U.S. Department of Labor

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Issue Date: 30 January 2015

CASE NO.: 2013-LHC-00937

OWCP NO.: 14-157015

In the Matter of:

JOHN SCARBROUGH,
Claimant,

v.

SHANNON WAGNER,
dba SEATTLE MARINE CONSTRUCTION,
Employer,

and

SEABRIGHT INSURANCE COMPANY,
for THE WASHINGTON STATE USL&H ASSIGNED RISK POOL,
Carrier and Third Party Administrator,

and

DISTRICT DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

Before: Richard M. Clark
Administrative Law Judge

DECISION AND ORDER AWARDING COMPENSATION AND BENEFITS

This claim arises under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 ("the Act"). A formal hearing was conducted in Portland, Oregon, on November 4 and 5, 2013. Charles Robinowitz, Attorney at Law, represented John Scarbrough ("Claimant"). Nina Mitchell, Attorney at Law, represented Shannon Wagner dba Seattle Marine Construction and SeaBright Insurance Company (collectively "Employer"). Susan Brinkerhoff, Attorney at Law, represented the District Director.

At the hearing, Claimant's Exhibits ("CX") 1 to 75, including CX 11, pages 21-A to 21-L, and Employer's Exhibits ("EX") 1 to 47, were admitted into evidence. TR at 25-26, 161-62, 301. The record remained open for the post-trial submission of deposition transcripts from Dr. Evans, CX 76, Dr. Woodward, EX 47, and Dr. Blumberg, EX 48, which are all admitted into evidence. TR at 420. The parties also submitted post-trial closing briefs. On January 10, 2014, the U.S. Department of Labor, Office of the Solicitor, submitted a letter indicating that it would not file a post-hearing brief. The record closed on January 10, 2014.

As explained below, this Decision and Order denies Claimant disability compensation related to his lower back and hernia, but awards permanent partial disability for his lower extremity. Claimant is awarded medical benefits for his right knee and low back. Claimant's hernia is determined not to be work-related.

I. RULING ON ADDITIONAL EVIDENCE

On June 5, 2014, Employer filed a Motion to Reopen the Record ("Motion to Reopen") seeking to admit new earnings records from Claimant, who apparently worked at two jobs in early 2014. Mtn. to Reopen at 2-4. Employer sought admission of a one-page record of Claimant's wages from one job, which listed no employer, and a one-page record of Claimant's wages from Paul Davis Restoration, which were attached as Exhibits 4 and 5, respectively, to Employer's Motion to Reopen. Mtn. to Reopen, Ex. 4, 5. On June 9, 2014, Claimant filed records of his post-hearing earnings marked as CX 77 and CX 78. CX 77 indicates that Claimant worked for Stride Construction from January 5, 2014, until February 4, 2014. CX 77 at 330-34. CX 78 indicates that Claimant worked for Paul Davis Restoration from March 8, 2014, until April 18, 2014. CX 78 at 335-41. On June 23, 2014, Claimant filed an opposition to Employer's Motion to Reopen asserting that Employer had failed to confer with Claimant as required by the pre-hearing order in this matter. On June 30, 2014, Employer submitted a reply containing a statement and evidence by affidavit that Employer had conferred with Claimant in a good faith effort to resolve the dispute prior to filing the Motion to Reopen. Reply at 2. Employer also offered to withdraw its Motion to Reopen if I were to accept Claimant's Second Amended Exhibit Index Volume 4 and Claimant's Exhibits 77 and 78 into the record. Reply at 3.

After the record is closed, "no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c). In this case, the evidence of Claimant's post-hearing employment was not available at the time the record closed on January 10, 2014. Furthermore, as the evidence of post-hearing earnings pertains to Claimant's employment in what was his usual and customary occupation at the time of his injury, it is material to his disability claims. CX 77 and 78 also contain the same information reflected in the reports from Employer in the Motion to Reopen. Accordingly, CX 77 and 78 are admitted into evidence. Based upon this ruling, Employer's Motion to Reopen is moot.

II. CONTENTIONS OF THE PARTIES

Claimant is a construction worker who worked temporarily for Employer in January and February 2012 and was injured on the job. The parties stipulated that the Act applies to this matter. TR at 28. Claimant argues that he is entitled to temporary total disability for injuries to his right knee and low back, as well as a hernia, caused or aggravated by a work-related accident at Employer on January 19, 2012. Claimant seeks temporary total disability benefits from February 7, 2012, until March 1, 2012, temporary partial disability from March 1, 2012, until May 14, 2012, and temporary total disability from May 14, 2012, to the present. Claimant's Closing Arg. at 22-23. Claimant further contends that he is entitled to a 12% permanent partial disability rating of the right leg. *Id*. at 22.

Employer contends that Claimant's accident was not work-related, and that it is not responsible for any injuries Claimant sustained. Post-Hr'g Br. of Employer at 7. If Claimant's accident is found to be work-related, Employer argues that Claimant has failed to prove that the accident caused or aggravated his injuries. Employer also argues that, even if Claimant proves causation for his injuries, he has reached maximum medical improvement ("MMI") for each of them. Hr'g Br. of Employer at 3. Employer argues that Claimant is not totally disabled, and experienced no loss of earning capacity. *Id*. at 3-4. Additionally, Employer argues that Claimant is not entitled to scheduled permanent partial disability benefits for his right knee injury. *Id*. at 4-5.

III. ISSUES FOR HEARING

1. Did Claimant suffer work-related injuries when he fell at Employer's worksite on January 19, 2012?
2. Did Claimant provide timely notice and timely file his workers' compensation claim?
3. Did the alleged injury of January 19, 2012, aggravate Claimant's right knee? If so, what is the extent of his entitlement, if any, to disability for his right leg?
4. Did the alleged injury of January 19, 2012, aggravate Claimant's low back? If so, what is the extent of his entitlement, if any, to disability for his low back?
5. Did the alleged injury of January 19, 2012, play any role in causing or aggravating Claimant's left inguinal hernia? If so, what is the extent of his entitlement, if any, to compensation for the hernia injury?
6. What is Claimant's average weekly wage for the January 19, 2012, injury?
7. Is Claimant entitled to any additional compensation under 33 U.S.C. § 914(e)?
8. Is Claimant entitled to medical benefits and expenses related to the injuries?
9. Is Employer entitled to Section 8(f) relief?

IV. FACTUAL FINDINGS

At the time of the hearing, Claimant was 47 years old, and lived in Corvallis, Oregon. TR at 88. Claimant was a contractor by trade, and primarily worked as a painter and tile setter, but he also had experience in floor care services and remodeling houses, and ran a DJ business prior to 2006. TR at 30, 91-92, 95-97, 151. Claimant is a high school graduate and attended some college. TR at 89-90.

January 19, 2012, Injury

2. On January 10, 2012, Claimant started working for Employer as a temporary tile worker for a project involving the ship *Ocean Peace* at the Vigor Shipyards in Portland, Oregon. TR at 114, 336-38; CX 7at 10. The job was expected to last two and a half to three months. TR at 119. Claimant, who had been living at his mother's home in Corvallis since 2009, moved in with his friend Jeremy Manning in Portland for the duration of the project. TR at 50, 62, 120. The distance from Corvallis to Portland is approximately 85 miles.[1] Claimant apparently maintained a work journal and provided excerpts from the journal at trial. CX 7; EX 3. During a deposition, which was not made part of the record, Claimant said the he made additions to the journal after his first payday on January 26, but at trial he said that he did not. TR at 175-76. His explanation for the discrepancy was that he did not understand the question at the deposition. TR at 176.

3. On January 18, 2012, Claimant received a phone call from his supervisor, Adam Wischhoefer, asking him to come in early the next morning. CX 7 at 11; TR at 121. On January 19, 2012, Claimant arrived at the shipyard around 5:00 a.m., which was earlier than usual, and he did not clock in. TR at 121, 352-53. It was raining that day, and to access the *Ocean Peace*, Claimant had to walk up the gangway to the barge on which the ship was positioned and then climb stair scaffolding to reach a hole cut in the side of ship. TR at 121, 351. Claimant, carrying two bags of fabrication tools weighing 40 to 60 pounds each, climbed to the top of the scaffolding and entered the *Ocean Peace*. TR at 121. As he entered, he stepped on a piece of plywood which slipped, causing Claimant to fall and hit his butt and lower back on a metal equipment container. *Id.* Claimant was able to get up and complete his work assignment for the day. TR at 122. In a journal entry dated January 20, 2012, Claimant wrote that he hurt his back and knee when he fell at work, but the journal entry does not mention that he hurt his groin. CX 7 at 11. The next day, January 20, there is a notation which reads "groin hurts." *Id.* The writing appears different than the other entries that day, and it appears to have been written at a different time than the other entries. Claimant did not miss work as a result of his injury at Employer. TR at 114.

4. Claimant said that he immediately told Mr. Wischhoefer about the accident. TR at 121. However, Mr. Wischhoefer said that he first heard of the accident several days later. TR at 397. Claimant said he told Shannon Wagner, the owner of Employer, about the accident around January 22, but Employer did not generate an incident report at that time or notify his carrier. TR at 129, 354-55, 369; CX 7 at 11. Mr. Wagner said that when he first learned of the accident, he believed that it had taken place entirely on a Vigor Shipyards barge, and told Claimant to report the incident to Vigor Shipyards. TR at 355-56. Mr. Wagner personally spoke to Vigor Shipyards regarding the accident. TR at 356. Mr. Wagner also gave Claimant money to see a chiropractor or masseuse. TR at 357, 369. Mr. Wagner said later that he misunderstood Claimant and later realized that the accident occurred while working for Employer on the *Ocean Peace*. TR at 360.

[1] *See* MAPQUEST, http://www.mapquest.com (last visited January 16, 2015).

5. Claimant said that he called and told his mother about the incident, and also expressed concern about not having insurance for his injuries. TR at 141. He described showing his mother a bubble in his groin sometime before he disclosed the bubble to his doctor in March 2012. TR at 139-40. He said he found the groin bubble after getting out of the shower, and his mother felt it and told him to go to the doctor. *Id.* He would not second guess his mother's recollection, and her description that she felt a bubble on January 24. TR at 188-89.

6. After the January 19, 2012, accident, Claimant continued to work for Employer and finished the tiling project for which he was hired following the accident. TR at 125, 356. Employer needed continued help on the project, and retained Claimant to do carpentry, some painting, and installing insulation at the same pay. TR at 125-26, 357-58. Claimant said that working on his hands and knees during this time caused consistent pain in one knee but that the other knee was "absolutely fine." TR at 170-72. Claimant remained employed until he was finished painting, and was employed longer than most of the other temporary workers Mr. Wagner had hired. TR at 357-58. Claimant's last day of work for Employer was February 13, 2012. TR at 132, 390; CX 7 at 15. The *Ocean Peace* left the shipyard on February 19, 2012. TR at 386.

7. After leaving Employer, Claimant worked as a truck broker for Crestline Trucking in Shady Cove, Oregon, from March 1, 2012, through May 14, 2012, where Claimant said he was paid $2,500 per month plus commission. TR at 136-38; CX 9 at 19; EX 46 at 849, 851. Shady Cove is located approximately 219 miles from Corvallis.[2] Claimant said he got the job because friends called and told him about the position. TR at 136. The Oregon Employment Department ("OED") information states that Claimant was paid $2,200 per month, and, starting on May 31, 2012, would have been paid minimum wage or commission, which ever was higher. EX 46 at 851-52. The position at Crestline Trucking was a desk job and involved making phone calls and arranging for loads to be picked up by trucks. TR at 136-37. Claimant says that Crestline Trucking fired him, while Crestline Trucking says that Claimant quit the job due to it being a poor fit and missed work as a result of his knee condition. TR at 137-38; EX 46 at 849. Claimant told Ms. Broten during his vocational interview that he left Crestline because he did not like the dynamics of the family owned business. EX 38 at 658. An investigation by the OED determined that Claimant left Crestline Trucking voluntarily. EX 46 at 854. Claimant did not appear at the unemployment hearing because he had phone trouble. TR at 191. During the investigation, Crestline reported that Claimant told them he may have received a hernia while working for them, but he could not provide any details. EX 46 at 857. Crestline reported to the OED that he averaged $440 per week during his 11 weeks of employment. EX 46 at 849. I find the evidence from OED more compelling than the testimony from Claimant and find that Claimant voluntarily quit the Crestline job. Claimant said at Crestline that he was able to manage the job until he had surgery, and that he did not quit Crestline due to pain. TR at 138, 181. He also said that his physical limitations do not affect his ability to work. TR at 184. Claimant thought he could continue to do construction work, and even applied for construction jobs during the summer of 2012, sending out 40-50 resumes, but thought it would depend on the work and the boss if it were work he could do, though he said he could work with pain. TR at 193. On May 18, 2012, Claimant filed for benefits under the Act. CX 1.

[2] *See* MAPQUEST, http://www.mapquest.com (last visited January 16, 2015).

8. From January 16, 2014, until February 4, 2014, Claimant worked for Stride Construction. CX 77 at 330-334; CX 78 at 342. Claimant was paid $18 per hour and earned a total of $2,760.75. CX 77 at 330, 332, 334. Claimant's work was coded for workers' compensation purposes as a mix of flooring, painting/wallpaper, and ceramic tiling, with some warehouse and delivery work. CX 77 at 331, 333; CX 78 at 342. From March 12, 2014, until April 18, 2014, Claimant worked for Paul Davis Restoration, where his work included floor covering installation, demolition, finish carpentry, siding and gutter installation, cleaning, painting and other tasks. CX 78 at 335-341. Claimant was paid $18 per hour, and earned a total of $7,425.00. CX 78 at 335.

9. Prior to his injury, Claimant said he worked odd jobs from June to December 2011. TR at 115. According to Claimant's amended income tax returns, he had income from construction work of $10,680 in 2011 and $3,226 in 2010. CX 11 at 21A, 21E. Claimant earned $5,490 at Employer from January 10, 2012, through February 13, 2012. CX 6 at 8; TR at 132-33. Claimant submitted a pay stub from Crestline for June 4, 2012, which showed he was paid $660 in gross wages, but it is unclear what that check represented since he was no longer working for Crestline on June 4. CX 9. According to Claimant, in the last 10 years, he had only worked for three companies, including Employer and Crestline, and he paid no taxes between 2003 and 2009. TR at 158, 164.

10. Claimant had a prior permanent partial disability award for his right knee in 1986 in Oregon. EX 7; EX 24. For that injury, Claimant received a total of $3,750. EX 24 at 436-37; EX 7 at 69. An additional 10% permanent partial disability, which was reduced by 25% for his attorney's fee, was awarded following a hearing. EX 7 at 69. The total net to Claimant after the attorney's fee for the 1986 award was $3,281.75.[3] At trial, Claimant showed that he had unreimbursed medical expenses totaling $244.65 for payments of $120 to Dr. Page-Echols and $124.65 for prescriptions. TR at 142-43; CX 63 at 190; CX 66 at 219.

Mr. Wagner's Testimony

11. Shannon Wagner, the owner of Employer, has been involved in the construction business since he was sixteen, and has operated Seattle Marine for several years. TR at 325-28. Mr. Wagner explained that the *Ocean Peace* project was originally intended to take place in Seattle. TR at 335. When the project and ship were moved to Portland, and following delays in starting work, Mr. Wagner decided to recruit temporary local workers for the project at a high wage due to the short term nature of the project. TR at 336-37. Mr. Wagner said Claimant was hired special to tile three bathrooms on the ship. TR at 338, 344. All of the employees hired for the project were paid the same, except for supervisors who were paid $5 more per hour. TR at 338-39. For the last day and a half of the project, Mr. Wagner paid Claimant at the supervisor's rate since Claimant was painting and providing his own paint sprayer. TR at 339.

[3] $1,875 x 25% = $468.75; $3,750 – 468.75 = $3,281.75.

12. Mr. Wagner said that prior to Claimant's accident there had been another incident where an employee was injured at the shipyard and Vigor Shipyards took full responsibility for the injury. TR at 341-42. After Claimant's accident, another employee of Employer tripped and fell onboard the *Ocean Peace*, breaking his wrist and Employer handled that claim. TR at 343.

