U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 April 2011

CASE NOS.: 2010-LDA-00333
2010-LDA-00334

OWCP NOS.: 02-190455
02-191381

IN THE MATTER OF

JENNIFER D. JORDAN,
Claimant

v.

L-3-VERTEX AEROSPACE, LLC,
Employer

and

INSURANCE COMAPANY OF THE STATE OF PENNSYLVANIA
Carrier

APPEARANCES:

Gary Pitts, Esq.
Pitts and Mills
On behalf of Claimant

Frank Gerold, Esq.,
Ledge, Farrow, Kimmitt, McGrath, & Brown, L.L.P.,
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq*., and its extension, the Defense Base Act (DBA), 42 U.S.C. § 1651 *et seq*. (2000) brought by Jennifer Jordan (Claimant) against L-3 Vertex Aerospace, L.L.C,. (Employer) and Insurance Company of the State of Pennsylvania, (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on December 7, 2010 in Oklahoma City, Oklahoma.

At the hearing, all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 23 exhibits, including: Claimant's medical records, designated DOL forms (LS-18, LS-206, LS-207, LS-203 dated February 8, 2010, and one undated LS-203); medical leave form; Claimant's travel expenses; employment offer letter and contract; Claimant's initial post-injury paycheck from Employer; letter from Employer Carrier to DOL dated February 16, 2010; informal conference recommendations of March 19, 2010, and April 16, 2010; Employer Carrier responses to discovery requests; Claimant's social security earnings records; earnings documents from Employer Carrier; aircraft mechanic job description; photos of Claimant after fuel spray; and invoice for accommodative vehicle retrofitting.

Employer objected to the report of Dr. Anil Patel (CX-1, pp. 66 and CX-21-23) on the grounds that his CV or a resume of his qualifications was not contained in the file. Claimant asked for and received permission to provide a resume post hearing. Subsequently, Claimant provided Dr. Patel's resume showing him to be board certified ophthalmologist in Canada and the United States with over ten (10) years of clinical practice at the University of Oklahoma, the Dean McGee Eye Institute, and the University of Saskatchewan. Dr. Patel is currently a clinical associate professor of ophthalmology at the University of Oklahoma where he has practiced since May 24, 2004. Before this, he served as an assistant professor from July 1998 to May 2004, an associate professor and acting head of the Department of Ophthalmology at the University of Saskatchewan. I find no reason to doubt his qualifications as an eye doctor or his ability to diagnose and treat Claimant's eye impairment and, thus, admit his CV and medical report on Claimant's eye condition.

Employer called Dr. David Tasker as an eye expert and listed 72 exhibits, but actually submitted 47 exhibits including: DOL forms; Claimant's wage data; pre-employment physical; personnel, employment, and military records; job site medicals; discovery responses; academic and military records; social security earnings and disability records; tax records; medical records from International Clinic, St. Anthony Hospital, Dean McGee Eye Institute, Integris Canadian Valley Surgical Association, First Choice Home Medical, Mercy Health Center, Access Medical Center, Norman Regional Hospital, Oklahoma Bone & Joint Hospital, Midwest Regional Medical Center, Oklahoma City Veterans Medical Center, Oklahoma Therapy Institute, Open-Sided MRI, Putnam North Family Center, West End Physical Therapy, Integris Canadian Valley Hospital, Integris Baptist Medical Center, Dr. Rory C. Dunham, and Dr. David L. Tasker; pharmacy records from Walgreen's Inc., Wal-Mart Stores, Inc., and CVS; and medical report from Dr. Jeffery Shaver.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. On August 5, 2009, and August 17, 2009, Claimant was injured in the course and scope of her employment with Employer during which an employer employee relations existed.

2. Employer was advised of Claimant's injuries on August 5 and 17, 2009.

3. Employer filed notices of controversion on September 2 and 7, 2009, and March 23, 2010.

4. An informal conference was held on March 11, 2010, between the parties.

5. Employer/Carrier has paid Claimant temporary total disability from August 6, 2009, at a weekly rate of $798.21 as well as some medical benefits.

II. ISSUES

1. Nature and extent of disability

2. Claimant's entitlement to temporary total and permanent total disability

3. Claimant's Average Weekly Wage

4. Claimant's entitlement to Section 7 medical benefits

5. Attorney's Fees and Interest

II. STATEMENT OF CASE

A. Background

Claimant is a 35 year old female; she is married and was born and raised in Oklahoma City, Oklahoma. Claimant attended Oklahoma State University and received a degree in criminal justice after which she went into the U.S. Army and U.S. Air Force where she obtained a degree in nursing. (Tr. 15). Prior to her employment with Employer, Claimant worked as a dispatcher and deputy sheriff in Oklahoma City, OK; a Chinook helicopter mechanic for the U. S. Army; a door gunner on the Chinook; a retrofit helicopter mechanic for LSI (Lear Siegler); and an air medevac technician. (Tr. 16-22). On June 20, 2009, Claimant began working for Employer as a Chinook aircraft mechanic at the Taji Airfield in Taji, Iraq. (EX-5) The airfield was a 15 minute flight by Black Hawk helicopter west of Baghdad. (Tr. 23).

