that time and estimated that he would be able to return to work in October.

A second report was written after a second evaluation on October 8, 2004. (EX 7). At this examination, Dr. Bercik felt there were no objective findings to correlate to Claimant's subjective complaints. He wrote that the Claimant has reached maximum medical improvement and required no further studies or treatment. He lifted the work restriction he had placed on Claimant at the first examination and suggested Claimant could return to work.

Dr. Bercik was deposed on September 7, 2005. (Deposition Transcript of Dr. Bercik identified as EX 19). He testified that upon his first examination of Claimant, he found no evidence of a complete tear of the biceps tendon, which he said would normally produce a dramatic deformity from the muscle retracting and forming a ball shape above the elbow. (EX 19 at 15). He stated that he did not find such deformity at the second examination either. Dr. Bercik stated that if another doctor found such a problem, that would most likely mean the injury must have occurred after his October 8th examination of the Claimant, during which he saw no deformity. (EX 19 at 23). In terms of a rotator cuff tear, Dr. Bercik said it is less clear; a person can present with no problems, i.e. asymptomatic, or be in significant pain. (EX 19 at 18).

While Dr. Bercik thought Claimant was disabled at the time of the first examination, he changed his mind at the second exam. The second examination produced no objective abnormalities, and Dr. Bercik felt therefore that the MRIs he suggested at the first exam (that were not done by that point) were no longer necessary. (EX 19 at 28).

Dr. Frederick Weisbrot

Dr. Weisbrot, a board certified neurologist, examined Claimant on September 21, 2004. (EX 6). Dr. Weisbrot had x-rays of the cervical, dorsal and lumbosacral spine available to him, as well as the CT scan of the brain. Dr. Weisbrot conducted a neurological examination of the Claimant and concluded that while he had suffered a mild head injury, it had since resolved. He also concluded that there was no neurological disability and no neurological treatment was needed.

Dr. Enrique Hernandez

Dr. Hernandez is certified by the board of Psychiatry and Neurology. He has treated Mr. Amado since September 22, 2004. At the initial evaluation, Dr. Hernandez diagnosed head trauma and contusion injuries to the cervical and lumbar spine regions with persistent pain radiating to the extremities, possibly with a herniated disc. (CX 9).

Dr. Hernandez' prognosis was guarded. He provided physical therapy with biofeedback to treat Claimant's headaches, as well as the medication Zoloft. Dr. Hernandez also suggested MRIs to rule out disc herniations in the cervical and lumbar regions. He treated Claimant mostly for his neck and headaches, while Dr. Schultz treated Claimant for his shoulder. Dr. Hernandez wrote that the Claimant's injuries were directly related to the August 8, 2004 accident. On September 29, 2004, Dr. Hernandez wrote a prescription for Claimant to get an MRI of his right shoulder and brain. On October 27, 2004 he wrote a note on behalf of Mr. Amado indicating total disability. Claimant treated with Dr. Hernandez approximately two to three times a week until January 28, 2005.

Dr. Hernandez was deposed on October 12, 2005. (Deposition Transcript of Dr. Hernandez identified as CX 18). He stated that since January 2005, Claimant continued to see Dr. Hernandez approximately once a month until September 6, 2005 (CX 18 at 22). Dr. Hernandez stated that at that time, Claimant had cervical pain, right shoulder stiffness with impaired mobility, and was continuing analgesics and home exercise. (CX 18 at 15). The range of motion in Claimant's cervical spine remained impaired, a note from May 2005 noting that it had a thirty percent reduced range. (CX 18 at 30). Dr. Hernandez did not believe there was much improvement in Claimant's condition. (CX 18 at 15). He also stated that he believed Claimant to be totally and permanently disabled. (CX 18 at 16).

John Kramer

John Kramer is a Licensed Professional Counselor with whom Claimant met on October 19, 2004 for psychological counseling. (CX 5). He noted that Claimant was taking the anti-depressant Zoloft daily. Claimant complained of increased forgetfulness and difficulty sleeping and concentrating. Mr. Kramer noted that he observed problems in concentration, with the Claimant jumping from topic to topic. It was Mr. Kramer's opinion that Claimant's problems were directly attributable to his work injury.