13. Mr. Wagner said that Claimant did a fine job completing his tiling work on the *Ocean Peace* and that he did not think Claimant needed assistance at any point, though the project was delayed because Claimant was taking longer than expected to do the work. TR at 346, 378. Mr. Wagner said that Claimant complained of soreness from being on his hands and knees during the project, and he thought that was why the tiling work took longer than expected. TR at 346. After Claimant completed the tile work, he was kept on the project and assisted in installing foam insulation in the freezer hold of the ship, installing plywood framing, and painting the hold. TR at 348-49. This work required Claimant to bend and twist, and to climb scaffolding. TR at 349-50. Mr. Wagner noticed that, after the accident, Claimant was hurting but was able to complete the same tasks as the other workers. TR at 350.

14. Mr. Wagner explained that when Claimant started his tiling work, the *Ocean Peace* was out of the water and on blocks in the shipyard. TR at 350-51. Vigor Shipyards' safety officers inspected the *Ocean Peace* worksite several times each day, and also set up and inspected all the scaffolding used by the project. TR at 343. On January 18, the day before Claimant's accident, the *Ocean Peace* was moved onto a barge. TR at 351. The next morning, stair scaffolding was set up in order to allow access through a hole cut in the side of the ship ten or twelve feet below the deck. *Id*. Mr. Wagner said that he never saw this scaffolding personally, as it was disassembled before he came to the worksite, but he did not believe that Vigor Shipyards would have allowed a gap between the scaffolding and the ship. TR at 353. Mr. Wagner said that on January 19, the staff started work at 5 a.m. in order to complete work before the barge was sunk and the *Ocean Peace* refloated, but were not able to clock-in because the office was closed that early. TR at 352-53.

15. Mr. Wagner said that he first heard about Claimant's accident several days after the *Ocean Peace* was refloated. TR at 354. Mr. Wagner initially understood that that Claimant fell on the barge itself because Mr. Wagner had been on the barge and saw a board in water similar to the one on which Claimant said he slipped. TR at 355. When Mr. Wagner first learned of Claimant's injury, he told Claimant to talk to Vigor Shipyards, believing that the injury was not related to Employer, and did not contact Employer's insurance carrier or broker at that time. *Id*. at 355-56. Mr. Wagner gave Claimant some money for medical care, and continued to employ him until the freezer hold was painted. TR at 357, 369. After Claimant's job ended, Mr. Wagner kept some temporary workers to help him finish staterooms, but most workers were let go before Claimant. TR at 358.

16. Mr. Wagner did not take any additional action regarding Claimant's accident until he returned to Seattle and contacted his insurance broker, who instructed Mr. Wagner to fill out an LS-202 form. TR at 359-60. Mr. Wagner said that he then contacted Claimant to get the details necessary to complete the LS-202 form, and learned that Claimant had not fallen on the barge but rather on the *Ocean Peace*. TR at 360. Mr. Wagner maintained that he filled out the

LS-202 form to the best of his ability, but that he made errors on the dates. TR at 361. Employer filed the notice of controversion on September 10, 2012. EX 1 at 4.

Mr. Wischhoefer's Testimony

17. Adam Wischhoefer, the foreman of the *Ocean Peace* project, was Claimant's immediate supervisor and had worked for Employer for six or seven years. TR at 330, 391-92. He was present on the *Ocean Peace* every day work was done and believed he saw Claimant every day that Claimant worked. TR at 393, 397. On the day the *Ocean Peace* was on the barge, Mr. Wischhoefer did not notice any gap between the scaffolding and the ship. TR at 399-400. Mr. Wischhoefer first learned of Claimant's accident when Mr. Wagner telephoned him, angry about not having received a report of the fall; Mr. Wischhoefer was adamant that Claimant had not mentioned a fall or injury on January 19. TR at 397.

18. Mr. Wischhoefer said that Claimant kneeled on a non-metal floor surface while wearing knee pads to do his tiling work. TR at 396. Claimant was not completing the tile work as quickly as anticipated, which Claimant attributed to back pain, and he did not notice a difference in Claimant's work speed before or after the fall. TR at 398-99. Mr. Wischhoefer did not offer Claimant any assistance in completing the tiling work, as it was a one man job. TR at 404-05. Mr. Wischhoefer did not remember Claimant missing any time due to pain or physical problems after January 19, 2012. TR at 407.

Jeremy Manning

19. Claimant lived with his friend Jeremy Manning in Portland when he worked for Employer. TR at 48-49. Mr. Manning had known Claimant about seventeen years and allowed Claimant to stay at his home for about a month to a month and a half. TR at 50. Mr. Manning said he did not notice that Claimant had any back or knee problems prior to the accident even though he was aware of Claimant's history of back problems. TR at 49-50, 55. After Claimant's accident, Mr. Manning observed that Claimant "could barely tie his shoe" and that Claimant wanted to move from an upstairs bedroom to another room in the house so he did not have to climb the stairs. TR at 51. He was surprised that Claimant returned to work after the accident. *Id.* Mr. Manning had not heard about a work-related hernia injury. TR at 57.

Diane Davis

20. Claimant's mother, Diane Davis, a registered nurse, testified that Claimant was complaining of "a little bit of soreness" prior to January 2012, but that he was able to work and was taking oxycodone and gabapentin for pain. TR at 63. According to Ms. Davis, Claimant lived rent free in a "fifth-wheel" trailer in her driveway in Corvallis, Oregon since 2009, and that he helped around her house by mowing the front yard using a gas-powered mower and by sometimes preparing the evening meal. TR at 61-62, 80-82, 89. In late 2008 and 2009 Claimant was employed by Ms. Davis and her husband doing various house remodeling jobs, including painting and doing trim and tile work, and Claimant did "a remarkably quick job" and "work[ed] quite fast." TR at 63, 65. Just before Claimant left for Portland to work for Employer, he had

completed some "fairly large" tiling jobs with no knee pain, but complained of stiffness in his back and was using a TENS[4] unit. TR at 65-66. Ms. Davis stated that Claimant called her on January 19, 2012, and told her that he had experienced a "major fall." TR at 66. When she saw Claimant on January 24, he looked pretty injured to her. TR at 67. Claimant told her that his back was hurting, that he had twisted his knee, and that he had pain in his left groin. TR at 67. Ms. Davis examined Claimant's groin and found what felt like a little bubble on the left side. *Id.*

21. Claimant continued to perform remodeling work for her and her husband after the January 2012 injury, though the work had become time consuming and progressed slowly. TR at 70-71. She continued to give Claimant $200 per week until October 2012. TR at 84. She also paid Claimant's child support until a few months before the hearing. *Id.* Ms. Davis said that Claimant's back pain had worsened from a month after the accident to the time of the hearing, to the point that, during the spring of 2012, Claimant at one point Claimant could not stand without support while shopping. TR at 71-72. Ms. Davis also recounted an incident from September 2013 where she heard Claimant screaming after he tried to reach for a pot on a low kitchen shelf. TR at 71. She found Claimant crouched in pain and took him to the hospital. TR at 75.

Claimant's Treatment History and Medical Evidence

22. At the time of the hearing, Claimant was taking gabapentin, morphine, and oxycodone for back pain. TR at 147. He used three to four times the dose of gabapentin he had been taking before the January 2012 accident; he did not use morphine prior to the accident. TR at 147-48. Claimant also periodically took cyclobenzaprine for back pain, which he also did not use before the accident. TR at 148.

23. On January 23, 2012, Claimant went to the doctor for back pain and saw Dr. Robin Page-Echols, who was a resident at Samaritan Family Medicine Residency Clinic in Corvallis. CX 19 at 45. Dr. Page-Echols's report indicates that Claimant had sustained a "slip/fall injury while working at night on deck of boat on 1/18." *Id.* At the time of the visit, Claimant had bruising on his upper buttocks, had experienced numbness and numbing pain in his right big toe for several days, and pain on his left side. *Id.* Claimant also reported that his right knee had been painful before the January 2012 accident, but had become more painful since his fall, even though he had begun wearing knee pads at work. *Id.* Dr. Page-Echols noted bilateral sciatic notch tenderness, but no other back, spinal, or walking abnormalities. CX 19 at 45-46. Dr. Page-Echols noted that Claimant's left knee was negative for all tests, and that Claimant's right knee had some tenderness at the medial joint line but no other issues. CX 19 at 46. Dr. Page-Echols diagnosed Claimant with right side lumbar radiculopathy, a lumbar back strain, and knee pain with a possible medial meniscus injury. CX 19 at 47. He prescribed oxycodone and cyclobenzaprine. CX 19 at 48. Dr. Page-Echols wrote Claimant a letter clearing him to return to work, in an upright position if possible, and limiting frequent changes of position and excessive bending at the waist. CX 69 at 270. If those modifications did not work, then he suggested that Claimant might limit his work hours and return for further evaluation. *Id.* Dr. Page-Echols's report does not mention that Claimant had any groin pain or a hernia.

[4] A transcutaneous electrical nerve stimulation ("TENS") unit uses an electrical current to alleviate pain. THE AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 1003 (Charles B. Clayman et al. eds, 1989).

24. On February 2, 2012, Claimant saw Dr. Matthew Bauer, a resident at Samaritan Family Medicine Residency Clinic. CX 20 at 49. Claimant complained of continuing low back discomfort from the January 19 accident, though the bruising and ecchymosis had resolved and Claimant was not experiencing any numbness, tingling, or muscle weakness. *Id.* Claimant said his right knee pain and the clicking, popping, and crepitation of his kneecap had worsened from having to kneel and crouch at work. *Id.* Dr. Bauer noted decreased sensation in the first and second toes of Claimant's right foot and tenderness in Claimant's right knee and lumbar spine. CX 20 at 49-52. Dr. Bauer noted that Claimant's primary complaint was knee pain, and ordered X-rays and an MRI. CX 20 at 52. Dr. Bauer expressed a desire to reduce Claimant's narcotic pain medication intake, and prescribed tramadol for Claimant's back pain. *Id.* Claimant was not taken off work by Dr. Bauer.

25. X-Rays taken of Claimant's right knee on February 2, 2012, revealed prominent chondrocalcinosis and trace knee joint effusion. CX 21 at 54. An MRI of Claimant's right knee performed on February 9, 2012, showed mild abnormality in the posterior cruciate ligament, complex tearing of the medial meniscus, undersurface tearing of the lateral meniscus, probable chondrocalcinosis and small joint effusion, with marrow edema. CX 22 at 55.

26. On February 14, 2012, Claimant saw Dr. Tobin Rummel, who was his primary care doctor at that time, and complained of low back discomfort and other symptoms "consistent with exacerbation of prior radicular pain" and continued right knee pain. CX 23 at 57. Dr. Rummel referred Claimant to orthopedics for an evaluation of his knee, but did not mention Claimant could not return to work. CX 23 at 58.

27. On February 29, 2012, Dr. Page-Echols saw Claimant, who was complaining of increased back pain, shooting pain in his right buttock, and right great toe numbness. CX 51 at 145. Dr. Page-Echols prescribed methadone for pain relief. CX 51 at 147. Claimant saw Dr. Page-Echols again on March 12, 2012, and was still suffering from back pain, which worsened when Claimant sat for long periods in the car. CX 52 at 149. Dr. Page-Echols recommended that Claimant look into purchasing an inversion table and undergoing hands on manipulation to lessen his back pain. CX 52 at 151-52.

28. On March 20, 2012, Claimant was seen by Dr. Donald Pennington at Samaritan Orthopaedics and Sports Medicine Center for a surgical evaluation. CX 24 at 62. Dr. Pennington recorded that Claimant was experiencing pain of seven or eight out of ten, and that Claimant's right knee was swelling, popping, and giving away. CX 24 at 61. Dr. Pennington observed that Claimant's right knee was slightly effused and painful to palpitation at the medial joint line. *Id.* He also observed that Claimant had positive McMurray's and Apley's tests, both of which test for medial meniscal tears.[5] *Id.* Dr. Pennington diagnosed Claimant with a right medial meniscal tear, a lateral meniscal tear, and chondromalacia patellofemoral articulation. CX 24 at 62.

[5] *Meniscus Tears*, MEDLINEPLUS, http://www.nlm.nih.gov/medlineplus/ency/article/001071.htm (last visited Dec. 22, 2014).

29. On May 7, 2012, Dr. Pennington performed a right knee arthroscopy with partial medial meniscectomy and chondroplasty. CX 26 at 65. As detailed in his report, the operation revealed a macerated tear of the posterior aspect of Claimant's right medial meniscus, as well as grade two to three chondromalacia of the medial femoral condyle and fraying of the lateral meniscus. *Id.* On May 15, 2012, Dr. Pennington said Claimant's surgical incisions were healing well and agreed with Dr. Page-Echols's opinion that physical therapy would benefit Claimant. CX 30 at 79-80.

30. On June 6, 2012, Dr. Page-Echols saw Claimant again, who was still suffering from pain, weakness, and tripping related to his back injury. CX 53 at 154. Dr. Page-Echols ordered an MRI to evaluate Claimant for back surgery. CX 54 at 161. On June 29, 2012, Claimant reported increased pain following attending a triathlon on the weekend. CX 31 at 81. At a follow-up to his right knee arthroscopy on July 26, 2012, Claimant reported to Dr. Pennington that his knee had been doing well except for an episode of swelling after he worked as a DJ at an event. CX 32 at 86. Dr. Pennington observed that Claimant was healing well and said that Claimant should return in eight weeks only if needed. *Id.*

31. On August 21, 2012, Claimant saw Dr. Page-Echols with continued back and knee pain. CX 55 at 164. Claimant found that his back pain was worse when standing for long periods of time and stepping on his left foot, but was better with ice, heat, and stretching. CX 55 at 163. MRIs taken on August 28, 2012, revealed a congenitally small canal, mild degenerative disk disease, mild central spinal stenosis, and mild disk bulging in Claimant's spine. CX 56 at 168.

32. On October 30, 2012, Claimant was seen by Daniel Stenger, a physician's assistant at Samaritan Orthopedic and Sports Medicine, for a follow-up. CX 33 at 87. Mr. Stenger noted that Claimant continued to experience knee pain, and opined that it was consistent with residual chondromalacia, with possible influence from residual muscle weakness, lack of rehab, and ongoing low back symptoms. CX 33 at 88. Mr. Stenger also discussed injection therapy to alleviate Claimant's right knee pain. *Id.*

33. Claimant saw Dr. Page-Echols on November 15, 2012, to receive a steroid injection in his right knee. CX 34 at 90. During the visit, Claimant told Dr. Page-Echols that his knee pain had worsened since the surgery, his back pain remained problematic, he was unable to be active, and he was still experiencing numbness in his right first toe. CX 34 at 89.

34. Claimant saw Mr. Stenger again on December 17, 2012, and told him that the November 15 injection had been effective for about one week, but that his pain had recently increased significantly. CX 35 at 93. Claimant continued to complain of low back pain which would sometimes radiate into the right leg at the thigh and lower leg, as well as tingling and numbness. *Id.* Claimant saw Mr. Stenger on January 10, 2013, and his pain had improved. CX 36 at 100.

35. On January 22, 2013, Claimant saw Dr. Page-Echols for a medication and pain review. CX 57 at 169. Claimant was experiencing stiffness in his legs and increasing numbness.

Id. He also complained of poor sleep. *Id.* However, Claimant said that he was able to do some work at his parents' house. *Id.* Dr. Page-Echols noted that Claimant's symptoms appeared to be increasing and prescribed amitriptyline to help Claimant sleep. CX 57 at 171. A follow up appointment with Mr. Stenger on February 21, 2013 showed little change in Claimant's condition, with his knee pain at four out of ten. CX 37 at 103. Mr. Stenger did note that Claimant's attempts at strengthening his knee through exercises were limited by his radicular complaints. *Id.*

36. Claimant saw Dr. Page-Echols again on March 21, 2013, with increased back pain and no change in activities or recent trauma. CX 58 at 173. Dr. Page-Echols recorded that Claimant was continuing to experience right leg pain and was also having some pain in his left leg. Claimant expressed interest in increasing his pain medication dosages, but Dr. Page-Echols was unclear as to what benefit that might give and was concerned with escalating the dosage. CX 58 at 174. Dr. Page-Echols referred Claimant to pain management for consideration of Claimant's medical management and spinal injections. *Id.* Dr. Page-Echols also stopped Claimant's amitriptyline due to concerns about over-sedation. CX 58 at 175.