Claimant worked 12 hours per day 7 days per week as a helicopter mechanic after which she went to her living quarters in a small trailer called a chue. Claimant worked in temperatures

ranging from 110 to 135 degrees with 80 percent humidity. On August 5, 2009, Claimant's supervisor John Acuna asked Claimant and another mechanic to perform a fit test on a helicopter. In the process of performing this test, Claimant discovered her equipment was not calibrated and when she attempted to remove a large tube she was blasted by fuel. The fuel, a mixture of JP4 and JP8, was apparently under about 200-300 pounds of pressure and blew her goggles off her face as she attempted the test, Claimant screamed to get the fuel off. Acuna responded by dousing Claimant with containers of eye wash, driving her first to the safety office and then to the combat area support hospital where hospital personnel used saline solution to wash her eyes. (Tr. 26-28).

Before being hired Claimant underwent a pre-deployment physical in which she disclosed past knee scopes, arthritis, and allergies. (EX-3; CX-1, pp.1-11). After her injury and initial evaluation, she was found to be unable to perform her mechanic work due to bilateral conjunctival acid eye burns. (EX-4; CX-10 p. 13). Several days later she was released to light duty with visual acuity in each eye of 20/40 and instructed to wear sunglasses at all times (EX-5; CX-1, p. 18, 26). International Clinic records show Claimant's condition improving by August 15, 2009, but she was still experiencing chemical conjunctivitis, mild iritis with photophobia, and acute muscle contraction headache. (CX-1, p. 33).

On September 9, 2009, Claimant began treatment at the Dean McGee Eye Institute due to her eye burns. (EX-11, CX-1, p. 35). In a statement dated September 16, 2009, Dr. Ralph Hester indicated Claimant had chemical keratoconjunctivitis and would be unable to return to work until he could determine if her corneal condition had resolved. (CX-1, p.41). While Claimant was being treated for her eye impairment, she was also being treated by Dr. Michael J. Davoli for a left ankle injury sustained by tripping over a tent stake on August 17, 2009. Dr. Michael J. Davoli released Claimant from his care on January 11, 2010, imposing no work restrictions. (EX-12).[1]

On January 6, 2010, Employer's first chosen medical expert, Dr. Jeffery Shaver, evaluated Claimant for blurred vision, dry eye, tearing, irritation, and reflex tearing accompanied by headaches and brow aches. Dr Shaver found no objective evidence of dry eye related corneal damage but noted the presence of reflex tearing and symptomatic dry eye. (CX-1, pp. 58-59). In his report, Dr. Shaver opined Claimant suffered from dry eye syndrome reasonably related to the August work accident. (CX-1, pp. 58-59).

On March 17, 2010, Dr. Stone of the Dean McGee Eye institute opined Claimant was still suffering from chronic inflammatory conjunctivitis as a result of the chemical exposure. (CX-1, p. 61). Despite her condition, Dr. Stone stated Claimant could return to work assuming the condition remained adequately controlled. (CX-1, p. 61). Upon request, Dr. Anil D. Patel evaluated Claimant's condition and provided a disability rating of Claimant's eyes. (CX-11, p. 66). In a letter dated June 4, 2010, Dr. Patel stated Claimant suffered a sixty percent (60%) loss of vision in each eye and, using the combined values chart, found a sixty percent (60%) disability rating to Claimant's visual system as a whole and a fifty-seven (57%) percent whole person disability. (CX-1, p. 66).

[1] Claimant's medical records prior to her injury with Employer show Claimant being treated for asthma (EX-14), allergic reactions to sulfa, penicillin (EX-15) eggs (EX-16) chondroplasty of right knee (EX-18) left ruptured anteeriore talofibular ligament (EX-23) adverse drug reaction to neurontin (EX-24)

On September 20, 2010, Dr. David I. Tasker, a Board certified ophthalmologist chosen as Employer's second medical expert, examined Claimant. (CX-1, p. 72). In a report dated September 23, 2010, he felt Claimant's only symptom that could be associated with the fuel spill was a temporary conjunctivitis lasting 3-5 days. (CX-1, p. 74). In Dr. Tasker's opinion, Claimant was most likely suffering from Ocular Rosacea which can cause similar symptoms such as burning, redness, and photophobia. (CX-1. pp. 69-78). In addition, he believed that Claimant's uncorrected vision in each eye was due to refractive error of myopia and astigmatism and that Claimant's reduced visual acuity was due to not wearing glasses (refractive amblyopia). (CX-1. pp. 69-78).

B. Testimony of Claimant

Claimant testified that following her eye injury she saw an optometrist, Dr. Burns, in Taji who assessed bilateral conjunctiva burns and applied a regimen of medication to her eyes and petroleum jelly to her face. Thereafter, Claimant saw Dr. Burns for the next several days on a daily basis and then every other day until she returned to the United States. Dr. Burns opined that Claimant could return to work provided she could manage the pain and see well enough to perform her job. (CX-1, p. 25). However, Claimant continued to experience blurred vision as well as burning, itching, watering, and pain in her eyes. Claimant was confined to her quarters by Dr. Earl Down of aviation medicine and apparently never returned to work.