Mr. Kramer felt that Claimant was suffering from depression and should receive psychological counseling. He also recommended continued treatment for physical ailments and possible psychotropic medication.

Dr. Alan Schultz

Mr. Amado saw Dr. Schultz for the first time on November 13, 2004, having been referred by Dr. Hernandez. (CX 11). Dr. Schultz is a board certified orthopedist. Claimant presented to him complaining of pain in his right shoulder and neck, and of headaches and radiating right arm pain. Dr. Schultz reviewed Claimant's diagnostic studies from other

physicians. Dr. Schultz outlined a plan for non-surgical treatment of Mr. Amado's right shoulder, but wrote that there might be a need for reconstruction of the rotator cuff. Dr. Schultz prescribed Motrin and Flexeril.

Claimant reported back to Dr. Schultz at the next appointment that physical therapy was increasing his pain. Dr. Schultz reduced physical therapy from three times a week to twice a week, and advised that if after four to six months of therapy his symptoms were not alleviated, then reconstruction of the rotator cuff may be necessary. Dr. Shultz also ordered an MRI of the lumbar spine.

At a follow-up visit on March 15, 2005, Dr. Schultz noted an abnormal pattern of movement with overhead and cuff stress. He also noted internal and external rotation problems. The Claimant improved with Motrin, but was unable to continue on the medication. Dr. Schultz wrote, "The patient does not appear, at this time, sufficiently healed to return to his previous occupation and it would be my opinion that were he mandated to do so he would be at risk of further injury to his shoulder and neck."

In April, Claimant was given a local steroid injection to his right shoulder. Mr. Amado was still complaining of overhead and rotational movements with his shoulder. He was instructed to avoid lifting exercises. Dr. Schultz wrote that surgery was still a possibility and that "clearly the patient will be unable to return to his previous level of work." In a letter dated April 13, 2005, Dr. Schultz wrote that severity of the shoulder injury, coupled with the herniated discs in the cervical spine and the radiculopathy, makes it unlikely that Mr. Amado would be able to return to his previous employment.

Dr. Schultz was deposed on August 16, 2005. (Deposition Transcript of Dr. Schultz identified as CX 17). He testified that an injury to the shoulder, such as the one suffered by Claimant, can negatively affect one's driving ability. (CX 17 at 11). Elevating one's arm to a driving position and steering is difficult and painful with such an injury. Dr. Schultz stated that when Claimant would lift his arm to the 90 to 100 degree range, his pain would increase significantly. (CX 17 at 22). Dr. Schultz and Mr. Amado discussed options for treatment and chose to try conservative treatment before considering a surgery that entails a lengthy recovery time. (CX 17 at 20).

Without surgery, Dr. Schultz stated unequivocally that Claimant could not return to work as a longshoreman driver. (CX 17 at 32). With the surgery, he might be able to depending on the success of the operation. (CX 17 at 31). Because Claimant was continuing with conservative treatment and had not completely ruled out the surgery, Dr. Schultz stated that he had not reached a point of maximum medical improvement. (CX 17 at 31). Dr. Schultz also stated that he believed the injuries to relate to the accident of August 8, 2004. (CX 17 at 32).

This deposition was taken in August of 2005. Dr. Schultz was continuing to treat Claimant, and had seen him the month before, in July. (CX 17 at 28). At that time, Claimant's symptoms remained basically the same as before. (CX 17 at 28-29). As regards the possible shoulder surgery,

Q: He, in the last visit that he had, that you had with Mr. Amado, he was not ready to decide on having the surgery, is that correct?

A: Correct.

Q: He hasn't ruled it out yet either?

A: That's true.

Q: He wants to keep doing the conservative measures?

A: Yes.

Q: In your opinion, has Mr. Amado reached maximum benefit of medical improvement?

A: Well, I don't think he'll change a lot more without surgical treatment, but I'm not so sure that automatically surgery is going to necessarily make him better ...

Q: At this point with the indecision right now regarding surgery and the desire to continue conservative measures, is it fair to say he has not reached maximum medical benefit?

A: True.

[CX 17 at 30-31].