37. Dr. Page-Echols saw Claimant again on April 30, 2013. CX 60 at 177. Due to his lack of insurance, Claimant was unable to see a pain management specialist. CX 60 at 179. Dr. Page-Echols noted that Claimant had been relatively stable neurologically over the prior year. *Id.* In June 2013, Dr. Clinton Evans, who had supervised Dr. Page-Echols's treatment of Claimant, took over Claimant's care. CX 68 at 245, 259.

38. On July 16, 2013, Dr. Evans observed that Claimant did not appear fit for most work, and prescribed a trial of prednisone. CX 74 at 287. On August 4, 2013, Claimant went to the ER with an acute back strain as a result of reaching under a cabinet at home. *Id.* Claimant had an MRI at Dr. Evans's request on August 21, 2013, which revealed little change from prior MRIs. CX 74 at 295-96. On August 22, 2013, Claimant saw Dr. Evans with edema in both legs, which had improved significantly by a visit with Dr. Evans on August 29, 2013. CX 74 at 302. Dr. Evans noted that Claimant's radicular pain was closer to baseline as well. *Id.*

39. On September 16, 2013, Dr. Evans wrote a letter regarding Claimant's condition, where he opined that Claimant's symptoms "have been debilitating to his mobility and function not allowing him to work." CX 61 at 188. Dr. Evans disagreed with the conclusions of independent medical evaluations ("IME") conducted by Drs. Williams and Borman in November 2011, that Claimant was not significantly limited for repetitive use of his lumbar spine and that loss of lumbar motion was related to pre-existing conditions. *Id.* While Dr. Evans acknowledged that pre-existing conditions had some role to play in his knee and back problems, he opined that Claimant's condition was at least partially due to his 2012 injuries, and that additional care would be needed before Claimant could be declared medically stationary. *Id.* Dr. Evans opined that based upon Claimant's condition, he should not perform manual labor work. *Id.* In a follow up letter dated October 3, 2013, Dr. Evans set work limitations for Claimant that he not engage in repetitive bending or stooping, engage in minimal twisting activity such as common daily movements, no repetitive twisting, no lifting, pushing, or pulling weight greater than twenty pounds, limit kneeling to avoid concurrent stooping and bending, engage in

squatting as tolerated, and to allow for change in position between sitting and standing up to once every fifteen minutes. CX 62 at 189.

40. Dr. Evans saw Claimant again on October 17, 2013, and observed that Claimant had less need for a staff or cane, and that Claimant was over his acute pain and was close to baseline. CX 74 at 306-07. Dr. Evans opined that Claimant's back issues had a causal relationship to his 2010 and 2012 work injuries, and that Claimant remained disabled to some extent from manual work. CX 74 at 306.

Hernia Treatment

41. Claimant was seen by Dr. Stephen Hallas, a resident at Samaritan Family Medicine Residency Clinic, for a right groin bump and diarrhea on March 20, 2012. CX 42 at 117. Claimant told Dr. Hallas that he had the groin bump for approximately one week. CX 42 at 119. Dr. Hallas diagnosed likely lymphadenopathy, but also considered a cyst or hernia as possibilities. *Id.* On March 21, 2012, Claimant went to the emergency department of Providence Medford Medical Center, where he was diagnosed with a left inguinal hernia by Dr. Laurie Dutkiewicz. CX 43 at 121. Claimant told Dr. Dutkiewicz that he developed the symptoms suddenly about seven days before. CX 43 at 122. On March 26, 2012, Claimant followed up with Dr. Page-Echols for his groin pain. CX 44 at 124. Dr. Page-Echols noted a nickel sized left inguinal hernia which Claimant reported had grown from pea sized. *Id.*

42. On April 6, 2012, Dr. Wie Peng Kuo surgically repaired Claimant's left inguinal hernia. CX 45 at 128-29; CX 46 at 130-31. Dr. Kuo said Claimant was healing normally at follow-up appointments on April 18 and May 14, 2012. CX 48 at 139; CX 49 at 140.

43. On August 22, 2013, Claimant's attorney sent Dr. Kuo a letter memorializing a telephone conversation from August 19, 2013. CX 50 at 142. Claimant's attorney wrote that Dr. Kuo opined that she could not determine from surgery whether the hernia was traumatic or not, that an inguinal hernia can be congenital but can be aggravated by injury and that Claimant's work could have worsened the hernia. *Id*. Claimant's attorney also wrote that Dr. Kuo opined that it was impossible to say whether the January 19, 2012, injury did or did not worsen the hernia. CX 50 at 143. In a response letter, Dr. Kuo agreed that the characterization of their conversation was accurate. CX 50 at 141.

Dr. Evans' Deposition

44. Dr. Evans gave a deposition on November 5, 2013. CX 76 at 313. He is a board certified practitioner of family medicine at Samaritan Family Medicine in Corvallis, and he treated Claimant for his lower back complaints, but not for his right knee condition or hernia. CX 76 at 314-15, 317. Dr. Evans opined that the January 2012 accident probably played some role in exacerbating Claimant's back pain, though he could not ascribe a percentage. CX 76 at 315. He also opined that Claimant's right great toe numbness could be related to radicular symptoms, but his swollen legs in August 2013 were probably not related to the January 2012 injury. CX 76 at 317-18. Dr. Evans last examined Claimant on October 17, 2013, and at that time was of the opinion that Claimant's back had returned to his baseline prior to flare-ups in July and August 2013. CX 76 at 318. Claimant had previously used a wooden staff for

assistance in walking, but Claimant was no longer using the walking staff at his last examination on October 17, 2013. *Id.*

45. Dr. Evans thought Claimant needed a neurosurgery evaluation because he continued to show symptoms related to his injuries, and further evaluation was necessary before saying he was at MMI. CX 76 at 318. Claimant had not been able to pursue a neurosurgery evaluation due to financial constraints. CX 76 at 319. Additionally, Dr. Evans suggested that nerve conduction testing, or, as an alternative, injection therapy might be helpful for Claimant. CX 76 at 318, 320. Dr. Evans disagreed with Dr. Woodward's opinion that Claimant suffered a low back strain in January 2012 which should have resolved within three months. CX 76 at 319. Instead, Dr. Evans opined that Claimant suffered a contusion and strain injury. *Id.* Dr. Evans also stated that Claimant had stenosis of the low back, and explained that while stenosis can be caused by injury, it is more often a congenital condition. *Id.* He opined that Claimant's current back issues may be caused by the cumulative effects of Claimant's prior back injury and stenosis. CX 76 at 320. Dr. Evans did not believe that Claimant could return to construction work or to tile and carpentry work in the shipyard. CX 76 at 318-19. Dr. Evans opined that Claimant has been at least moderately limited for repetitive use of his lumbar spine since 2010, and that Claimant's spine was vulnerable to injury prior to the January 2012 accident. CX 76 at 321.

Dr. Pennington's Deposition

46. Dr. Pennington gave a deposition on September 19, 2013. CX 67 at 229; EX 36. He is a board certified orthopedic surgeon and treats the sports teams of Oregon State University for orthopedic injuries. CX 67 at 237. Dr. Pennington performed a right knee arthroscopic meniscectomy and chondroplasty to repair a tear in Claimant's meniscus on May 7, 2012. CX 26 at 65-66. Dr. Pennington described the meniscal tear as having two portions, one which appeared to be chronic and the other which appeared to be acute. CX 67 at 231-32. Dr. Pennington opined that the type of acute tear he repaired in Claimant's knee is most commonly caused by a slip and fall with a twist, but that the tear could be caused by an injury like Claimant's January 2012 fall. CX 67 at 236. He also doubted that the acute portion of the tear was present when Claimant was examined by Dr. Ferguson in April 2011. CX 67 at 238-39. Dr. Pennington opined that Claimant does not need any further treatment for his January 2012 knee injury. CX 67 at 236-37. Dr. Pennington thought Claimant had reached MMI on July 26, 2012, for the right knee, and his treatment after July 26, 2012, was not related to his work injury, but rather to Claimant's pre-existing osteoarthritis. CX 40 at 108, 110; CX 67 at 237. Dr. Pennington also said that Claimant would have no current physical limitations related to the January 2012 knee injury. CX 40 at 110.

Dr. Page-Echols's Deposition

47. Dr. Page-Echols gave a deposition on September 19, 2013. CX 68 at 244; EX 37. Dr. Page-Echols is board certified in family medicine, and has been practicing as a full physician since completing his residency in June 2013; he treated Claimant as a resident from January 2012 until May 2013. CX 68 at 245, 248. Dr. Page-Echols believed that Claimant's right knee symptoms pre-existed the January 2012 accident and were worsened by it. CX 68 at 246. When

Dr. Page-Echols examined Claimant in January 2012, he did not make any findings which indicated that Claimant's right knee was worse than when Dr. Ferguson examined Claimant in April 2011, but he did note that Claimant was having more symptoms in January 2012 than in April 2011. CX 68 at 247. Claimant's right knee symptoms worsened, leading to Claimant's May 7, 2012 meniscal tear repair, and had not returned to baseline prior to the May 2012 surgery. CX 68 at 248. In a letter following his deposition, Dr. Page-Echols opined that Claimant's pre-existing knee pain was worsened by the January 2012 incident, which was also at least partly the reason for the steroid injection he gave Claimant on November 15, 2012. CX 75 at 310. Dr. Page-Echols referred Claimant for hernia surgery on March 26, 2012, but he did not believe the hernia was related to Claimant's fall at Employer. CX 68 at 248.

48. Based on the severity and duration of Claimant's subjective low-back symptoms, Dr. Page-Echols said Claimant likely suffered an injury greater than a lumbar strain as a result of his January 2012 accident. CX 68 at 253, 261. Dr. Page Echols opined that Claimant's subjective symptoms appeared to be out of proportion to the objective findings, but he still believed that Claimant's pre-existing back pain worsened after the January 2012 accident. CX 68 at 253; CX 68 at 260-61. He also noted that Claimant's right great toe and foot numbness correlated with MRI scans of Claimant's back and with a diagnosis of radiculopathy. CX 68 at 250-51. Dr. Page-Echols thought Claimant should engage in routine activities like cooking and cleaning, but avoid activities that required lifting, bending, and twisting. CX 68 at 259. He stated that he was uncertain as to whether Claimant was medically stationary by May 2013, as Dr. Page-Echols had been hoping that Claimant would receive physical therapy, injection therapy, or additional neurological examination. CX 68 at 260. Dr. Page-Echols said that he was hoping Claimant could go back to full time work in the shipyards after the incident, but he was not sure if that would have been a good idea. CX 68 at 261.

Dr. Woodward's IME and Deposition

49. Dr. Anthony Woodward performed an IME of Claimant on October 22, 2012. EX 23 at 403. After reviewing additional medical records and imaging studies, Dr. Woodward amended his IME report on November 9, 2012. EX 23 at 423. Dr. Woodward is board certified in orthopedic surgery and was in active practice for approximately twenty-four years, but since 1997 has been performing only IMEs on a full-time basis. EX 35 at 545; EX 48 at 888, 911-12. Initially, Dr. Woodward thought that Claimant's knee condition was not at MMI five and a half months after surgery, and that he could benefit from physical therapy. EX 23 at 418. However, after reviewing additional medical records, Dr. Woodward said that Claimant's right knee condition had resolved, and that any increased symptoms were not attributable to the January 2012 accident. EX 23 at 429. Dr. Woodward opined that Claimant had pre-existing, but not disabling, degenerative joint disease of the right knee which would make him more likely to report a knee injury, but did not limit Claimant's work capacities before or after the January 2012 accident. EX 23 at 420.

50. Dr. Woodward opined that Claimant did not have a permanent aggravation of his pre-existing spinal condition as a result of the January 2012 accident. EX 23 at 418. Claimant also had pre-existing, but not disabling, chronic low back pain, which made it more likely he would report additional low back injuries. EX 23 at 420. However, based upon his work

schedule, Claimant's work capacities were not limited before or after the January 2012 accident. *Id.* After reviewing additional records, Dr. Woodward diagnosed Claimant with a lumbar strain/contusion which had resolved. EX 23 at 431. Dr. Woodward did not give an opinion on the cause of Claimant's hernia as he did not feel qualified to do so. EX 23 at 419.

51. Dr. Woodward gave a deposition on September 9, 2013. EX 35 at 543. He currently performs about 200 IMEs each year. EX 35 at 545. Dr. Woodward faced three malpractice claims while in private practice; two of the claims were dismissed, and the third, for an amputation of a leg, was settled out of court. *Id.* After the amputation, which occurred in the 1990s, Dr. Woodward's emergency room privileges for unassigned patients were restricted for one year. *Id.*

52. Dr. Woodward noted that Claimant had knee surgery in 1986 and had been experiencing knee pain prior to the January 2012 accident. EX 23 at 546-47. Dr. Woodward stated that an oblique complex tear of the type seen on Claimant's February 9, 2012, MRI is usually due to degeneration of the meniscus, and, to a reasonable degree of medical probability, was likely present prior to the accident. EX 35 at 545-47. He agreed that Claimant experienced an increase in low back symptoms after the accident, but did not agree that Claimant had an increase in right knee symptoms from his accident to the date of his knee surgery in May 2012. EX 35 at 550. Taking into account Claimant's history of knee pain, the accident as described, and the macerated tear seen in surgery, Dr. Woodward opined that to a reasonable degree of medical probability the accident likely did not cause pathological worsening of Claimant's right knee. EX 35 at 551.

53. Dr. Woodward examined MRI films taken on August 31, 2011, and August 28, 2012, and found no signs of worsening between the two films, and noted only slight differences of technique and slightly less abnormality in the 2012 films. EX 35 at 552. Dr. Woodward opined that Claimant had chronic low back pain prior to the accident which may have been worsened for up to three months by the accident. EX 35 at 553-54. He opined that Claimant had no physical work limitations related to his accident. EX 35 at 549.

54. On November 22, 2013, Dr. Woodward was deposed again for perpetuation purposes. EX 48 at 887. Dr. Woodward explained that Claimant's big toe numbness indicated a nerve injury close to the toe, as opposed to near the spine itself, and the lack of any observable pathology or lesion on Claimant's spine suggested no spine injury. EX 48 at 892. Dr. Woodward disagreed with Dr. Evans to the extent that Dr. Evans believed that Claimant's accident played a role in his current back condition. *Id.* Dr. Woodward also disagreed with Dr. Lin's evaluation of Claimant's right knee impairment and thought Dr. Lin erroneously believed Claimant to have a partial medial and lateral meniscal tear, leading to an incorrectly increased impairment rating. EX 48 at 896. The error, Dr. Woodward said, was due to Dr. Lin mistakenly equating fraying with tearing. *Id.* Dr. Woodward explained that Dr. Pennington's surgical report, which described the lateral meniscus as frayed, supported a permanent disability rating of one to three percent, and that he felt a two percent rating would be appropriate. CX 48 at 896-97.