Claimant saw Dr. Down on other occasions during which she reported intermittent blurry vision and headaches due to dry eye. On August 15, 2009, Claimant went to the International Clinic in Kuwait where the ophthalmologist there opined Claimant had acute iritis and photophobia with acute muscle contraction headaches and chemical conjunctivitis and, as a result, recommended sick leave. (CX-1, p.33).

Admittedly, Claimant's eye condition improved overseas. However, despite this improvement she had a hard time seeing and found herself walking into ten foot concrete barriers and repeatedly falling due, in part, to an inability to distinguish between wet and dry floors. On August 17, 2009, Claimant tripped over a tent stake at 4:30 a.m. while in Ali Al Salem and hurt her left ankle rupturing a ligament. (Tr. 30). As of the hearing date, Claimant had no problems with this ankle. (Tr. 31). Claimant had her ankle in a cast for thirteen and one-half (13 ½) weeks followed by use of a black walking boot. Occasionally, she suffers plantar fasciitis (heel pain) when standing for long periods of time.

Claimant paid for her airline ticket home and, once back in the U.S., was reimbursed for all but two-hundred and forty-five dollars ($245) in expenses. When Claimant arrived back in Oklahoma City, she went to the Dean A. McGee Eye Institute where she was treated by various doctors including Dr. Patel and Dr. Stone. (Tr. 33). Dr. Patel and Dr. Stone are Claimant's primary treating physicians and have treated her with Pataday and Restasis, a tear producing medication. Today, Claimant suffers from dry eye, pain, swelling, and photophobia. (Tr. 34, 35). Carrier has not paid for the Restasis, Pataday, glasses, or travel to or from the doctors or pharmacy since the summer of 2011.

Claimant's doctors have diagnosed her with chemical conjunctivitis and chronic inflammatory conjunctivitis. (Tr. 37; CX-1, p. 41). Claimant testified she has difficulty seeing at distances or close up and stated she has lost most of her peripheral vision. (Tr. 39). Because

of having difficulty in focusing, Claimant has had to give up her nursing career. (Tr. 40, 41). However, Claimant acquired a job, upon her return to the States, with the State of Oklahoma as an administrative technician imputing data about nursing home compliance. Claimant later began working as a management assistant in the Air Force. When working for Employer, she worked under a one year renewable contract. (Tr. 43). While in Iraq, Claimant wore personal protective gear which included a Kevlar cover and ceramic plates contained within a netting vest. On occasion, the base where she worked was attacked. (Tr. 45).

On cross, Claimant admitted being known as Jennifer Diane Jablonski, Jennifer Estrada, Jennifer Summer, and Jennifer Jorday. (Tr. 46). Claimant's medical records show Claimant suffering with arthritis of the right knee due to injury and various severe allergies resulting in anaphylaxis (sulpha drugs, penicillin, blue dye, Tylenol, Ladril, cephalosporins, Cymbalta, Percocet, latex, Advil, avocados, eggs, anthrax shot). (Tr. 48, 49, 50). Claimant admitted being terminated while working for Integris and Surgical Specialties in 2008 and 2009. (Tr. 52-54). On January 11, 2010, Dr. Davoli released Claimant to work with no limitations due to her ankle. (Tr. 57).

Concerning her eyes, Claimant admitted that no doctor had told her she sustained retinal or iris damage and that she was told she had damaged her cornea. (Tr. 58, 59). Claimant also admitted using eye glasses on occasion to drive and being evaluated by Dr. Jeffery Shavers and Dr. Tasker. (Tr. 60, 61). Claimant also admitted being told by Dr. Stone that other than wearing sunglasses she could go back to the duties she performed before her injury. (Tr. 67; EX-70). Further, she was given a waiver in April 2010 to return to full duty overseas but did not return.

Claimant continued to work for Employer from August 2009 to December 31, 2009 in the United States. Thereafter, Claimant held two jobs: Oklahoma Dept. of Health (June 23, 2010 - October 1, 2010; EX-65) and Tinker AFB (employed at time of hearing). (Tr. 69-70). Claimant also testified that before her eye incident her eyes did not itch or turn red when she had an allergic reaction and she had no problems with dry eye, eye pain, swelling, or photophobia as she does now. (Tr. 50-51,163).

C. Testimony of Dr. David Tasker

Dr. Tasker has been a board certified ophthalmologist for the past 35 years. He has previous experience in U. S Air Force as a flight surgeon, in making disability determinations for State of Texas Dept. of Insurance and Social Security Administration, and has worked with the VA evaluating military personnel for chemical and fuel exposure. Dr. Tasker testified that he spent eighty percent (80%) of his time making vision impairment assessments for the state and federal government. (Tr. 75-77). Dr. Tasker described the structure of the eye with the cornea receiving the first insult with a chemical invasion, followed by the iris and lens. Behind the lens is the posterior chamber which contains the retina and optic nerve. (Tr. 79-80).