The Therapy Center at Wilson Towers

Mr. Amado received therapy at Wilson Towers from December 2, 2004 to May 5, 2005. He was treated three times a week primarily for his right shoulder. Treatment consisted of ultrasound, electric stimulation, heat, manual therapy and weights. (CX 12).

Dr. Todd Siegal

Dr. Siegal, radiologist, reviewed the MRI of Claimant's cervical spine dated 11/8/06. He reported that Claimant has chronic disc desiccation throughout his cervical spine, and that the disc abnormalities identified at C3-4 and C5-6 relate to a pre-existing degenerative process that predated the subject accident. (EX 11).

Dr. Andrew Merola

Dr. Merola is a board certified orthopedic surgeon who evaluated Claimant on an unspecified date. (EX 9). He performed this examination on behalf of the U.S. Department of Labor. Dr. Merola examined patient and reviewed the CT scan and the reviews of Dr. Bercik and Dr. Weisbrot. He concluded that the sprains in the shoulder, neck and back were resolved and that no further treatment was required. Dr. Merola also stated that Claimant was able to return to work at that time.

A letter dated April 18, 2005 from OWCP to Dr. Merola requested an additional report that would take into account the MRIs taken on November 19, 2004. (EX 13). I do not see an updated report included in Employer's exhibits.

Dr. Joseph Mammone

Dr. Mammone wrote a review dated May 16, 2005 of the MRI of Claimant's right shoulder that was taken on November 8, 2004. (EX 15). He indicated a full thickness tear involving the supraspinatus tendon and atrophy of the muscle. He also indicated fluid extending from such.

DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

In arriving at a decision in this matter, the Administrative Law Judge is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968) *reh'g. den.* 391 U.S. 929 (1968); *Todd Shipyards v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

The person seeking benefits under the Longshore Act has the burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 312 U.S. 267 (1994). Such burden of persuasion obliges the person claiming benefits to persuade the trier of fact of the truth of a proposition. This burden is not met where the person claiming benefits simply comes forward with evidence to support a claim.

Causal Relationship

Employer here contests the claim that Claimant's injuries are a result of the accident that occurred on August 8, 2004. Section 20 (a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, 174 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once the claimant invokes this presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the employer does rebut the presumption, then the administrative law judge must weigh all evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

In order to invoke the Section 20(a) presumption, a claimant must prove his prima facie case. A claimant proves his prima facie claim for compensation by establishing two elements: (1) the claimant sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work that could have caused the harm or pain. *United States Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326, 331 (1981).

I find that Claimant has set forth a prima facie case and therefore is entitled to the presumption. Claimant's credible subjective complaints can be sufficient to establish both elements of a prima facie case and invoke the Section 20(a) presumption. Here, Claimant

testified to pain in his shoulder, neck and back and to the specifics of the August 8th accident. Additionally, there is evidence to corroborate his claim. Mr. Fernandez and Mr. Paglio testified to seeing Mr. Amado's cab rock, even if it was not the worst rocking Mr. Paglio had seen. There also is the accident report that was filed right away and the subsequent medical treatment that followed. So I find that Claimant established a physical harm and that this harm could have been caused by the August 8, 2004 accident.

Since the presumption has been invoked, the burden now shifts to the employer to rebut the presumption. In order to do so, the employer must put forth substantial countervailing evidence which severs the connection between the harm and the employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-145 (1990).

Here, the Employer argues that the accident was not severe enough to cause Claimant's complaints, and therefore Claimant's shoulder injury must have been incurred in a different manner after the accident. To support this contention, Employer put forth testimony from co-worker Thomas Paglio saying he saw the cab rocking, but that it was neither the easiest nor hardest landing he had ever seen. Employer also put forth the testimony of co-worker Darryl Vetro, who was the top-loader of Claimant's hustler that day. Mr. Vetro stated that he did not recall anything happening that day and that he cannot even remember working with Claimant on that particular day. Mr. Vetro, as the top-loader and possibly the cause of the accident, has an interest in not recalling the accident. Therefore, his testimony is given less weight.

Employer contends that the August 8, 2004 accident could not have caused Claimant's injuries. This argument depends on the testimony of co-workers, such as Thomas Paglio, who witnessed the accident and did not think it was severe, and the cross-examination of Dr. Schultz regarding ecchymosis of Claimant's skin. Employer also argues that because there was no mention of a shoulder injury in Trinitas Hospital's records, the injury must have occurred afterward. This evidence is too speculative in nature to overcome the Section 20 (a) presumption to which Claimant is entitled.