Dr. Lin's IME

55. Dr. Victor Lin evaluated Claimant's right knee complaints on October 22, 2013. CX 73 at 278. At the time of the exam, Claimant reported an average level of right knee pain of six out of ten, but denied any numbness or significant weakness. CX 73 at 279. Claimant reported swelling in his knee, which seemed activity related, and occasional pressure in the anterior section of his knee. CX 73 at 278. When Dr. Lin physically examined Claimant, he noted diffuse tenderness in the medial aspect of Claimant's right knee, somewhat limited flexion of Claimant's right knee as compared with the left, some effusion and crepitation, and minimal valgus instability. CX 73 at 282. He noted that Claimant's McMurray's test and Apley's test, which test for medial meniscus tears, were both positive for pain in the medial compartments. *Id.* Dr. Lin also observed that Claimant had significant antalgia during formal gait testing, but that Claimant showed significantly less antalgia during casual conversation. *Id.*

56. Following his review of Claimant's medical records and a physical examination of Claimant, Dr. Lin diagnosed Claimant with an acute and chronic right medial meniscal tear, with traumatic arthritis of the right knee, as a consequence predominantly of Claimant's 1986 and 1987 work related injuries. *Id.* Dr. Lin recommended that Claimant avoid jobs requiring heavy lifting, significant climbing, working at heights, prolonged or repeated squatting or bending, and repeated or sustained crawling. *Id.* In a report dated October 22, 2013, Dr. Lin determined that Claimant should be limited to jobs with a light to light/medium physical demand (lift/carry fifty pounds rarely, and thirty-five pounds occasionally) and which allow him to sit or stand as necessary, move around for comfort, preferably work on padded surfaces, and avoid repetitive use of his right knee. *Id.* Dr. Lin apportioned 70% of Claimant's current knee disability to the January 2012 accident and the remaining 30% to Claimant's pre-existing injuries. CX 73 at 283. Dr. Lin rated Claimant to have a 12% lower extremity disability under the Guide to the Evaluation of Permanent Impairment, Sixth Edition. CX 73 at 284.

Dr. Blumberg's IME and Deposition

57. On March 25, 2013,[6] Dr. Jack Blumberg conducted a records review and opined that Claimant's left inguinal hernia was not related to his January 19, 2012, accident. EX 28 at 509, 511. Dr. Blumberg did not examine Claimant in person, even though he would have preferred to do so. EX 47 at 865, 873. Dr. Blumberg explained that if the hernia had a traumatic origin, there would likely have been pain at the time of the trauma because there would be a tear, which would have filled with blood, and part of his opinion that the hernia was not related to Claimant's work injury was the lack of any reported pain. EX 28 at 511. He also noted that congenital defects allow for the development of an indirect hernia. *Id.* Dr. Blumberg also opined that he would expect Claimant to be medically stationary and without impairment six weeks after surgical repair of the hernia. *Id.*

58. At his deposition on November 1, 2013, Dr. Blumberg said he has been retired from clinical practice for ten years, where he was a general surgeon and performed "a great deal of trauma surgery," and now does only consulting work. EX 47 at 860-61. Dr. Blumberg holds

[6] EX 28 lists the date of evaluation as March 25, 2012, but the evaluation took place on March 25, 2013. EX 28 at 509; EX 47 at 863.

an Oregon state medical license, is board certified in general surgery, and is a certified medical review officer. EX 47 at 861. Dr. Blumberg agreed that Dr. Kuo's surgical repair of Claimant's hernia was an appropriate treatment, and also agreed with her recommendation that Claimant not lift over fifteen pounds for four to six weeks after the surgery. EX 47 at 864. Dr. Blumberg explained that most hernias are caused by a congenital defect and not trauma, but that trauma can accelerate the manifestation of a hernia or aggravate a hernia. EX 47 at 865-66. Dr. Blumberg said that Claimant's January 19, 2012, fall could have torn tissue and led to a hernia, but that the tearing would have been very painful and Claimant would have displayed symptoms, including bleeding at the site of the tear, at the time of injury. EX 47 at 866. Dr. Blumberg agreed with Dr. Kuo that it was possible, but not probable, that Claimant did not notice pain related to his hernia in January 2012 because the pain in his back and knees was more severe. EX 47 at 868. Dr. Blumberg also agreed with Dr. Kuo that it was possible that the hernia developed spontaneously, but that he could not say whether it in fact did or did not spontaneously develop. *Id.* If Claimant had been experiencing continuous hernia symptoms from the time of the January 2012 incident until reporting the hernia in March 2012, then Dr. Blumberg thought there would be a relationship between the accident and the hernia. EX 47 at 869. However, Dr. Blumberg still believed that the January 2012 accident did not aggravate or accelerate Claimant's hernia. EX 47 at 872.

Claimant's History of Back Complaints

59. On July 6, 2010, Express Employment Professionals, a temporary staffing agency, hired Claimant, and the next day sent him to a Hewlett-Packard facility where he injured his back moving cubicles. TR at 98-99; EX 5 at 38; EX 10 at 97. Prior to the incident at Express Employment, Claimant said his back was in "fair" condition, with only occasional pain; he took no medication and had not had any medical treatment for back injuries. TR at 99.

60. Claimant saw Dr. William Ferguson on July 13, 2010, who diagnosed an acute lumbosacral strain, and took Claimant off work. EX 10 at 97-98. Claimant received physical therapy, and was also prescribed Percocet and Flexeril for pain. TR at 106; EX 10 at 98. Dr. Ferguson cleared Claimant to return to light sedentary work on August 26, 2010. EX 10 at 112. By September 19, 2010, Claimant had returned to light duty sedentary work. CX 10 at 20. Claimant's light duty at Express Employment Professionals initially consisted of office work, then of holding a sign and walking back and forth on concrete. TR at 100; EX 10 at 133. Claimant saw Dr. Ferguson again on August 30 and September 13, 2010, who noted slow gradual improvement in Claimant's low back pain. EX 10 at 114, 116.

61. Dr. Todd Lewis evaluated Claimant's low back pain and numbness on September 21, 2010. EX 11 at 181. Dr. Lewis diagnosed Claimant with degenerative joint disease of the back, a lumbar back strain, and spondylolisthesis. EX 11 at 183-84. Dr. Lewis later said that the spondylolisthesis diagnosis was a typographical error, and that he had meant to diagnose congenital spinal stenosis. EX 11 at 185.

62. Dr. Ferguson again saw Claimant on October 11, 2010, and, noting that Claimant continued to experience back pain, encouraged Claimant to focus on stretching and core strengthening to reduce pain. EX 10 at 118. On October 25, 2010, Dr. Ferguson saw Claimant again and noted no significant improvement in his back pain. EX 10 at 121. Dr. Ferguson switched Claimant's pain medication from Percocet to Darvocet. *Id.* Claimant continued to have low back pain when he saw Dr. Ferguson on November 8, 2010, when Dr. Ferguson recommended a neurological consultation. EX 10 at 123. Claimant had not improved when he next saw Dr. Ferguson on November 18, 2010. EX 10 at 125.

63. On November 22, 2010, Dr. Timothy R. Borman conducted an IME of Claimant. EX 12 at 189. Dr. Borman opined that the July 7 incident at Hewlett Packard was "a major contributing cause" of the symptomatic aggravation of Claimant's pre-existing lumbar spinal stenosis, lumbar disc degeneration, and lumbar spine facet degenerative joint disease, and that Claimant was not yet medically stationary. EX 12 at 195-96.

64. Dr. Paul Williams also conducted an IME of Claimant on November 22, 2010. EX 12 at 189. Dr. Williams, in disagreement with Dr. Borman, opined that there was no objective evidence that the July 7 incident led to any worsening of Claimant's pre-existing conditions, and that Claimant's physical complaints were not substantiated by the objective clinical findings. EX 12 at 195. Dr. Williams also said that Claimant's lumbar strain had reached maximum medical improvement. EX 12 at 196. On April 1, 2011, Dr. Williams performed a second examination of Claimant, and said that Claimant's lumbar spine strain had resolved without impairment and that a microdiscectomy surgery was not medically necessary. EX 12 at 200, 205-06. In his opinion, Claimant could return to work without any restrictions. EX 12 at 205-06.

65. When Claimant saw Dr. Ferguson on November 29, 2010, Dr. Ferguson noted that he could not explain Claimant's continued pain. EX 10 at 127. No improvement was noted on Dr. Ferguson's examination of December 7, 2010. EX 10 at 130. On December 21, 2010, Claimant and Dr. Ferguson discussed the results of Claimant's IMEs, and Dr. Ferguson agreed that Claimant had degenerative lumbar disc disease. EX 10 at 132. Dr. Ferguson restricted Claimant's work duties to no more than five minutes of walking or standing at a time. EX 10 at 155. On January 14, 2011, Dr. Ferguson noted that he would like for Claimant to see a neurosurgeon. EX 10 at 135. On March 15, 2011, Dr. F. Clifford Roberson, a neurosurgeon, recommended that Claimant have a right L5-S1 microdiscectomy, which he reiterated on June 23, 2011, in response to Dr. Williams' second medical evaluation of Claimant. EX 13 at 216, 237.

66. On June 15, 2011, Dr. Ferguson discontinued treatment of Claimant after seeing video of Claimant lifting groceries, mowing the lawn, and playing volleyball. EX 10 at 176, 179. Dr. Ferguson also concluded that Claimant's knee pain was unrelated to the 1986 claim. CX 16 at 38. Dr. Roberson stated on September 6, 2011, that he no longer thought that surgery on Claimant's lower back was advisable. EX 13 at 240. During the period between his injury at Express Employment Professionals and his January 2012 accident, Claimant's back pain periodically flared up. TR at 109.

Claimant's History of Knee Complaints

67. In the summer of 1986, Claimant injured his right knee in a car accident which required right knee surgeries in 1986 and 1987. TR at 102-03; EX 7 at 45, 50, 60. As a result of the injury, he received a 20% partial permanent disability rating and a payment of $3,750. EX 7 at 67-68; EX 24 at 434. After the surgeries, Claimant returned to construction work and experienced no trauma to his right knee between 1986 and 2011, though he experienced irritation and pain from leaning down, pacing, and climbing ladders. TR at 102-03. In 2011, Claimant's knee began to swell and become painful, and he attempted to reopen his previous workers' compensation claim. TR at 101; EX 10 at 154. At the time Claimant tried to reopen the claim, he was working light duty at Express Employment Professionals holding a sign and walking on concrete. TR at 101. On April 13, 2011, Claimant was seen by Dr. Ferguson for his knee complaints. TR at 101; CX 14 at 35. In early June 2011, Claimant stopped carrying a sign and pacing on concrete, and three to four weeks after he stopped, his knee returned to normal. TR at 103-04.

Claimant's History of Groin Complaints

68. After his injury moving cubicles on July 7, 2010, Claimant experienced groin pain. TR at 105. On July 9, 2010, Claimant visited an emergency room, complaining of left testicle and low back pain. EX 9 at 91-94. Dr. Gabriel B. Ledger suspected a kidney stone, but a CT scan did not reveal any stones, and he diagnosed Claimant with musculoskeletal low back pain. EX 9 at 94-95. Dr. Ledger prescribed Claimant Percocet, and also told him to rest, use anti-inflammatories, and follow up with his primary care physician. EX 9 at 94. Claimant saw Dr. Ferguson, his primary care doctor at the time, on July 13, 2010, who noted tenderness in Claimant's left abdomen, but no hernias, and diagnosed an acute lumbosacral sprain. EX 10 at 97-98. Claimant's groin pain was gone after six to eight weeks of physical therapy. EX 44 at 822, 827-29; TR at 105.

Vocational Evidence

Employer's Expert -- Ms. Broten's Analysis and Deposition

69. Elizabeth Broten, a vocational expert, prepared a labor market survey at the request of Employer. EX 38 at 653. Ms. Broten, who has a Master's degree in Social Work, is a licensed clinical social worker and a vocational rehabilitation counselor in Oregon, and has been certified as a vocational counselor since 1986. TR at 247; EX 30 at 523. Ms. Broten interviewed Claimant on September 24, 2013, and also reviewed Claimant's medical records, resume, and educational documents. EX 38 at 653-54. At the time she interviewed Claimant, he lived in Corvallis, Oregon. EX 38 at 654. Ms. Broten found Claimant to be personable and a good communicator, but thought that he had minimized his skills and abilities during their interview even though she thought Claimant lacked the skill set to work as a shipyard carpenter. TR at 252-53, 258. Ms. Broten explained that, when evaluating Claimant's skills, she inferred from Claimant's enrollment in online classes and a computer course that he had some computer skills. TR at 265-66.

70. Ms. Broten identified jobs using a twenty to twenty-five pound lifting restriction and allowing for interchangeable positioning between sitting, standing, and walking. TR at 269; EX 38 at 656. Claimant described these limitations to Ms. Broten, as she was not provided with specific physical limitations until October 21, 2013, the day her report was due. TR at 269, 319; EX 38 at 656-57. After receiving Dr. Evans's description of Claimant's physical limitations, Ms. Broten finalized her report, re-contacting some employers using the limitations of lifting no more than twenty pounds occasionally and no repetitive stooping, climbing, bending, twisting, or crawling, as well as allowing for interchangeable positioning. TR at 319; EX 38 at 656. She primarily reviewed jobs in the sedentary to light range. EX 38 at 657. When Ms. Broten spoke to potential employers, she told them Claimant could not work construction jobs. TR at 269.

71. Ms. Broten identified eleven positions in Corvallis, Albany, Salem, Eugene, and Portland, Oregon. EX 38 at 663-74. Ms. Broten noted Claimant had a serviceable vehicle and Albany, Salem, and Eugene are 13, 40, and 49 miles respectively from Corvallis.[7] EX 38 at 654. Ms. Broten identified positions in Portland because Claimant had been injured in Portland. EX 38 at 653. All of the positions identified had current openings or had been open during the previous sixty days. TR at 283. In her report, she usually included the names and phone numbers of her contacts at each job, but she did not do so in this case because she thought Mr. Stipe, who was Claimant's vocational expert, would have hostile or threatening communications with her contacts, and she did not think the lack of contact information would impede Mr. Stipe. TR at 271, 317.

72. The positions she identified included: retail sales associate, cashier, and customer service specialist positions at Petco in Corvallis and Albany, paying $9-$9.50/hour; a video rental clerk position at Blockbuster Video in Albany, paying $8.95/hour; a customer service representative position at U-Haul in Corvallis, paying $9/hour; a front desk clerk position at Motel 6 in Corvallis, paying $8.95/hour; a retail sales associate position in Corvallis, paying $13-$14/hour, and a retail store manager trainee position in Salem, paying $30,000-$90,000 annually, at Firestone Car Care; a bank teller position, paying $12.38-13.46/hour, and a financial advisor trainee position, paying a competitive salary and commissions up to $40,000-$50,000 per year, at Wells Fargo in Corvallis and Albany; a customer service advisor position at Jiffy Lube in Corvallis and Albany, paying $9.50/hour; a product support specialist position at Garmin AT in Salem, paying $14/hour; dispatch, security guard, and gate guard positions at Securitas in Eugene, Albany, and Portland, paying $9-$11/hour; a rental customer service position at Hertz Rental Car in Portland, paying $9.20-$9.70/hour; and a mall security officer position at the Lloyd Center/Integrated Systems Security in Portland, paying $11.33/hour. EX 38 at 663-74.

73. Ms. Broten spoke to staff at Petco who said the positions were in the process of being modified and would be performable by someone with Claimant's physical limitation. TR at 272-73. Ms. Broten said employees at Blockbuster told her that they were able to sit during slow periods and that the job could be modified to avoid lifting of thirty-five pound boxes. TR at 274-75. Similarly, Ms. Broten testified that her contact at U-Haul told her that a lifting restriction like Claimant's could be accommodated. TR at 275. Ms. Broten explained that her contact with Motel 6 specifically told her that Motel 6 hires employees with disabilities to work

[7] *See* MAPQUEST, http://www.mapquest.com/ (last visited Jan. 16, 2015).

their front desks. TR at 276-77. Since submitting her labor market survey, Ms. Broten identified an additional position as a front desk clerk at a Best Western in Corvallis and Albany. TR at 277. Ms. Broten agreed that the positions which she identified at Firestone Car Care would involve lifting no more than thirty pounds. TR at 279. She also said that tellers at Wells Fargo were able to sit on stools, and lifting of heavy weights could be accommodated. TR at 280-81. According to her Wells Fargo contact, the financial advisor trainee position did not require a bachelor's degree, and Claimant's entrepreneurial background would be a positive. TR at 282-83. Even though the Jiffy Lube position required prior customer service experience, Claimant met that requirement, and though the position would require some driving to move cars, it primarily consisted of guiding cars into repair bays and client interaction, allowing Claimant to change positions frequently. TR at 288-89. For the product support specialist with Garmin, Ms. Broten's contact indicated that a headset could be worn and an adjustable height desk used, allowing Claimant to change position frequently. TR at 290. Ms. Broten said that Securitas would also be able to accommodate Claimant's physical limitations. TR at 291. She noted in her labor market survey that the Securitas location in the Corvallis area had only a part-time position. EX 38 at 672. Ms. Broten testified that her contact at Hertz told her that the position she identified allowed sitting. TR at 292. At Lloyd Center/Integrated Security Systems, Ms. Broten spoke with a contact who told her that there was no lifting required in the position, and while the job required climbing of stairs and patrolling a parking lot, the stairs did not need to be climbed quickly and a mall vehicle was used for patrols. TR at 293-94.