According to Dr. Tasker, jet fuel acts as an acid and because it does not penetrate into the eye causes a temporary condition. For social security purposes a person does not have to have anatomical change to be qualified for disability but rather can qualify on a function loss in visual acuity such as 20/200. Under the AMA guidelines, anatomical damage is necessary for vision impairment. (Tr. 83). After reviewing Claimant's records in this case, Dr. Tasker stated Claimant sustained no anatomical damage to her optic nerve, retina, lens, pupil, iris, or outside of the eye. (Tr. 84).

Dr. Tasker testified that on September 20, 2010, he tested Claimant's visual acuity using the standard Snellen eye charts, tested Claimant's visual fields using a Goldmann test, and tested for photophobia using an Amsler Grid and others. (EX-37). This testing showed a normal cornea; good peripheral vision; normal conjunctiva; and normal interior chamber, lens, iris, optic nerve, macula, and retina. (Tr. 86-97). Claimant's eyes were also evaluated on January 22, 2010, by Dr. Jeffery Shaver who found her vision to be 20/30 in both eyes with corrective glasses. (Tr. 97; EX-38). Dr. Shaver also did an external examination which he found to be normal. (Tr. 98). In addition, Dr. Shaver performed a funduscopic examination, and the results were normal. (Tr.102).

Concerning her dry eye, Dr. Tasker testified Claimant's acne rosacea (skin disease) is associated with a dryness of the eye and needs to be treated with antibiotics on a regular basis. Further, lupus and arthritis can also cause dry eye. (Tr. 103-104). Dr. Tasker described jet fuel, MSDS Number 62, used by Claimant as a skin irritant. In addition, he testified about his examination of Claimant which included visual acuity. After the visual acuity examination, he found Claimant's vision was 20/40, best corrected, in her right eye and 20/50, best corrected, in her left eye and concluded she had nearsighted myopia and astigmatism. Because there was a lack of scaring, he did not associate the astigmatism with exposure to jet fuel, but rather he felt it was due to not wearing glasses for a long enough period of time. Dr. Tasker also noted Claimant had normal ocular mobility; normal reaction to light; normal visual fields; normal interior chamber and funduscopic examinations; normal intraocular pressure; and normal retina, macula, and iris. (Tr. 107-122). Dr. Tasker tested Claimant's visuals fields using the Goldman Visual Field and the confrontational visual field tests and found inconsistent results when comparing the two tests and considering the results of the two Goldman tests. (Tr. 122-123).

As a result of the testing, Dr. Tasker found no impairment of any kind as a result of fuel exposure, and concluded she suffered no burning of eye tissue and no dry eye due to the exposure on August 5, 2009. (Tr, 125-29). On cross examination, Dr. Tasker testified Claimant's dry eye (irritative conjunctivitis) was associated with eczema, arthritis, and ocular rosacea (all systemic diseases). The jet fuel was an irritant of short duration lasting up to seven (7) days (Tr. 136; EX-37, p. 9). Further, Claimant's treating doctors put her on tetracycline (deoxycycline) which is used only for ocular rosacea. (Tr. 137).

On redirect, Dr. Tasker admitted that Dr. Stone of the Dean McGee Institute permitted Claimant to return to the work place with sunglasses as of March 31, 2010. (Tr. 146, 147). Also, Dr. Shaver did not compare the results of the Goldman test to the visual field tests to determine Claimant's veracity. (Tr. 148). Dr. Tasker agreed that Claimant had dry eye but felt such a condition existed for a long time starting at about age twenty-five (25) with most persons having it asymptomatic. (Tr. 152). Dr. Stone found Claimant to be suffering from inflammatory conjunctivitis as a result of the exposure to the airplane fuel and felt it was controllable to an adequate degree. He released her to go back to work as of March 17, 2010. (EX-70, p.2). Further, Dr. Stone notes Claimant will continue to have irritated eye and photophobia but it can be adequately controlled. (EX-70, p.2).

IV. DISCUSSION

A. Parties Contention:

First, Claimant contends that she suffers from chronic dry eye, photophobia, eye swelling, and loss of vision as a result of the blast of aviation fuel into her face. Further, Claimant contends her assertion is supported by Dr. Patel who after examining Claimant and administering several test determined Claimant had a 60% vision loss in both eyes. Dr. Patel's performed these calculations using the specified guidelines contained in the "Evaluation of Permanent Visual Impairment" section of the Physician's Desk Reference for Ophthalomology, 24th edition. (CX-1, pp 66; CX-21, p.1). The evaluation considers central visual acuity, both near and distance; peripheral vision, tested using Goldman perimetry using III4e isopter; and ocular motility. Claimant also points to Employer's first choice of examining physicians, Dr. Schaver, to support that she suffers from dry eye. Dr. Schaver found symptoms consistent with dry eye syndrome and attributed the symptoms to the incident on August 5, 2009. Indeed, all physicians who diagnosed Claimant except Dr. Tasker, who underwent no fellowship training, stated she had chemical conjunctivitis.