Total/Partial Disability

Claimant contends he has been totally disabled continuously from the date of his accident, August 8, 2004. Employer contends that Claimant currently has no disability and has been able to return to his regular or usual work since Dr. Bercik declared so on October 8, 2004. Neither party takes the position that Claimant is partially disabled, i.e., that Claimant is unable to perform the duties of his longshoreman job but can perform other work whose compensation is less than that of his longshoreman job. Since neither party submitted any evidence relating to partial disability, I am presented with the task of making the "all or nothing" determination that Claimant is either totally disabled or not disabled at all.

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, Claimant must show that he cannot return to his regular or usual employment due to his work-related injury. If Claimant meets this burden, Employer must establish the existence of realistically available job opportunities within the geographical area where Claimant resides

which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Mills v. Marine Repair Service*, 21 BRBS 115, 117 (1988); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976), *aff'd.* 2 BRBS 178 (1975); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, n.7 and related text (3d Cir. 1979). As Employer has not presented any evidence of suitable alternative employment, and the record evidence is not sufficient for me to infer from it that Claimant is able to perform any other work, Claimant need only establish that he is unable to perform his regular or usual longshoreman work in order to prove he is totally disabled.

Employer has put forth the opinions of Dr. Bercik and Dr. Merola, both board certified orthopedic surgeons, to contend that Claimant is not currently disabled. Dr. Bercik met with Claimant on two occasions. At the first, on September 13, 2004, Dr. Bercik found objective evidence of sprains in the shoulder and cervical and lumbosacral regions. He therefore ordered MRIs, which were not conducted. When Claimant returned on October 8, 2004, Dr. Bercik stated there were no objective findings to correlate to Claimant's complaints. Dr. Bercik did not have the benefit of the MRI findings, as his evaluations were conducted prior to the MRIs. Dr. Merola, at the request of the OWCP, wrote a report on an unspecified date which concluded that while Claimant had suffered from sprains, these were resolved as of that time. Dr. Merola as well did not have the benefit of objective evidence such as the MRI reports. The OWCP requested he write another report that took the MRIs into account, but I do not find any additional report from Dr. Merola in Employer's exhibits. Both Dr. Bercik and Dr. Merola stated that Claimant could return to work.

Claimant has put forth the opinions of Dr. Hernandez and Dr. Schultz, a board certified neurologist and a board certified orthopedist, to contend that Claimant is totally disabled. Dr. Hernandez first met with Claimant in September 2004, and ordered MRIs of the right shoulder and cervical region and an electrodiagnostic test. These tests revealed: a large joint effusion with tears of the anterior and posterior glenoid labrum, a complete tear of the long head of the biceps tendon, a full thickness tear of the anterior fibers of the supraspinatus muscle with muscle tendon retraction, a disc osteophyte complex and probable left foraminal herniated disc at C3-C4, a left central herniated disc at C5-C6, and right cervical radiculopathy at the C7 level and bilateral upper dorsal radiculopathy.

In October 2004, Dr. Hernandez wrote a note for Claimant stating that he was totally disabled and could not return to work. One year later, in October 2005, Dr. Hernandez was still treating Claimant. He stated at that time that Claimant was totally and permanently disabled. Dr. Schultz was also continuing to treat Claimant at the time of his deposition in August 2005. In April, Dr. Schultz had concluded that Claimant would not be able to return to his previous level of work, but at the deposition stated that one can not know conclusively how the surgery, if undertaken, would change the Claimant's position. Therefore, Dr. Schultz concluded in August 2005 that Claimant was totally disabled, but had not reached maximum medical improvement.

As a hustler driver, Claimant does not have to perform lifting functions and does not have to work with his arms above his head. (T at 49-50). Claimant does describe the steering wheel as heavy, however. (T at 49-50). It is this steering function, particularly, that Dr. Schultz focuses on in determining that Claimant can not return to work as a driver because it requires

raising one's arm to a 90 degree angle. Both Drs. Hernandez and Schultz say that it is the combination of injuries, the cervical herniations, radiculopathy and shoulder problems, that make Claimant's return to his employment impossible.