74. Ms. Broten submitted her job analysis report to Dr. Evans, who reviewed them in light of Claimant's limitations on October 31, 2013. EX 44. Dr. Evans approved the positions of: bank teller at Wells Fargo; product service specialist at Garmin AT; consumer care advisor at Jiffy Lube, provided that the position did not include cross-covering of service tech positions; front desk clerk at Motel 6; and video rental clerk at Blockbuster video, with a comment questioning whether the job description, which mentioned VCRs and videotapes, was out of date. EX 44 at 773-78, 783-89, 793-95. Dr. Evans did not approve the position in rental customer service at Hertz Rent-a-Car due to concerns about repetitive stooping and bending motions involved in washing and cleaning cars. EX 44 at 779-82. Dr. Evans also did not approve the position of retail store manager trainee at Firestone Car Care as the position required pushing, pulling, and lifting thirty pounds, more weight than Dr. Evans had recommended. EX 44 at 790-92.

75. Claimant said he applied for the jobs identified by Ms. Broten except for the jobs located in Portland, because he considered the commute to be impractical. TR at 152. He also sent out 40-50 resumes for construction jobs. *Id.*

Claimant's Expert -- Mr. Stipe's Analysis and Deposition

76. Scott Stipe, a vocational expert hired by Claimant, has a Master's degree in Rehabilitation Counseling and is a licensed professional counselor in Oregon, a certified rehabilitation counselor, and a Diplomate, American Board of Vocational Experts. CX 13 at 24. Taking into account Claimant's work background, Mr. Stipe thought that Claimant would have had an earning capacity of $1000 per week had he not been injured. TR at 199. Mr. Stipe based

this earning capacity calculation on information from labor market contacts and from the State of Oregon Employment division regarding workers with backgrounds similar to Claimant's. TR at 198-99. The highest wages Mr. Stipe found in the state of Oregon for tile and marble setters were $26.04 per hour, with a median of $15.52 per hour. CX 8 at 17. In the Portland area, the median wage for tile and marble setters was $14.09 per hour with a high wage of $23.57 per hour. *Id.* Painters in the Portland area earned a median wage of $18.11 per hour, with a high wage of $25.92. *Id.* Painters in Oregon as a whole earned median wages of $17.18 per hour, and the 90th percentile earned $24.55 per hour. *Id.* Carpenters in the Portland area earned a median of $22.67 per hour, with the high wage at $34.78 per hour. *Id.* In Oregon as a whole, carpenters took home a median of $21.11 per hour and a high wage of $34.78 per hour. *Id.* Based on this information, Mr. Stipe opined that a wage of $25 per hour appropriately represented Claimant's earning capacity had he not been injured. TR at 199; CX 8 at 17.

77. Mr. Stipe testified that he also investigated each of the job openings identified by Ms. Broten, and found many unsuitable for Claimant. TR at 203. The Petco and U-Haul jobs identified by Ms. Broten were unsuitable for Claimant because both required him to lift more than 20 pounds and Claimant would be unable to frequently change position between sitting and standing in either position. TR at 203-04, 205. Mr. Stipe opined that the Blockbuster and Wells Fargo teller jobs would be unsuitable for Claimant because frequent sitting was not allowed in either position. TR at 205, 206. The Jiffy Lube position was unsuitable because it required person-to-person sales experience, which Claimant did not have, and would not permit frequent sitting. TR at 207. The position at Garmin was unsuitable for Claimant because it required experience with technical computer issues and would not permit frequent changes between sitting and standing, and the Securitas job was unsuitable because it did not allow for frequent change between sitting and standing. TR at 208-09. The Hertz Rental Car position was unsuitable because it did not allow sitting, as was the mall security guard job because of the high physical demand requirements, such as climbing stairs, walking for an eight hour day, pushing wheelchairs, patrolling on a mountain bike, and lifting 25-50 pounds. TR at 210-11. Mr. Stipe thought Claimant was most suitable for the Wells Fargo or Motel Six jobs, but he thought it was improbable that Claimant would be hired for either job if he diligently applied. TR at 212-14.

78. Mr. Stipe further opined that, even if he diligently applied, Claimant would not be a likely hire for some positions. TR at 212. Mr. Stipe said that, due to Claimant's lack of computer skills and limited touch-typing ability, it was unlikely that he would be hired for the Motel 6 position. TR at 213. Mr. Stipe had similar reservations about Claimant's suitability for the Hertz Rent-A-Car position. TR at 222. Due to Claimant's lack of retail background, cash handling experience, and computer skills, Mr. Stipe thought that Claimant would likely not be hired by Wells Fargo as a bank teller. He also said that the Wells Fargo financial advisor trainee position required the applicant to start as a teller, and that the position almost always required a college degree. TR at 218-19. Claimant's lack of customer service and cash handling experience was cited by Mr. Stipe as a reason that Claimant would be unlikely to be hired at Petco, Blockbuster Video, or U-Haul. TR at 215-17. Mr. Stipe opined that Claimant's lack of automotive experience made him a poor candidate for the Jiffy Lube position. TR at 220. Mr. Stipe said that Claimant's lack of computer, customer service, and data entry skills made him an unlikely candidate for the Garmin AT position. TR at 220-21. While Mr. Stipe allowed that the security guard positions at Securitas and the Lloyd center might be able to make

accommodations for Claimant's limitations, the jobs which allowed for sitting rather than walking or bicycling would not be available to a new hire. TR at 221-22.

V. ANALYSIS AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon analysis of the entire record, the arguments of parties, and the applicable regulations, statutes, and case law. 29 C.F.R. § 18.57. In deciding this matter, I am entitled to weigh the evidence and draw inferences from it. 29 C.F.R. § 18.29.

A. Notice of Injury

Generally, under the Act, an employee has thirty days to provide notice of an injury, and the clock starts to run when reasonable diligence would have disclosed the relationship between his injury and his employment. 33 U.S.C. § 912(a); 20 C.F.R. § 702.212(a). Although it is the claimant's burden to establish timely notice, Section 20(b) creates a presumption that sufficient notice of the claim has been given. An employer may rebut the presumption by presenting substantial evidence that it did not have knowledge of the employee's work-related injury or death. *See Blanding v. Dir., OWCP [Oldham Shipping]*, 186 F.3d 232 (2d Cir. 1999) (citing *Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir. 1982)). Failure to give timely notice as required by Section 12(a) bars a claim, unless excused under Section 912(d). *See Kashuba v. Legion Ins. Co.*, 139 F.3d 1273 (9th Cir. 1998); *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989). Under Section 12(d), failure to provide timely written notice will not bar the claim if the claimant shows either that the employer had knowledge of the injury during the filing period, 33 U.S.C. § 912(d)(1), or that the employer was not prejudiced by the failure to give timely notice, 33 U.S.C. § 912(d)(2). *See Addison*, 22 BRBS at 34; *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986).

Employer stated at the hearing that it intended to contest whether notice had been given, but did not address the issue in its hearing and post-hearing briefs. TR at 28. The evidence established that Claimant told both Mr. Wischhoefer and Mr. Wagner about his injury close in time to the incident. F.F. ¶ 4. Furthermore, Mr. Wagner admitted that Claimant told him of the accident within a couple days of the injury, but that he misunderstood where the injury occurred. F.F. ¶ 15. The presumption that the claim was timely noticed applies in this matter, and Employer has not presented substantial evidence that it did not have notice of Claimant's work-related injury. Therefore, Employer has failed to rebut the Section 20 presumption that sufficient notice of the claim has been given. Accordingly, I find that Claimant gave timely notice and timely filed his claim.

B. Causation

Under Section 20(a) of the Act, a court may presume a claimant's injury causally relates to his employment. 33 U.S.C. § 920(a); *Haw. Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 650 (9th Cir. 2010); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 331 (1981). To invoke the presumption, a claimant must first establish two elements: (1) that physical harm or pain has

occurred and (2) that working conditions existed or an accident occurred that could have led to such harm. *Ogawa*, 608 F.3d at 651; *Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 959 (9th Cir. 1998). A claimant does not need to establish either of these elements by a preponderance of the evidence; the submission of "some evidence" with respect to each of the above elements is sufficient to invoke the presumption. *Albina Engine & Mach. v. Dir., OWCP*, 627 F.3d 1293, 1298 (9th Cir. 2010) (citations omitted).

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that a claimant's condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by such conditions. *Ogawa*, 608 F.3d at 651; *Gooden v. Dir., OWCP*, 135 F.3d 1066 (5th Cir. 1998). "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. 1988). Employer must produce facts, not speculation, to overcome the presumption of compensability. *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 130-31 (1984).

If an employer is able to introduce substantial evidence to rebut the Section 20(a) presumption, the presumption drops from the case and the Administrative Law Judge ("ALJ") must weigh all of the evidence and resolve the issue of causation based on the record as a whole. *Holmes v. Univ. Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153, 155 (1985); *see generally Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). If the presumption is rebutted by substantial evidence, the burden shifts to the claimant, who must prove by a preponderance of the evidence that the alleged injury is work-related. *Greenwich Collieries*, 512 U.S. at 281; *Albina*, 627 F.3d at 1298. If the evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281.

1. Claimant's Prima Facie Case – Right knee, Low back, Hernia

In order to establish a prima facie case and invoke the Section 20(a) presumption, Claimant must show that he has been physically harmed or pained and that working conditions existed or an accident occurred that could have led to such harm. Here, Claimant has established a prima facie case for his claims. Claimant established that was at work on January 19, 2012, when he slipped and hurt his back, right knee and groin. He was able to continue to work, but the pain increased over time. Mr. Manning and Ms. Davis both observed that Claimant was hurt more following his fall at work on January 19, and that he appeared to have back and knee pain. TR at 51, 67. Dr. Page-Echols also noted bruising on Claimant's buttocks when he examined Claimant on January 23, 2012, and his medical treatment over the course of the next year is consistent about how he injured his back and right knee. CX 19 at 45. Claimant's testimony and the testimony of Mr. Wagner and Mr. Wischhoefer establish that an accident occurred on January 19, 2012, which could have led to the harms asserted by Claimant. TR at 121, 354, 402-03. On the morning of January 19, 2012, Claimant was boarding a boat at the job site while carrying two sixty pound tool bags to a specific work location for Employer when he slipped on a piece of wood. F.F. ¶ 3. The only evidence suggesting that the accident occurred anywhere

besides the *Ocean Peace* comes from Mr. Wagner's testimony. However, Mr. Wagner himself admitted that he had initially misunderstood Claimant's description of the accident. TR at 355. Furthermore, Claimant's narrative is consistent with the description offered by Ms. Davis and her observations of his injury. TR at 66. There was no contradicting evidence about Claimant's slip and fall at work. The evidence is more than sufficient to raise the presumption as to Claimant's right knee and back on January 19, 2012.

Regarding Claimant's hernia, Claimant said he hurt his groin when he fell at work on January 19, 2012. TR at 125. However, he did not tell any doctor that he had groin pain until March 2012, over two months after the work-related accident. CX 42 at 117. Claimant explains that he was experiencing much more significant pain in his back and knee, and he did not tell anyone about the groin injury until his pain subsided some. However, he kept a journal where he noted the groin injury, and he also told his mother that he had groin pain within a couple days of the injury. F.F. ¶¶ 3, 5. His mother, who is a nurse, inspected his groin and felt a small growth. F.F ¶ 5. Based upon the testimony from Claimant and Ms. Davis, I find there is some evidence of the groin injury on January 19 sufficient to invoke the presumption as to Claimant's groin injury.

2. Employer's Rebuttal of Presumption

Having found that Claimant is entitled to the Section 20(a) presumption of causation, the burden shifts to Employer to offer substantial evidence to rebut the presumption. Dr. Woodward's medical evaluation and opinion provides evidence that Claimant's right knee and low back pain were not aggravated or caused by his working conditions on January 19. Dr. Woodward opined that Claimant suffered an increase in pre-existing right knee symptoms, which had since resolved and were not responsible for any deterioration in Claimant's condition. EX 23 at 429. Dr. Woodward further opined that Claimant suffered a lumbar sprain as a result of the accident, which had since resolved without increasing or aggravating Claimant's condition. EX 23 at 431; EX 48 at 892-93. Dr. Woodward is a well-qualified orthopedist and his opinion is based upon an examination of Claimant as well as a records review. His opinion that there is no causal relationship between Claimant's accident and his current low back and knee conditions is sufficient to rebut the Section 20(a) presumption. *Kier*, 16 BRBS at 129-30. Medical evidence need not provide an alternate cause for the injury, and "medical evidence regarding the lack of causal nexus" must be rendered only "within a reasonable degree of medical certainty." *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 40-41 (2000). Therefore, the presumption of causation of Claimant's low back and right knee conditions drops from the case.

Regarding Claimant's hernia, Dr. Blumberg is a well-qualified expert in general surgery, and has repaired at "at least 1,000" hernias over his career. EX 47 at 870. Dr. Blumberg opined that Claimant's left inguinal hernia was not related to his January 19, 2012 accident. EX 28 at 511; EX 47 at 872. Dr. Blumberg based his opinion on the fact that Claimant did not report the hernia for two months after the accident, and reported no hernia related pain at the time of the alleged traumatic event. EX 28 at 511; EX 47 at 866. According to Dr. Blumberg, a hernia suffered as a result of a traumatic event is painful because of torn tissue, and the area of the tear fills with blood. F.F. ¶ 58. Dr. Blumberg stated that, if Claimant had been experiencing groin

pain from the time of the accident until the date he reported the hernia, Dr. Blumberg's opinion would change, but based upon the information he reviewed, he did not believe there was a groin injury on January 19. F.F. ¶ 58. While his opinion was based on a review of Claimant's records rather than an examination of Claimant, Employer's burden at this stage is merely to provide substantial evidence rebutting the Section 20(a) presumption. *Kier*, 16 BRBS at 129-30. I find Dr. Blumberg's evaluation to be credible on the issue of a groin injury, and thus, sufficient to rebut the presumption that the hernia was related to Claimant's employment on January 19.

3. Evaluation of the Evidence

Once the Section 20(a) presumption drops from the case, the issue of causation is determined based on an evaluation of the record as a whole.

a. Credibility of the Witnesses

The Act is construed liberally in favor of injured employees. *Dir. v. Perini N. River Assocs.*, 459 U.S. 297, 316 (1983); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147 (D.C. Cir. 1967). In arriving at a decision in this matter, the finder of fact is entitled to determine the credibility of witnesses and is not bound to accept the opinion or theory of any particular medical examiners or other expert witnesses. *Bank v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 467 *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997).

In cases under the Act, the ALJ determines the credibility and weight to be attached to the testimony of a medical expert whether in whole or in part. It is solely within the ALJ's discretion to accept or reject all or any part of any testimony. *Perini Corp. v. Hyde*, 306 F. Supp. 1321, 1327 (D.R.I. 1969). In evaluating expert testimony, the ALJ may rely on his own common sense. *Avondale Indus., Inc. v. Dir., OWCP*, 977 F.2d 186 (5th Cir. 1992). The ALJ may base one finding on a physician's opinion and, then, on another issue, find contrary to the same physician's opinion. *Pimpinella v. Universal Maritime Serv., Inc.*, 27 BRBS 154, 160 (1993). It is nonetheless generally true that the opinion of a treating physician deserves greater weight than that of a non-treating physician. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830 (2003) (rule similar to the Social Security treating physicians rule, affording such physicians special deference); *Amos v. Dir., OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998) (greater weight afforded to treating physician because "he is employed to cure and has a greater opportunity to know and observe the patient as an individual") *amended at* 164 F.3d 480 (9th Cir. 1999). However, the ALJ is not bound to accept the opinion of a physician if rational inferences urge a contrary conclusion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962).