Second, Claimant contends she has established entitlement to temporary total disability from August 6 to April 13, 2010 except for August 13, 2009 when she is due temporary partial disability when Employer paid her for two hours straight time. Third, Claimant's average weekly wage should be based only on what Claimant make overseas applying the principles announced in *K.S. v. Service Employees Int'l Inc.* wherein a claimant who worked under dangerous conditions abroad under a one year contract received an AWW based upon the higher overseas wages. *K.S. v. Service Employees Int'l Inc.* 43 BRBS 18 (2009). Claimant alleged that from June 20, 2009, to August 5, 2009, she earned $2,505.43 per week but received only $798.21 per week from December 02, 2009, through January 18, 2008. Finally, Claimant contends she is entitled to medical expenses incurred in connection with her airplane fare back to the U.S. as well as attorney fees and expenses.

On the other hand, Employer contends there are two injuries in this case, a left ankle injury and an eye impairment. Further, Employer contends the ankle impairment ran from August 5, 2009, to January 18, 2010, when Claimant's ankle had improved to the point she could resume her former work without any restrictions. Regarding Claimant's eyes, Employer contends that any impairment was only temporary and lasted no more than 7 days. Furthermore, there was no evidence of anatomic damage to Claimant's eyes when she was released to return to work without restriction on March 7, 2010. Employer argues Claimant's dry eye condition was not related to her jet fuel exposure but from possible ocular rosacea or possible long term immunological or systemic illnesses including lupus, pre-accident arthritis, fibromyalgia, eczema and allergies.

According to Employer, Claimant sustained no anatomical damage to the eye and, thus, has no vision loss, no photophobia, and no eye burns. In addition, Claimant suffers from myopia and astigmatism but with no scarring or any relation to the fuel exposure. In essence, Claimant sustained a temporary eye condition lasting no more than a week for which she is entitled to no compensation or medical benefits because the condition was unrelated to the work place accident of August 5, 2009, and was of such short duration. Furthermore, Claimant is only entitled to limit TTD for the ankle injury because it had completely healed, without residuals, by January 22, 2010.

Finally, Employer contends Claimant's AWW should be based upon her wages over the fifty-two (52) weeks prior to the accident giving Claimant an AWW of $824.64 with a resulting compensation rate of $550.43. Alternatively, Employer argues that her AWW is $1,024.11 with a compensation rate of $694.74. These figures are based upon what Claimant actually made while overseas and what she was guaranteed to make under the remainder of the contract. In other words, Claimant was paid $17,083.55 covering the period from June 20, 2009, until the time of her injury (representing 6 weeks and 4 days), and she was guaranteed 40 hours a week at $20.42 per hour for the remaining 45 weeks and 3 days in her employment contract. Employer used these figures to show $37,106.08 (guaranteed remaining) plus $17,083.55 (previously earned) for a grand total of $54,189.63. This results in an AWW of $1,024.11 and a compensation rate of $694.74. Moreover, Employer requests this court reduce Claimant's AWW by her retained earning capacity.

In support of its position, Employer relies upon Dr. Tasker to conclude that as a result of the fuel spills Claimant sustained temporary conjunctivitis which amounts to nothing more than a contact dermatitis or keratojuntivitis which should have resolved in 3 to 5 days. Dr. Tasker found Claimant to have irritative conjunctivitis which favored ocular rosacea as it etiology. Dr. Tasker also thought Claimant's dry eye syndrome most likely stemmed from rheumatoid or osteoarthritis; in any event, her condition was certainly not related to her fuel exposure although he did not know the composition of JP-4 which combined with JP-8 to form the helicopter fuel. Dr. Tasker surmised that JP-8 could not cause irreversible loss of vision because the documentation on JP-8 did not contain any such warning although it did mention JP-8 could produce irritation upon eye contact. Dr. Tasker had no explanation why Claimant had been asymptomatic prior to the fuel incident if the fuel explosion had nothing to do with it.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Assn v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law, and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In this case, I am confronted by the conflicting opinion of two board certified eye physicians one of whom has fellowship training (Dr. Patel) and the other has none (Dr. Tasker). Dr. Tasker would have me believe that Claimant has no lasting visual impairments due to the explosion of jet fuel into her eyes. Dr. Tasker would attribute Claimant's eye problems, including dry eye, pain, swelling, and photophobia, to only pre-existing systemic diseases such as lupus or arthritis; however, he had no explanation for why these conditions did not appear until after the jet fuel incident or why no other doctors agreed with his etiology.

Dr. Tasker, moreover, could not explain the sudden onset of Claimant's difficulty with near and far objects or with her peripheral vision came only after the jet fuel incident except maybe to discredit her assertions. However, in discrediting her he would also have to discredit Dr. Patel who tested and found restrictions in both Claimant's visual acuity and visual field and, also, had no reason to misrepresent Claimant's condition. Further, Dr. Tasker would have me believe that the aviation fuel which literally exploded into Claimant face and eyes could not cause the damage attributed to it because none of the manufactures literature about the JP-8 fuel warned of such an outcome. Could it be that the fuel mixture of JP-8 and JP-4 could have caused the damages suffered by Claimant especially considering Dr. Tasker had no knowledge of ingredients or effects of JP-4 fuel?