Here, I am not presented with evidence of other jobs that would be suitable for Claimant. Therefore I must decide that Claimant is either totally disabled or not disabled at all. Dr. Bercik and Dr. Merola both concluded that Claimant was not disabled without the benefit of seeing the MRIs, which show substantial injury. Dr. Hernandez and Dr. Schultz' records are much more comprehensive and include the MRI reports referenced above. Additionally, they acted as Claimant's treating physicians, and continue to treat the Claimant. Both doctors state that Claimant cannot return to his usual employment. I find that Claimant has met his burden of proving he cannot return to his regular or usual employment due to his work-related injury. Therefore Claimant is totally disabled.

Temporary/Permanent Disability

A disability is permanent when the claimant reaches the point of maximum medical improvement (MMI). *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988). The date of MMI is a medical determination to be based upon the medical evidence of record. The evidence must show a date on which a claimant has received maximum benefit from medical care, such that his condition is no longer improving. Usually, a Claimant will not be declared permanently disabled where there is impending surgery.

It may appear as if, in regards to permanency, the doctors say three to one that Claimant has reached maximum medical improvement. But really, I am concentrating on the opinions of Dr. Hernandez and Dr. Schultz. This is due to the fact that Dr. Bercik and Dr. Merola concluded there was no disability; since I have found that there was, their opinions on whether Claimant reached maximum medical improvement are not as relevant.

At his deposition, Dr. Hernandez stated that little improvement was being made, for example, in Claimant's range of motion in the cervical spine. (Hernandez at 30). Dr. Schultz stated that some improvement was being made. (Schultz at 30, 59). Dr. Hernandez primarily treated Claimant's back, while Dr. Schultz treated Claimant's shoulder. It is the shoulder injury that is the crux of the disability, and therefore I give more credence to Dr. Schultz' opinion on the permanency of the disability. Because of the nature of the operation, it is prudent to undertake conservative measures first, which is exactly what Dr. Schultz has done. Dr. Schultz stated that he desired Claimant to return to some sort of work in the future. If Claimant undergoes the reconstruction of the rotator cuff, he may be able to return to the workforce in some capacity. Dr. Schultz stated that while it is unlikely, the surgery could completely alleviate the Claimant's disability, in which case he could return to his prior work. Of course, he also stated that the surgery might only partially alleviate Claimant's disability, or not at all.

At this point, Claimant is totally disabled, however one can not say that his disability is permanent because he is considering surgery that could dramatically alter the nature and extent

of his disability. For that reason, I find that Claimant continues to have a temporary total disability.

Section 7

Claimant in this case was directed to go to NAMO to receive treatment. He thereafter chose to treat with Dr. Patel. Employer paid for the medical treatment rendered at both facilities. After just two visits with Dr. Patel, Claimant changed physicians and began seeing Dr. Hernandez, and then Dr. Schultz thereafter. He readily admits to not having sought authorization to make such a change. (T at 51-53). In such a case, Sections 7(c)(2) is the applicable part of the LHWCA.

Section 7(c)(2) provides that a Claimant has a free choice of physicians, but that once that physician is chosen, he may only change physicians upon obtaining prior written approval of the employer, carrier or deputy commissioner. 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406. If he does not, Employer is not usually responsible for the payment of medical benefits. *Slattery Associates v. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT)(D.C. Cir. 1984). Here, Claimant has not demonstrated that he requested authorization before changing physicians. Therefore Employer is not responsible for the payment of benefits for the treatment rendered without authorization.

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

IT IS ORDERED THAT:

1. Claimant is entitled to compensation based upon his average weekly wage for total temporary disability from August 9, 2004 to present and continuing.

2. Employer is not responsible for the payment of medical benefits that were obtained without authorization as required by Section 7.

3. Claimant's counsel is entitled to attorney's fees and costs as set forth in 20 CFR 725.366 (a).

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

5. 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.

PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

EXAMINED:
U.S. DEPARTMENT OF LABOR
DLHWC - D.O. 2
JAN 23 2006
RONALD A. KUCENSKI, C.E.