In evaluating whether Claimant's January 2012 accident is causally linked to his medical conditions, I concentrate my analysis on the medical opinions and consider Claimant's right knee and low back complaints together, and the hernia separately.

b. Right Knee and Low Back Complaints

Dr. Page-Echols

Dr. Page-Echols treated Claimant's low back and right knee pain and was Claimant's primary care physician from January 23, 2012, until May 23, 2013. CX 19 at 45; CX 60 at 177. As a treating physician, his opinions are entitled to special deference. *Amos*, 153 F.3d at 1054. He opined that Claimant's right knee pain was worsened by the January 2012 accident, and that the accident necessitated the steroid injections he gave Claimant's right knee on November 15, 2012. CX 68 at 246; CX 75 at 310. He also opined that the January 2012 accident likely worsened, or played some role in the worsening of, Claimant's pre-existing back pain. CX 68 at 260, 261. Dr. Page-Echols prescribed cyclobenzaprine, a muscle relaxant, to Claimant in order to reduce muscle spasm and back pain, as well as morphine and oxycodone for pain. CX 68 at 260. Dr. Page-Echols' reports and evaluations were thorough and well-documented. His opinion is consistent with Claimant's reported history and I find that they are entitled to substantial weight.

Dr. Evans

Dr. Evans has been Claimant's treating physician since July 2013, and treated Claimant for his low back complaints during four office visits in 2013. CX 74 at 286, 291, 298, 302, 306. Dr. Evans was involved with Claimant's care as a supervising physician of Dr. Page-Echols, and supervised at least one of Claimant's visits when he saw Dr. Page-Echols. CX 68 at 259; CX 60 at 184. Dr. Evans opined that the January 2012 accident and Claimant's other back injuries probably played a role in exacerbating Claimant's low back pain. CX 76 at 315. He based his opinions on his knowledge and evaluation of Claimant's conditions over time. In contrast to Dr. Woodward's diagnosis of a back strain as the result of Claimant's January 2012 accident, Dr. Evans diagnosed a contusion and strain injury. CX 76 at 319. CX 76 at 316-17. Dr. Evans also prescribed prednisone to reduce inflammation in the back and potentially to relieve any nerve impingement which might be contributing to Claimant's radiculopathy and pain. CX 78 at 315-16. Dr. Evans maintained Claimant's other pain medications, including morphine, oxycodone, and cyclobenzaprine, at approximately the same levels as they had been under Dr. Page-Echols. CX 76 at 316. The nature of the incident described by Claimant likely caused an increase in symptoms in Dr. Evans's opinion. F.F. ¶ 44. I find Dr. Evans to be well-qualified to opine about Claimant's conditions and treatment, and I find his opinions entitled to substantial weight.

Dr. Pennington

Dr. Pennington performed a right knee partial medial meniscectomy on Claimant. CX 26 at 65. Dr. Pennington's opinion was that the January 2012 worsened the meniscal tear which he repaired in Claimant's right knee, and that Claimant's accident could have caused a meniscal tear. CX 67 at 236, 238. Dr. Pennington reached his conclusions after a thorough review of Claimant's medical history and after thorough and well-documented examination and treatment. He specifically observed both an acute and chronic meniscal tear. Dr. Pennington was credible and I find that his opinions are entitled to substantial weight.

Dr. Lin

Dr. Lin is a well-qualified medical expert and conducted an IME of Claimant and reviewed his medical records nearly two years after the incident. CX 73 at 278-79, 281-82. Due to Claimant's ability to perform heavy duty work prior to the January 2012 accident, Dr. Lin opined that Claimant's current disability could be apportioned seventy percent to the January 2012 accident and thirty percent to his pre-existing injuries. CX 73 at 283. Dr. Lin concluded that Claimant had a 12% lower extremity disability at the time of his IME, and there was no contradicting evidence. CX 73 at 284. Dr. Lin's reports are thorough and well-documented, and are entitled to substantial weight.

Dr. Woodward

Dr. Woodward conducted an IME of Claimant nine months after the January 2012 accident and also reviewed his medical records. EX 23 at 403; EX 48 at 911-12. Dr. Woodward opined that Claimant's meniscal tear predated the January 2012 accident. EX 23 at 416; EX 35 at 546. He also opined that Claimant suffered either a right knee sprain or increased symptoms as a result of the accident, either of which would have resolved by February 29, 2012. EX 23 at 429.

Dr. Woodward opined that Claimant suffered a lumbar strain/contusion as a result of the January 2012 accident, which had since resolved, and that Claimant experienced no permanent aggravation of his back condition. EX 23 at 418, 431. At his deposition, Dr. Woodward restated his opinion that the January 2012 event did not play any role in Claimant's lower back condition, and also opined that a surgical consultation for Claimant's low back condition was not appropriate. EX 48 at 892, 902. Dr. Woodward explained that the limitation of numbness to Claimant's toes and foot suggested that any nerve injury was in his toe or foot and not at the spinal root nerve in Claimant's low back. EX 48 at 892.

Dr. Woodward, while well qualified and experienced in performing IMEs, has not practiced as a treating physician since 1997, and performs only medical evaluations for employers and carriers; of the thousands of IMEs he had performed, he could only recall one or two of those that were at the request of a claimant or a claimant's attorney. EX 48 at 898. His opinion that Claimant's knee symptoms had resolved by February 29, 2012, is inconsistent with the record. For example, Dr. Woodward opined that Claimant's right knee complaints had resolved by February 29, 2012, concluding that Dr. Page-Echols reported no symptoms associated with the knee on that date. EX 23 at 429. However, Dr. Page-Echols's notes from February 29 indicate that Claimant did in fact continue to suffer from knee pain on that date. CX 51 at 145. Dr. Woodward appears to have worked backward from his conclusion that Claimant sustained no more than an increase in pre-existing right knee symptoms and dismissed all evidence of Claimant's subjectively worsening pain and symptoms from the time of the January 2012 injury until his surgery in May 2012. Thus, I find Dr. Woodward's opinion to be less persuasive than that of the treating doctors, which found more support in the record as a whole and were based upon continual interaction with Claimant, over Dr. Woodward's one-time examination of Claimant.

Referring solely to the issue of causation as it related to Claimant's right knee condition, I find the opinions of Drs. Page-Echols, Pennington, and Lin more credible than that of Dr. Woodward. Dr. Page-Echols was Claimant's treating physician immediately after the January 2012 accident, and for a substantial period afterwards, and was in the best position to observe and evaluate Claimant's condition. He opined that Claimant's right knee pain was worsened by the January 2012 accident. F.F. ¶ 47. Dr. Pennington also treated Claimant and specialized in orthopedic surgery. His opinion was that it was medically probable that Claimant aggravated his right knee during the January accident. F.F. ¶ 46. Furthermore, Dr. Lin opined that a large majority of Claimant's right knee disability could be apportioned to the January 2012 injury. F.F. ¶ 56. While Dr. Lin was not a treating physician, and had no special relationship with Claimant which would lend his opinion additional weight, his opinion does corroborate those of Drs. Pennington and Page-Echols.

As to whether Claimant had a tear which was chronic in one portion of his knee and acute in another, a major issue of dispute between Drs. Pennington and Woodward, I find Dr. Pennington to be more credible and persuasive. Dr. Pennington was the surgeon who actually performed the meniscectomy and repaired the injury. Dr. Pennington unequivocally stated that the tear had acute and chronic portions. Dr. Woodward only read Dr. Pennington's report of the surgery and looked at what he described as "a very poor copy" in black and white of pictures taken during the surgery. EX 48 at 899. When Dr. Woodward saw color photos of Claimant's medial meniscus taken during surgery at his deposition, he defended his previously formed opinion and became defensive when challenged about it. EX 48 at 899-901. I found Dr. Pennington to have the more considered opinion about the knee injury and accept his opinion over that of Dr. Woodward. Thus, I find that Claimant's right knee condition was work-related.

Further, I am not persuaded by Dr. Woodward's opinion about Claimant's back. Dr. Woodward thought any back aggravation was temporary and not permanent, and that no further treatment was needed. F.F. ¶ 52, 53. He discounted the continuing numbness that Claimant felt in his big toe as not related to Claimant's back. F.F. ¶ 54. Dr. Woodward's opinion did not appear to consider the extent of the medical evaluations and information available in this case. Further, there was no medical evidence indicating a problem with Claimant's toe or foot which could cause numbness, and the other doctors persuasively opined that Claimant's low back problems correlated with his foot issues. Dr. Woodward stated that MRIs of Claimant's spine shows no degeneration after the accident as compared with before, and that any aggravation was not permanent and would resolve within three months. F.F. ¶ 50, 53. Even though Dr. Woodward said that Claimant's injuries were only temporary due to the objective MRI findings and his own opinion that Claimant's back would have resolved to baseline within three months, the evidence showed that Claimant was not able to function as well after the accident as he did before the accident. Before Claimant fell at Employer, he did not have much back pain. F.F. ¶ 19, 20, 66. After the fall, he had substantial back pain which persisted for well over three months. *E.g.* F.F. ¶ 21, 40. Dr. Woodward's opinion ignores the ample evidence of Claimant's worsened back pain that persisted long after the three month healing period which Dr. Woodward suggested was a reasonable healing time. This evidence convincingly indicated that Claimant suffered more than a flare up in early 2012. Thus, I am not persuaded by Dr. Woodward's opinions about Claimant's back condition.

Referring again only to the issue of causation for Claimant's low back, I find that Drs. Page-Echols and Evans give more credible opinions that Dr. Woodward. Both Dr. Page-Echols and Dr. Evans are Claimants treating physicians, and together have cared for Claimant for over a year and a half. Both opined that Claimant's January 2012 accident aggravated his low back condition. Furthermore, the testimony of Mr. Manning and Ms. Davis, in addition to that of Claimant himself, indicates that Claimant's low back condition worsened markedly following his January 2012 accident. F.F. ¶ 19, 20. While Mr. Manning is Claimant's friend, and Ms. Davis is Claimant's mother, their statements are consistent with medical evidence in the record. After considering the weight of the evidence of the record as a whole, and taking into account the respective credibility of the medical experts and lay witnesses, I find that Claimant has shown by a preponderance of the evidence that his low back injury was work related.

The entirety of a condition need not be traceable to a given work injury for that employer to be liable under the Act. So long as a claimant's disability is due at least in part to an aggravating injury from the last employer, that employer is liable for the disability. *See, e.g., Lopez v. Stevedoring Servs. Of Am.*, 39 BRBS 85, 89-90 (2005). Here, I find that the preponderance of the evidence shows that Claimant's right knee and low back conditions were aggravated by the January 2012 accident while working for Employer.

c. Hernia

Dr. Kuo

Dr. Kuo examined Claimant and then surgically repaired Claimant's hernia on April 6, 2012. CX 46 at 130. Based upon her treatment of Claimant, Dr. Kuo opined that it was possible that Claimant did not notice or complain of groin pain following the accident due to the severity of his other pain. CX 50 at 141-42. Dr. Kuo also opined that it would be impossible to say whether the accident probably did or did not worsen or accelerate the development of Claimant's hernia, but that it was possible that it did. CX 50 at 141, 143.

Dr. Blumberg

Dr. Blumberg offered a contrary opinion and opined that Claimant's left inguinal hernia was not related to the accident. EX 28 at 511; EX 47 at 867. Dr. Blumberg noted that the hernia was an indirect hernia, which is usually congenital in nature. EX 28 at 511. He explained that he would expect pain from a traumatic event causing hernia, because the tissue would tear and then fill with blood. EX 28 at 511; EX 47 at 867. Here, Claimant did not complain of significant groin pain until March 2012.

The preponderance of the evidence does not establish that the hernia was caused or aggravated by Claimant's work at Employer on January 19, 2012. Claimant wrote that he felt groin pain in a journal entry from January 20, 2012, but it appeared to be written at a different time than other entries on the same day. CX 7 at 11; F.F. ¶ 3. Claimant admitted at a deposition that he added to journal entries, but denied doing so at trial. F.F. ¶ 2. When confronted with the deposition transcript, he said he misunderstood the question at the deposition. *Id.* Claimant's mother testified that Claimant complained of groin pain as early as January 24, 2012, when she

examined Claimant's groin and found a small "bubble." TR at 67-68. She advised him to seek medical treatment for it, but Claimant refused as he did not have insurance, even though Claimant immediately sought treatment for his right knee and low back injuries despite not having insurance. TR at 68-69. Claimant and Ms. Davis also recounted inconsistent accounts of when Ms. Davis inspected Claimant's groin. F.F ¶ 5. Claimant told Crestline Trucking that the hernia may have happened while working for them suggesting that Claimant did not develop the hernia until he began working at Crestline in March 2012. F.F. ¶ 7. When he finally went to see the doctor about the groin situation on March 20, 2012, two months after the work incident, he told the doctor that he had noticed the hernia for only about a week, contradicting his mother's testimony and Claimant's journal entry. CX 49 at 119.

Dr. Kuo said it was possible Claimant developed a hernia as a result of the accident, and that Claimant's groin pain might have been overshadowed by the back and knee pain to the point where he would not mention it to a doctor. However, I am not persuaded by Dr. Kuo's opinion, which I find does not make logical sense and is speculative. Dr. Blumberg's opinion that Claimant's hernia developed weeks or months after his accident because a worsened hernia would be expected to cause a great deal of pain, makes logical sense, is consistent with Claimant's March 20, 2012, medical records, and is more persuasive than Dr. Kuo on this point. None of Claimant's contemporaneous medical records from the time of his January 2012 accident discuss any pain from a hernia, and Claimant was not reserved in addressing pain from his knee or back. I am not persuaded that the groin pain was related to the January 2012 work incident. Based on the record as a whole, I find that Claimant has not established that his left inguinal hernia was work-related.

Claimant suffered a work-related injury to low back and right knee. Claimant has failed to show by a preponderance of the evidence that his hernia was work-related.

C. Nature and Extent of Claimant's Disability

The initial burden of proving the nature and extent of disability lies with Claimant. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). Disability is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. § 902(10). A disability compensation award requires a causal connection between the claimant's physical injury and his inability to obtain work. The test for determining compensability of a work injury is whether work is unavailable due to the work injury, and the claimant bears the burden of establishing that his loss of wage-earning capacity is related to his work injury. *See McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988); *See, e.g., Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984)." *Kogut v. Electric Boat Co.*, BRB No. 14-0046 (Sept. 24, 2014)(unpublished).

When a claimant has a work-related injury, even one which imposes some physical impairment, but is able to perform his usual work adequately, regularly, and without help in a full-time capacity, the claimant's actual earnings fairly represent his or her earning capacity and the claimant is not disabled. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984). In cases where a claimant's employment is terminated or he is not able to work for

reasons not related to the claimant's disability, benefits are not awarded. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).(claimant was found not to have a compensable disability after being put on alternate duty and subsequently terminated for an unrelated violation of company rule); *see Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001) (claimant voluntarily retired); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989) (claimant voluntarily retired); *see also* 33 U.S.C. §§ 980(h), 902(10); *cf. Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997) (claimant is disabled when he was physically unable to perform his usual work due to his injury at the time he took longevity retirement). An "employer is not a long-term guarantor of claimant's employment" and does not have a responsibility to identify new employment when a claimant is discharged for reasons unrelated to his or her work-related injury. *Brooks*, 26 BRBS at 6.

The degree of physical impairment is not only a medical concept, but is also an economic one "measured by its impact on the worker's earning capacity." *Bumble Bee Seafoods v. Dir., OWCP*, 629 F.2d 1327, 1328 (9th Cir. 1980); *accord Stevens v. Dir., OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990); *Palombo v. Dir., OWCP*, 937 F.2d 70, 76 (2d Cir. 1991); *Sproull v. Stevedoring Servs. of Am.*, 25 BRBS 100, 110 (1991). The employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a preexisting disease or underlying condition, the entire resultant disability is compensable. *Port of Portland v. Dir., OWCP*, 932 F.2d 836, 839 (9th Cir. 1991).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). 33 U.S.C. § 908. The Act provides coverage for four categories of disabilities: permanent total disability, temporary total disability, permanent partial disability, and temporary partial disability. 33 U.S.C. § 908; *Stevens*, 909 F.2d at 1259. An injured claimant who is incapable of working is entitled to total disability compensation equal to two-thirds of his average weekly wage (AWW) at the date of injury. 33 U.S.C. § 908(a). If a claimant is capable of some work, he is entitled to partial disability equal to two-thirds of the difference between his AWW and his post-injury wage earning capacity. 33 U.S.C. § 908(e). Here, the nature and extent of Claimant's work-related injuries must be determined.