Further, Dr. Tasker could not explain why other doctors did not agree with his assessment concerning decreased visual acuity, Claimant's failure to wear glasses, or his assessment that Claimant had dry eye since age twenty-five (25), apparently without knowing it. In essence, I do not credit Dr Tasker's assertions concerning either the cause, severity, nature, or extent of Claimant's seeing impairment. After reviewing all evidence, I am convinced Claimant's position, which is supported by her physicians and her own testimony, is more logical and consistent with the facts. Indeed, Employer has no explanation for the occurrence of Claimant's symptoms which came only after the traumatic events of August 5, 2009. In fact, it appears from Claimant's pre-employment physical that Claimant had essentially normal vision before working for Employer.

C. Causation & Section 20(a) Presumption

Under the Act, Claimant has the burden of establishing the *prima facie* case of a compensable injury. The claimant must establish a *prima facie* case by proving that he suffered some harm or pain and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). *See U.S. Industries/Federal Sheet Metal v. Director, OWCP* (Riley), 455 U.S. 608, 14 BRBS 631, 633 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). It is the claimant's burden to establish each element of his *prima facie* case by affirmative proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). In *U.S. Industries*, the United States Supreme Court stated, "[a] *prima facie* 'claim for compensation,' to which this statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries*, 455 U.S. at 615, 14 BRBS at 633.

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v.*

Washnock, 135 F.3d 366, 371 (6th Cir. 1998)(*quoting Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991).

Section 2(2) of the Act defines injury as an accidental injury or death arising out of and in the course of employment. 33 U.S.C. § 902(2) (2003). In order to show the first element of harm or injury, a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C. Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer). A claimant's uncontradicted, credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. *Wheatley*, 407 F.2d at 313. Unlike occupational diseases, which require a harm particular to the employment, a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease); *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

Degenerative changes not caused by working conditions are not compensable as traumatic injuries. *Lennon v. Waterfront Transport*, 20 F.3d 658, 663 (5th Cir. 1994) (degenerative disc disease); *Director v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65 (5th Cir. 1980) (degenerative lumbar disc disease).

For an injury to be compensable under the Act, it must have "arose out of" and occurred "in the course of employment." 33 U.S.C. 902(2). These are separate elements that must both be proven. "Arising out of" refers to the activity in which the claimant was engaged when the injury occurred. "Course of employment" refers to the time, the place and the circumstances surrounding the injury. *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593, 595 (1081). The general rule as established by the Board is that an injury occurs in the course and scope of employment if it occurs within the time and space boundaries of employment and in the course of an activity the purpose of which is related to the employment. *Alston v. Safeway Stores*, 19 BRBS 86, 88 (1986), *citing Wilson v. WMATA*, 16 BRBS 73 (1984); *Willis v. Titan Contractors*,

20 BRBS 11 (1987). The Board further defined their position in *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997), holding that the employee's action would be found within the "scope of employment" if it was of some benefit to the employer. However, the Act does not require that the employee, at the time of injury, be engaged in activity of benefit to the employer. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951).

A claimant's uncontradicted, credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimants reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that certain conditions existed at work that could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976) (finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

In establishing that an injury occurred in the course and scope of his employment, a claimant is entitled to rely on the presumption provided by Section 20(a) of the Act. *Willis*, 20 BRBS at 12; *Mulvaney*, 14 BRBS at 595; *Wilson*, 16 BRBS at 75. Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. 920(a). Once a *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of his employment. *Hunter*, 227 F.3d at 287.

Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based on a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003) (the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (the hurdle is far lower than a ruling out standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), aff'd mem., 722 F.2d 747 (9th Cir. 1983) (the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.")

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285 at 288; *Holmes v. Universal Maritime Serv. Corp*., 29 BRBS 18, 20 (1995). In such cases, the administrative law judge must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 at 281. Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d) (2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries*, *supra*; *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

In this case, there is no question that Claimant suffered two injuries at work: one when her eyes were exposed to fuel and the other to her left ankle. What is at issue is the existence of any lasting impairment and disability as a result of the injuries. Regarding her ocular condition, Claimant asserted she suffered from chemical conjunctivitis due to the explosion of a fuel line which propelled helicopter fuel at an estimated pressure of three hundred pounds per square inch (300 psi) into Claimant's eyes and onto her face. Claimant further contends this injury kept her from working until March 17, 2010, when she was released by her treating physicians including Dr. Ralph Stone at the Dean McGee Eye Institute.[2] Employer does not dispute this accident occurred but contends that whatever injury Claimant suffered lasted no more than seven (7) days and that any subsequent vision problems are unrelated to this incident.

Claimant seeks total and temporary disability benefits associated with the August 5, 2009, eye injury and August 17, 2009, ankle injury for the period running from August 5, 2009, to March 17, 2010, when she was released for work. During this time, Claimant did not work due to condition of her eyes and/or her ankle impairments.[3] From March 17, 2010, Claimant seeks permanent partial disability pursuant to the schedule for the disability resulting from the injury to her eyes.

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[2] Claimant incorrectly asked for April 13, 2010, but the undersigned can find no basis for this date. While Employer paid Claimant for about two hours of work on August 13, 2009, I find no evidence of substantial work during this time period to warrant removing her from the disability role.

[3] Dr. Davoli treated and released Claimant for her ankle injury of January11, 2010 with no restrictions.