1. Claimant is Not Disabled Due to His Low Back Injury[8]

Claimant seeks temporary total disability benefits based upon his knee and low back from February 13, 2012, his last day of work at Employer, until March 1, 2012, when he began work for Crestline Trucking.[9] Claimant seeks temporary partial disability benefits from March 1, 2012, to May 14, 2012, when he worked at Crestline Trucking. Claimant also seeks temporary total disability benefits from May 14, 2012, when he ceased working for Crestline Trucking, until July 26, 2012, the date of MMI for his right knee. Claimant's Closing Arg. at 9. Claimant further asserts that he is entitled to temporary total disability benefits from July 26, 2012, until his lower back reaches MMI. Claimant's Closing Arg. at 23. Employer argues that Claimant is

[8] I previously determined that Claimant's hernia was not related to his work at Employer. Therefore, he is not entitled to any disability compensation or medical benefits for the hernia treatment. *Supra*, Part 3.c.
[9] Claimant's last day of work for Employer was February 13, not February 7. CX 7 at 15.

not entitled to disability benefits because his injuries were not disabling since Claimant was able to continue working for Employer after his injury and was able to work at Crestline Trucking until he voluntarily quit, and has suffered no loss of earning capacity. Employer's Post-Hr'g Br. at 19.

For the period of February 13, 2012, to March 1, 2012, I do not find any evidence that Claimant's injury at Employer prevented him from working. Disability is "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). A disability compensation award requires a causal connection between the claimant's physical injury and his inability to obtain work. Claimant had a work-related injury to his low back and right knee, but he continued to work at Employer performing construction work at the same pay. He did not miss any work related to the injuries, and he specifically said that he left Employer when the contract was done. Claimant was retained longer at Employer than some of the other temporary employees, and he even received a bump in pay for some of his last shifts. Employer let the majority of the temporary workers go on February 13, and the project for which they were hired was completed and the ship left the Portland area on February 19. Claimant took the job with Employer understanding that it would be only temporary. The natural conclusion of a temporary job is not an injury related loss of work. Furthermore, there was no persuasive evidence that Claimant suffered any loss of wages due to the injury.

Claimant also did not show any connection between his injury at Employer, which ended by the terms of the employment agreement on February 13, and his inability to find work until March 1, 2012. Claimant worked longer than anticipated at Employer, and there was no evidence that his injury prevented him from seeking other work. His medical providers did not take him off work when he first sought treatment, and it was only later, in hindsight that the medical providers thought it was not a good idea for Claimant to have worked in construction. In fact, Dr. Page-Echols specifically stated that Claimant was cleared to work on January 23, 2012. F.F. ¶ 23. Dr. Pennington first treated Claimant's knee condition on March 20, 2012. He opined at a deposition in September 2013 that Claimant could not work construction from the time of January 2012 injury. CX 40 at 110. However, when Dr. Pennington began treating Claimant, he was working at Crestline Trucking. Dr. Pennington did not take him off work at that time, and his medical reports do not reflect that he told Claimant not to work construction. Dr. Page-Echols, Claimant's treating physician, did not have an opinion about whether he should have continued to work construction, but probably did not think it was a good idea. CX 68 at 261. The same is true for Dr. Evans, who treated Claimant much later in the process. The evidence did not show Claimant was not able to work during the brief period between his job at Employer ending and starting work at Crestline Trucking. The brief, two week period of unemployment was consistent with Claimant's earning history and intermittent work, and with Claimant relocating from his temporary employment in Portland to Crestline Trucking in Shady Cove, 219 miles away. *See* F.F. ¶ 7.

Further, Claimant himself said that he did not leave Employer because of his injuries, but left when the work was done. He also claimed he was terminated from Crestline Trucking, a position he found when friends called and told him about it. Claimant did not testify that he was unable to work construction during the period between work at Employer ending and Crestline

Trucking starting. The evidence established that he voluntarily quit the Crestline Trucking job and I so found. Claimant gave inconsistent stories about why he left Crestline, including telling Ms. Broten that he did not like the dynamic of a family owned business. Crestline Trucking reported to the OED that Claimant voluntarily quit after he told them that the work was not for him. Claimant specifically said that he did not leave Crestline Trucking because of his injuries at Employer.

Thus, I do not find Claimant entitled to any compensation for the low back injuries he suffered at Employer for the period February 13, 2012, to March 1, 2012. Regarding his right knee injury, because that is a scheduled injury, Claimant is entitled to permanent partial disability for that condition, which will be discussed below.

2. Nature of Claimant's Disability – Right knee

Regarding the nature of the disability, the date of maximum medical improvement (MMI), which is the point when the injury has improved to the fullest extent possible, is the date when a temporary disability becomes permanent.[10] *Dir., OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1990); *Palombo*, 937 F.2d at 76; *Stevens*, 909 F.2d at 1259. MMI is a question of fact that the ALJ determines from the medical evidence in the record. *Container Stevedoring Co. v. Dir., OWCP*, 935 F.2d 1544, 1551 (9th Cir. 1991); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184, 186 (1988); *Trask*, 17 BRBS at 60.

a. Maximum Medical Improvement – Right knee

Dr. Pennington performed the arthroscopic knee surgery on May 7, 2012, and followed up with treatment of Claimant's knee through the healing process. Dr. Pennington opined that Claimant's right knee became medically stationary on July 26, 2012. CX 67 at 237. Dr. Woodward, who examined Claimant at the request of Employer, opined that the right knee sprain with which he diagnosed Claimant would have resolved within six weeks of injury, but he did not give a specific date of MMI. EX 48 at 895. I am more persuaded by the opinion of Dr. Pennington regarding MMI because he performed Claimant's knee surgery, followed up with treatment, and was in the better position to judge the date of MMI. Even though Employer offered the opinion of Dr. Woodward regarding MMI of the knee, in its closing brief, it no longer disputed the July 26 MMI date. Employer's Hr'g Br. at 25. Therefore, I find that Claimant was at MMI for his right knee as on July 26, 2012 and his right knee condition became permanent on that date.

[10] Permanency may also be found using a second test: when the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery follows a normal healing period. *La. Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Care v. Wash. Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988). In such cases, the date of permanency is the date that the employee ceases receiving treatment with a view towards improving his condition. *Leech v. Serv. Eng'g Co.*, 15 BRBS 18, 21 (1982). This test is not applicable here.

b. Maximum Medical Improvement – Low Back

Dr. Page-Echols treated Claimant from January 2012 until May 2013, when he completed his residency. Dr. Page-Echols opined that Claimant had not reached MMI for his low back condition by the time he stopped treating him. CX 68 at 260. He noted that the injury was more severe than a simple lumbar strain, and that Claimant should have an additional neurosurgical evaluation, spinal injection, or physical therapy, even though Dr. Page-Echols never said Claimant could not work at his regular job in construction and tile work. *Id*. Claimant continued to work even while he saw Dr. Page-Echols. At his deposition in November 2013, Dr. Evans also believed that Claimant was not medically stationary for his lower back, and could benefit from an additional neurosurgical evaluation. CX 76 at 318. When a physician believes that further treatment should be undertaken, MMI does not occur until the treatment is complete. *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 126, 29 BRBS 22 (CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). Dr. Evans did not offer and opinion about whether Claimant could continue working in construction and tile work until much later in the process. Dr. Evans opinion is entitled to significant weight and is well-supported by the medical evaluations in the case.

For the period of February 13, 2012, to March 1, 2012, I do not find any evidence that Claimant's injury at Employer prevented him from working. Disability is "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). A disability compensation award requires a causal connection between the claimant's physical injury and his inability to obtain work. Claimant had a work-related injury to his low back and right knee, but he continued to work at Employer performing construction work at the same pay. He did not miss any work related to the injuries, and he specifically said that he left Employer when the contract was done. Claimant was retained longer at Employer than some of the other temporary employees, and he even received a bump in pay for some of his last shifts. Employer let the majority of the temporary workers go on February 13, and the project for which they were hired was completed and the ship left the Portland area on February 19. Claimant took the job with Employer understanding that it would be only temporary. The natural conclusion of a temporary job is not an injury related loss of work. Furthermore, there was no persuasive evidence that Claimant suffered any loss of wages due to the injury.

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Dr. Woodward, on the other hand, opined that Claimant had suffered from a lumbar strain/contusion of the low back, which typically resolves within a few weeks. He opined that any lumbar strain/contusion suffered by Claimant on January 19, 2012, had resolved by the time he evaluated Claimant on October 22, 2012. EX 48 at 892. Dr. Woodward's date for the back MMI is speculative, and does not comport with the other medical evidence that shows Claimant continued to experience back pain well past Dr. Woodward's examination date and it had been ongoing and consistent since the date of injury. Here, I am more persuaded by the opinions of Claimant's treating doctors who believed Claimant needed additional evaluation and potential treatment before his back should be determined to be at MMI.

In addition, the evidence submitted several months after the hearing shows that Claimant was employed by two construction firms from January 16, 2014 and April 18, 2014, and worked a total of 56 days. CX 77, CX 78. This employment information suggests that Claimant's condition had improved to some degree, but is not sufficient to persuade me that Claimant's back had reached MMI. There was no medical information included to support an MMI finding, and I am more persuaded by the opinion primarily of Dr. Evans, who believed Claimant needed further treatment and evaluation for his back. Therefore, I find, based on the record before me, that Claimant's back condition needs further evaluation and possible treatment. Therefore, Claimant has not reached MMI for his low back condition.

3. Extent of Claimant's Disability

The extent of disability is classified as total or partial, depending on the claimant's ability to continue to work in light of his or her disability. A claimant is presumed to be totally disabled where he can establish that a work-related injury prevents his from performing or returning to his usual employment. *Edwards v. Dir., OWCP*, 999 F.2d 1374, 1375 (9th Cir. 1993); *Berkstresser*, 921 F.2d at 311-12; *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988). A claimant has the burden of proving a prima facie case of total disability by showing he cannot return to his regular employment due to a work-related injury. *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1984). A claimant's credible complaints of pain alone may be enough to meet this burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (1981). The Section 20 presumptions do not apply to the analysis of nature and extent. *Carlisle v. Bunge Corp.*, 33 BRBS 133, 138 (1999), *aff'd*, 227 F.3d 934 (7th Cir. 2000). To determine whether a claimant has carried his prima facie burden of establishing an inability to return to usual employment, the ALJ must compare "the medical opinions regarding claimant's physical limitations with the requirements of his usual work" at the time of the injury. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988). However, "a worker cannot be compensated under the Longshore Workers' Act unless the injury caused the loss of wages." *Del Monte Fresh Produce v. Dir. OWCP*, 563 F.3d 1216, 1219 (11th Cir. 2009) (citing *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 4 (1992), *aff'd sub nom.*, *Brooks v . Dir., OWCP*, 2 F.3d 64 (4th Cir. 1993)).

A claimant's "usual" employment is the job and regular duties he was performing at the time he was injured. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). A physician's opinion that the employee's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988); *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407 (1983); *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257, 261 (1978). If the physician recommends surgery and light-duty work and the claimant experiences pain while performing many activities, he has also met his burden. *Carter v. General Elevator Co.*, 14 BRBS 90 (1981); *see also Offshore Food Serv. v. Murillo*, 1 BRBS 9 (1974), *aff'd sub nom. Offshore Food Serv. v. Benefits Review Bd.*, 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975).

Once the claimant has shown that he is totally disabled, the burden shifts to employer to establish the availability of "suitable alternate employment" that the claimant is capable of performing considering claimant's limitations. *Edwards*, 999 F.2d at 1375; *Berkstresser*, 921 F.2d at 312; *Hairston*, 849 F.2d at 1196. If the employer makes such a showing, the burden shifts back to the claimant, who can still prevail and establish total disability if he demonstrates that he diligently tried but was unable to secure such employment. *Edwards*, 999 F.2d at 1376 n. 2; *Berezin v. Cascade Gen., Inc.*, 34 BRBS 163, 164 (2001).

a. No Disability for Low Back

I have determined that Claimant is not entitled to disability compensation for his low back since it was not disabling and Claimant did not suffer any loss of wage-earning capacity due to the low back injury. He continued to work for Employer after his injury, and then he moved on to other employment approximately two weeks after his position with Employer ended. Thus, Claimant is not entitled to any compensation for his low back because he cannot show any loss of compensation.

Claimant did not establish that he could not return to his usual employment in construction work, which he was doing when he was injured. He was tiling on a boat when he was injured, but he also did painting, carpentry and other miscellaneous construction tasks. After the accident, Claimant continued to work for Employer performing his usual work for nearly a month. Claimant stopped working for Employer on February 13, 2012, because the project for which he was hired was complete. He did not leave due to his injury or an inability to work. After the injury, Claimant completed the tile work and then worked other jobs for Employer that did not require him to continually kneel. F.F. ¶ 6. Claimant obtained a new job at Crestline Trucking on March 1, 2012, but there was no evidence to establish he took that job due to his injuries. Instead, the evidence established that Claimant needed to work to pay his bills and routinely moved job to job when a particular position ended. When Claimant left his job at Crestline Trucking, he continued to search for construction jobs. F.F. ¶ 7.

Dr. Pennington opined that Claimant could not have returned to work in either shipyard construction or general construction prior to July 26, 2012, the date of MMI for his right knee. CX 40 at 110. However, the evidence showed that Claimant continued to work construction until the natural termination of the position on February 13, 2012. Dr. Page-Echols, who treated Claimant until May 2013, offered at his deposition taken in September 2013, that he was not sure whether Claimant should return to the same work he was doing at the time of the injury. CX 68 at 261. Dr. Evans opined that Claimant was not capable of returning to tile work, painting, or carpentry, either at a shipyard or in construction, but he did not elaborate on his answer. CX 76 at 319. Claimant's physicians never expressed a contemporaneous opinion that he should not work construction, and, in fact, Claimant continued to perform construction work. I find that Claimant has failed to establish that he could not return to his usual employment due to his work-related injury.

b. Permanent Partial Disability for Right Knee

An injury which falls under a scheduled disability under Section 8(c)(1)-(20) does not require a showing of loss of wage earning capacity. *Potomac Electric Power Company (PEPCO) v. Dir., OWCP*, 449 U.S. 268, 282-83 (1980). The Board has held that an ALJ should only consider physical factors when determining the disability for a scheduled injury. *Bachich v. Seatrain Terminals*, 9 BRBS 184, 187 (1978). The mere fact that a claimant is able to perform work duties is immaterial to entitlement to compensation for a scheduled injury. *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053, 1055 (1978). An ALJ may base his findings on the medical evaluations and on a claimant's description of the symptoms and the effects of the injury. *Amato v. Pittston Stevedoring Corp.*, 6 BRBS 537, 538 (1977); *Pimpinella v. Universal Maritime Service Incorporated*, 27 BRBS 154, 159 (1993). Moreover, the Act does not require adherence to any particular formula for determining the extent of disability and an ALJ is not bound by a physician's opinion or required to apply the AMA Guides. *Mazze*, 9 BRBS at 1055 .

Claimant argues that he is entitled to a 12 percent permanent partial disability of the leg. *Id*. Dr. Pennington opined that Claimant was not able to return to his usual employment in either general construction or shipyard construction prior to July 26, 2012, the date of MMI for Claimant's right knee condition. CX 40 at 110. He also opined that Claimant would not have any subsequent physical limitations due to his right meniscus tear. *Id.* Dr. Lin gave Claimant a 12 percent lower extremity impairment using the Guide to the Evaluation of Permanent Impairment, Sixth Edition. CX 73 at 284. Dr. Lin based this evaluation on the fact that Claimant suffered a tear of his medial meniscus, which required a meniscectomy, and a tear of his lateral meniscus, which did not require a meniscectomy. CX 73 at 284. Dr. Woodward opined that Dr. Lin had improperly increased Claimant's impairment rating on the assumption that Claimant had a lateral meniscus tear, and did not consider fraying of the lateral meniscus, as reported by Dr. Pennington, to be a tear. EX 48 at 896-97. Dr. Woodward opined that if the lateral meniscus tear were removed from the impairment evaluation, then Claimant would have a permanent impairment of two to three percent, though he thought two percent was appropriate. EX 48 at 896-97.

The difference of opinion between Drs. Lin and Woodward appears to come down to their differing interpretations of the word "frayed" as used to describe the condition of Claimant's lateral meniscus in Dr. Pennington's surgical report. CX 26 at 65; CX 73 at 284; EX 48 at 897. Dr. Lin apparently took frayed to be equivalent to a tear in the AMA Guides, while Dr. Woodward considered frayed to have no significance. I am more persuaded by Dr. Lin's opinion, which was in conformity with the AMA Guidelines, and reached after he also reviewed the photographs of the injury. Dr. Woodward disregarded the significance of the pictures taken by Dr. Pennington during the procedure, to the point that he did not consider the photos until his deposition, and then only briefly. I find that Claimant is entitled to a 12 percent permanent partial disability of his right leg, less credit for the amount previously paid to Claimant for his state worker's compensation award in 1987. 33 U.S.C. § 903(e).

1. Average Weekly Wage

Section 10 of the Act sets forth alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d)(1), to arrive at an AWW. 33 U.S.C. § 910. Section 10(a) applies to an employee who has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding her injury. *Matulic v. Dir., OWCP*, 154 F.3d 1052, 1057 (9th Cir. 1998); *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158, 160 (1986). Substantially the whole of the year refers to the nature of a claimant's employment, *i.e.*, whether it is intermittent or permanent, *Eleazar v. Gen. Dynamics Corp.*, 7 BRBS 75, 79 (1977), and presupposes that the claimant could have actually earned wages during all 260 workdays of that year. *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978). Section 10(a) applies in determining the injured worker's average weekly wage unless it would be unreasonable or unfair to do so. *Matulic v. Dir., OWCP*, 154 F.3d 1052, 1057 (9th Cir. 1998). If Section 10(a) applies, then a court need not consider the application of Sections 10(b) or 10(c).

Section 10(b) uses a similar method, but computes the claimant's average daily wage based on the earnings of a typical worker engaged in similar employment, rather than the claimant's actual earnings. 33 U.S.C. § 910(b).

Unlike Sections 10(a) and 10(b), Section 10(c) does not impose a specific time period for determining AWW. 33 U.S.C. § 910. Instead, analysis under Section 10(c) is intended to arrive at a sum which "reasonably represent[s] the annual earning capacity of the injured employee." 33 U.S.C. § 910(c). Section 10(c) is used where the claimant's employment is seasonal, part-time, intermittent, or discontinuous. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822, 25 BRBS 26 (CRT) (5th Cir. 1991). The overriding objective of Section 10(c) is to reach a fair and reasonable approximation of claimant's wage earning capacity at the time of the injury. *Story v. Navy Exch. Ctr.*, 33 BRBS 111 (1999). The judge has broad discretion in determining annual earnings capacity under Section 10(c). *Sproull v. Stevedoring Servs. of Am.*, 25 BRBS 100, 105-107 (1991); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137, 139 (1990*); Bonner v. Nat'l Steel & Shipbuilding Co.*, 5 BRBS 290, 293 (1977). Generally, post-injury events are not taken into account when calculating average weekly wage. *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 321 (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

In this case, the application of Section 10(c) is most appropriate. Claimant worked sporadically over the year prior to his injury, and did not work enough to calculate his wages under 10(a), and neither party provided evidence of a substitute employee's wages as required under Section 10(b). Furthermore, the parties agree that Claimant's AWW should be calculated under Section 10(c). 33 U.S.C. §910(c); Post-Hr'g Br. of Employer at 15; Claimant's Closing Arg. at 20.

Claimant contends that his average weekly wage before the January 2012 accident was $1,000 per week, and no less than $440.67 per week. Claimant's Closing Arg. at 22. He bases the figure of $1,000 per week on the testimony of Mr. Stipe. TR at 199; CX 8 at 18. The figure

of $440.67 is based on 75% of Claimant's reported construction income from 2011 plus his income from January 10 to 19, 2012, the period during which Claimant worked for Employer before his accident, divided by 15.86 weeks. Claimant's Closing Arg. at 21. Mr. Stipe's speculation that Claimant would have had an AWW of $1,000 is not persuasive, and is based on generous assumptions about the hourly rate at which Claimant could have been hired. For example, the highest wages Mr. Stipe found in the state of Oregon for tile and marble setters were $26.04 per hour, with a median of $15.52 per hour. CX 8 at 17. In the Portland area, the median wage for tile and marble setters was $14.09 per hour with a high wage of $23.57 per hour. *Id.* Painters in the Portland area earned a median wage of $18.11 per hour, with a high wage of $25.92. *Id.* Painters in Oregon as a whole earned median wages of $17.18 per hour, and the 90th percentile earned $24.55 per hour. *Id.* Carpenters in the Portland area earned a median of $22.67 per hour, with the high wage at $34.78 per hour. *Id.* In Oregon as a whole, carpenters took home a median of $21.11 per hour and a high wage of $34.78 per hour. *Id.* The hourly wage of $25 per hour which Mr. Stipe determined to be a reasonable evaluation of Claimant's earning capacity is above the median for all of these statistics, and above the high wage for tile and marble setters in the Portland area.

I do not find either of Claimant's calculations to fairly and reasonably approximate of his wage earning capacity at the time of the injury. The numbers unfairly inflate Claimant's wages, particularly since the evidence showed that Claimant worked sporadically and for brief periods of time, and his wages were not comparable to the $1,000 AWW he now seeks. Under Section 10(c), the average weekly wage requested by Claimant is not fair and reasonable.

Employer also suggests several figures for Claimant's AWW, which I also reject as not a fair and reasonable approximation of Claimant's wage earning capacity at the time of the injury. Employer argues that I should use Claimants Social Security Administration earnings from 2011, which total $8,690, divide by 52 weeks, which gives an AWW of $167.12. Post-Hr'g Br. of Employer at 16; EX 6 at 34. Employer also suggested using Claimant's reported earnings from 2003, 2010, and 2011 (the only three years in which Claimant's Social Security earnings are reported), which totaled $26,152.50 and divide them by 468 (nine years) for an AWW of $55.88. Post-Hr'g Br. of Employer at 16.[12] Employer's wages are not a fair and reasonable approximation of Claimant's wage at the time of the injury, and are much too low.

According to Claimant's amended income tax returns, his gross wages in 2011 were $10,680 and were $3,226 in 2010. CX 11 at 21A, 21E. This would give an AWW over those two years of $133.71.[13] For 2011 alone, it would give an AWW of $205.38.[14] Claimant earned $5,490 at Employer from January 10, 2012, through February 13, 2012, but he was paid at a higher wage rate than the average for Portland. CX 6 at 8; CX 7 at 15, TR at 132-33; TR at 337, 347. Claimant testified that his construction earnings for 2011 represented work performed from June to December of that year. TR at 115. According to his amended tax return, Claimant had gross wages in 2011 of $10,680, with a net profit from that work of $7,172. CX 11 at 21A. In

[12] It appears that Employer intended to suggest a third AWW based on the amended tax returns provided by Claimant at the hearing. However, Employer's Post-Hearing Brief was submitted with only placeholders. Post-Hr'g Br. of Employer at 16.
[13] $10,680 plus $3,226 divided by 104.
[14] $10,680 divided by 52.

2010, he had amended earnings of $5,383. CX 11 at 21C. While working at Employer from January 10 to 19, 2012, Claimant earned $1,610 at Employer. CX 6 at 8.

Based upon the entire record before me, I find that the period from June 2011 to January 19, 2012, provides a fair and reasonable approximation of claimant's wage earning capacity at the time of the injury. That period is twenty-eight weeks and five days, which is more than half a year of wages. During that time, Claimant earned $12,290, with an AWW of $428.07.[15] Claimant worked consistently during this time, but it also accounts for the intermittent nature of his employment. I considered including 2010 wages in the calculation, but given his work history and injuries that year, I do not believe the 2010 wages fairly reflect his earning capacity that year and should not be included here. Therefore, Claimant's AWW at the time of the January 19, 2012 injury was $428.07.

2. Award for Permanent Partial Disability -- Right Knee

A scheduled award runs for the amount of time yielded by multiplying the number of weeks provided in the pertinent schedule provision by the percentage of the Claimant's impairment, and that Claimant receives weekly benefits based on the full compensation rate. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391 (1983), *rev'd on other grounds*, 760 F.2d 569 (5th Cir. 1985), *aff'd on recon. en banc*, 782 F.2d 513 (5th Cir. 1986); *Macleod v. Bethlehem Steel Corp.*, 20 BRBS 234, 237 n. 4 (1988). Under Section 8(c)(2) and (19), based upon Dr. Lin's 12% lower extremity impairment rating, Claimant is entitled to 34.56 weeks[16] of compensation for permanent partial disability, based on an average weekly wage of $428.07 from July 26, 2012.

Under Section 903(e), Employer is entitled to a credit for any amounts paid to an employee for the same injury or disability pursuant to any other workers' compensation law. Here, the evidence showed that Claimant received $3,750 in disability payments for his right knee under Oregon workers' compensation laws. The net to Claimant after paying an attorney fee was $3,281.75. Employer is entitled to a credit under Section 903(e) in the amount of $3,281.75.

D. Medical Benefits and Interest

In general, the employer is responsible for all medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding, Inc. v. Dir., OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140 (1978). Section 7(a) of the Act provides that "[t]he 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); *see also* 20 C.F.R. § 702.401. In order for a claimant to receive medical expenses, the injury must be work-related, but need not be economically disabling. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Ballestros v. Willamette Western Corp.*, 20 BRBS 184 (1988). So long as a claimant is found to have suffered an injury as defined by the Act, the

[15] $10,680 plus $1,610 divided by 28.71 = $428.07.
[16] 288 weeks x 12% = 34.56 weeks

claimant is entitled to Section 7 medical benefits. *Bath Iron Works Corp. v.* Preston, 380 F.3d 597, 610 (4th Cir. 2005). Claimant is entitled to reimbursement for all medical expenses for treatment of his right knee and low back from the January 19, 2012, incident. Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. Gen. Dynamics Corp.*, 22 BRBS 356 (1989).

A claimant is entitled to compound interest under 28 U.S.C. § 1961(b) on any accrued unpaid compensation benefits. *Price v. Stevedoring Services of America, Inc.*, 697 F.3d 820 (9th Cir. 2013); *Foundation Constructors, Inc. v. Dir., OWCP*, 950 F.2d 621, 625 (9th Cir. 1991); *Bynum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co*., 14 BRBS 833 (1982); *Clefsted v. Perini North River Assocs.*, 9 BRBS 217 (1978). Interest accrues from the date each compensation payment becomes overdue. Accordingly, interest on the unpaid compensation amounts owed by Employer should be included in the District Director's calculations of amounts due under this Decision and Order.

E. Section 14(e) Compensation

Failure to begin compensation payments or to file a notice of controversion within twenty-eight days after an employer receives notice or has knowledge of the injury renders the employer liable for an assessment equal to ten percent of the overdue compensation. 33 U.S.C. § 914(e). Employer learned of Claimant's injury on January 22, 2012, but paid no compensation and did not file a notice of controversion until September 10, 2012. F.F. ¶ 4; EX 1 at 4. Thus, Employer is liable for a Section 14(e) assessment for the installments due between twenty-eight days after January 19, 2012 until the controversion was filed on September 10, 2012. Accordingly, such penalty should be included in the District Director's calculations of amounts due under this Decision and Order.

F. Section 8(f) Relief

Employer filed a petition with the District Director seeking Section 8(f) relief, which was denied. EX 26, 27. Section 8(f) shifts part of the liability for permanent partial or total disability to the special fund, provided that the claimant's disability is not due solely to the injury that is the subject of the claim. 33 U.S.C. § 908(f). Under Section 8(f)(1), an employer's liability is limited to 104 weeks of benefits, and Section 8 relief does not apply when the employer's liability is less than 104 weeks of benefits. *Byrd v. Toledo Overseas Terminal*, 18 BRBS 144, 147 (1986). Here, because I have determined that Claimant is entitled only to 34.56 weeks of partial permanent disability benefits for his right knee injury, the request for Section 8(f) relief is moot.

G. Attorney's Fees

Claimant's counsel is entitled to reasonable attorney's fees and costs for benefits procured on the Claimant's behalf. In cases where an attorney's fee is awarded, costs may also be assessed. 33 U.S.C. § 928(d). Claimant's counsel may submit an application for attorney's fees and costs as listed in the Order. *See* 33 U.S.C. § 928; 20 C.F.R. § 702.132.

ORDER

1. Claimant suffered a work-related injury to his low back and right knee on January 19, 2012, while working for Employer. Claimant's hernia was not a work-related injury.

2. Claimant's knee injury reached MMI on July 26, 2012. Claimant's low back injury has not reached MMI.

3. Claimant's average weekly wage at the time of the January 19, 2012 low back and knee injuries was $428.07.

4. Employer shall pay Claimant permanent partial disability for his lower extremity impairment under the schedule for 34.56 weeks of compensation based on an average weekly wage of $428.07 from July 26, 2012. Employer is entitled to a credit in the amount of $3,281.75 against this award.

5. Claimant is not entitled to any disability compensation for his low back injury, but is entitled to ongoing medical benefits for the low back injury.

6. Employer shall reimburse Claimant for medical mileage related to treatment for his knee and low back injuries. Claimant shall provide proof of the mileage to the District Director within 30 days of the date of this Order. Employer shall also reimburse Claimant for reasonable and necessary medical expenses incurred in this matter, including reimbursement in the amount $244.95 for expenses shown at trial. Claimant shall provide proof of any additional medical expenses incurred in this matter to the District Director within 30 days of the date of this Order.

7. Employer shall pay Claimant Section 14(e) penalties on all compensation installments due from 28 days after Claimant gave notice of his injury on January 24, 2012, until September 10, 2012.

8. The District Director shall make all calculations necessary to carry out this Order, including calculating mandatory compound interest on any accrued benefits at the rate prescribed by 28 U.S.C. § 1961.

9. Employer is entitled to reimbursement for all overpayments of compensation benefits made to Claimant, to the extent that the District Director finds there were overpayments made in this matter.

10. Claimant's counsel is entitled to reasonable attorney's fees and costs for benefits procured on the Claimant's behalf. Claimant's counsel is ordered to serve an initial petition for fees and costs on opposing counsel within 21 days of the date of this Order. All counsel are ordered to initiate a verbal discussion within 14 days after receipt of the fee petition in an effort to amicably resolve any dispute concerning the amount of fees requested. The discussion must include prior attorneys, if any, in addition to the current attorney. If counsel are able to agree on the amount of fees and costs to be awarded, they are ordered to promptly memorialize their agreement in writing and to file it with me.

If counsel cannot resolve all their disputes, Claimant's counsel is ordered to file within 30 days of the date the initial fee petition was served a Final Application for Fees and Costs that comports with 20 C.F.R. § 702.132 and shall incorporate any changes agreed to during the discussions. Within 21 calendar days after service of the Final Application, Employer's counsel shall file and serve a Statement of Final Objections detailing the objections to the fees and costs sought and the basis for the objections. The Claimant's counsel may file a reply to Employer's opposition 14 days after the opposition is served. No other reply briefs are permitted. For purposes of this order, a document is considered served on the date it is mailed.

11. The parties are ordered to notify this office promptly if an appeal is filed.

Digitally signed by Richard M.Clark
DN: CN=Richard M.Clark, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

RICHARD M. CLARK
Administrative Law Judge

San Francisco, California