D. NATURE AND EXTENT

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A

permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement ("MMI").

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence**.** *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp***.**, 903 F.2d 168 (2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, (*Leech v. Service Engineering Co.*, 15 BRBS 18 (1982)), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

The Act does not provide standards to distinguish between classifications or degrees of disability. However, case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d at 1038; *P&M Crane Co. v. Hayes*, 930 F.2d at 429-30; *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). Claimant need not establish that she cannot return to *any* employment, only that she cannot return to her former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984) (emphasis added). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, she is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

In this case, I find Claimant could not return to her former employment as a result of her injuries until March 17, 2010. On this date, Claimant was cleared to return to work by Dr. Stone, one of her treating physicians at the Eye Institute. Therefore, I find Claimant was totally disabled from the date of injury until March 17, 2010, at which point she was at maximum medical improvement.

Regarding Claimant's request for permanent partial disability, a claimant is considered to have a permanent disability only where there is some residual impairment after reaching maximum medical improvement (MMI). The scheduled permanent partial disability rates established by Sections 8(c)(1)-8(c)(20) of the LHCWA are merely the minimum levels of compensation to which the injured employee is automatically entitled as a result of his injury and no proof of actual loss of wage-earning capacity is required in order to receive at least the

amount specified in the schedule for such injury. *See Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *Greto v. Blakeslee, Arpaia & Chapman*, 10 BRBS 1000 (1979).

Additionally, the Board has held that an ALJ's determination of disability from loss of use of an arm by considering both economic and physical factors, in adjudicating a claim under the Section 8(c) schedule provisions, was improper because determination of disability in adjudication of such claims must be based upon a consideration of physical factors alone. *Bachich v. Seatrain Terminals*, 9 BRBS 184, 187 (1978). An ALJ may, however, properly base

his or her findings on medical evaluations plus the claimant's own descriptions of the symptoms and the physical effect of the injury. *Amato v. Pittston Stevedoring Corp.*, 6 BRBS 537 (1977).

The Board has also held that "the Act does not require adherence to any particular guide or formula" and that the "administrative law judge [is] not bound to apply the Guides or any other particular formula for measuring disability." *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053, 1055 (1978). Moreover, although the question of whether the loss of use of the member affects his ability to perform his work is immaterial to the issue of his entitlement to compensation, i.e., any economic loss, the judge can properly consider the claimant's ability to return to work at his regular job in determining whether or not the claimant has sustained any measure of physical injury. *Mazze*, 9 BRBS at 1054-55; *Michael v. Sun Shipbuilding & Dry Dock Co.*, 7 BRBS 5 (1977) (judge properly awarded four percent partial loss of use of the right foot, pursuant to Section 8(c)(4) and (19) where claimant's initial treating physician rated such impairment as two percent and the second physician issued a rating of from three to five percent, according to the AMA Guides).

It is well-settled that any loss of vision must be based upon the claimant's uncorrected vision. The Ninth Circuit aligned itself with the Fifth Circuit when it acknowledged that the Board's use of uncorrected vision constituted a liberal construction of the LHWCA but was in accord with the LHWCA's "compelling language." *McGregor v. National Steel & Shipbuilding Co.*, 8 BRBS 48, 51 (1978), *aff'd sub nom. National Steel & Shipbuilding Co. v. Director, OWCP*, 703 F.2d 417, 15 BRBS 146 (CRT) (9th Cir. 1983); *Gulf Stevedore Corp. v. Hollis*, 298 F. Supp. 426, 430-31 (S.D. Tex.), *aff'd per curiam*, 427 F.2d 160, 161 (5th Cir. 1969), *cert. denied*, 400 U.S. 831 (1970) (The Fifth Circuit affirmed a decision holding that the proper method involves the use of uncorrected rather than corrected vision and affirming an award under Section 8(c)(16) based on the claimant's uncorrected vision). In so doing, the Ninth Circuit court rejected the employer's argument that benefits should be based upon the claimant's corrected vision and his loss of earnings, as determined under Section 8(c)(21). *National Steel*, 15 BRBS at 148.

Thus, the correct legal standard requires the use of Claimant's uncorrected vision when determining visual impairment pursuant to Sections 8(c)(16) and 8(c)(5). After reviewing all of the medical evidence presented, I credit Dr. Patel's conclusion that Claimant currently has a sixty percent (60%) visual impairment. As noted above, I find Claimant reached MMI on the date she was released to work, March 17, 2010. Because Claimant suffers residual impairment after the date of MMI, the undersigned finds Claimant entitled to permanent partial disability.

Under the Act, the loss of binocular vision is a scheduled disability and compensation for the loss of binocular vision is the same as for the loss of an eye under Section 8(c)(5) which

provides for 160 weeks of compensation. 33 U.S.C. § 908(c)(5), (c)(16). Thus, the undersigned finds Claimant is entitled to permanent partial disability in an amount equal to sixty percent (60%) of 160 weeks of her average weekly wage.

E. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); *Staftex Staffing v. Director, OWCP,* 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000). Where neither Section 10(a) nor Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for

determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Assoc., v. Bunol,* 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.,* 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.,* 130 F.3d 157, 161 (5th Cir. 1997); *Deewert v. Stevedoring Services of America,* 272 F.3d 1241, 1246 (9th Cir. 2001); *McKnight v. Carolina Shipping Co.,* 32 BRBS 165, 172 (1998).

1. Section 10(a)

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant 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 his injury." 33 U.S.C. § 910(a); *See also Ingalls Shipbuilding, Inc., v. Wooley,* 204 F.3d 616, 618 (5th Cir. 2000)(stating Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority,* 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker." 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co., v. Chilton,* 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp., v. Wright,* 155 F.3d 311, 327 (4th Cir. 1998). In this case, Claimant worked seven (7) days a week and did not work overseas for a substantial portion of the year preceding her injury. As a result, Section 10(a) would distort Claimant's average annual earnings and, thus, cannot be used to calculate her average weekly wage.

2. Section 10(b)

If Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. §910(c); *Bunol,* 211 F.3d at 297; *Wilson,* 32 BRBS at 64. Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker,

and two hundred and sixty times the average daily wage of a five day worker. *Id.* To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.,* 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id.* at 130; *Empire United Stevedores v. Gatlin,* 936 F.2d 819, 822 (5th Cir. 1991). In this case, the record is devoid of wage records of similar employees; thus, Section 10(b) cannot be utilized.

3. Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly, then a determination of a claimant's average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297-98; *Gatlin*, 936 F.2d at 821-22; *Browder v.*

Dillingham Ship Repair, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

> "[S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee."

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher,* 219 F.3d 426 (5th Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock,* 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards,* 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner,* 600 F.2d 1288, 1292 (9th Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.,* 12 BRBS 410, 413 (1980).

In determining AWW, Claimant urges that I use the wages earned while flying to, working in, or coming from Iraq in accord with *K.S. v. Service Employees Int'l Inc.* 43 BRBS 18 (2009). Employer, on the other hand, would have me find no AWW or, in the event I do, would have me use Claimant's wages over the past fifty-two (52) weeks prior to the accident. Under this method Claimant's AWW comes to $824.64 with a resulting compensation rate of $550.43. Alternatively, Employer argues that Claimant's AWW should be based upon what she made from June 20, 2009, until her injury, plus an extrapolation of the remaining amount Claimant was guaranteed under the employment contract. Claimant earned $17, 083.55 in six weeks and four days under her contract and was guaranteed forty hours a week for an additional forty-five weeks and three days at $20.42 per hour which totals $37,106.08. Under this method, Claimant's

annual earnings would equal $54,189.63 with an AWW of $1,024.11 and a resulting compensation rate of $694.74.

As stated above, Claimant would have me use the total amount earned while working for Employer. However, the wage records submitted include time and wages before Claimant left for Iraq on June 20, 2009, and also include time from July 31, 2009, through August 5, 2009, for which there is no recorded earnings for Claimant. Because the information supplied does not allow for an accurate calculation, the undersigned must use what is available. Using the payroll information available I have concluded that Claimant earned gross wages in the amount of $12,970.02 from June 20, 2009, to July 31, 2009, a total of forty-two (42) days, or exactly six (6) weeks, resulting in an AWW of $2161.67 with a compensation rate of $1,441.11. However, this rate exceeds the maximum compensation rate in effect at the time of $1200.62. Although I do not agree with the reasoning of *K.S.*, I am bound to follow it in this case and award a weekly compensation rate permanent partial disability for a loss of binocular vision equal to 60% of 160 weeks, or 96 weeks, with a compensation rate of $1200.62 per week for a total award of

$115,259.52. This sum is in addition to Claimant's right to temporary total disability from August 5, 2009, to March 17, 2010, when Claimant became entitled to a scheduled award.

F. Medical Expenses

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima facie case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

In this case, Claimant is entitled to be reimbursed for any reasonable and necessary medical expenses she had to pay as a result of the injury sustained while in the course and scope of her employment on August 5, 2009, and August 17, 2009, to her left ankle or her eye impairment. Claimant asserted without contradiction that she paid for and was not reimbursed for $245.00 in travel expenses back to the U.S. for treatment; medication for eye treatment (Restasis and Pagaday); glasses; and travel expenses to and from her physicians since the summer of 2011. I find she is entitled to be reimburse under the Act for the reasonably and necessary costs she expended for such.

IV. INTEREST AND ATTORNEY FEES

A. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

B. Attorney Fees

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

V. ORDER

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

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from August 5, 2009, to March 17, 2010, based on an average weekly wage of $2161.67 and a corresponding maximum compensation rate of $1200.62. Thereafter, Employer shall pay to Claimant the maximum compensation rate of $1200.62 for ninety-six (96) weeks, or $115,259.52, according to the schedule as set forth in Section 908(c)(5)and Section 908(c)(16) of the Act.

2. Employer shall be entitled to a credit for all compensation previously paid to Claimant for his injuries of August 5, 2009, and August 17, 2009.

3. Employer shall pay Claimant for all past and future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act including $245. 00 in expenses for travel back to the U.S. for treatment; medication for eye impairment (Restasis and Pagaday); glasses; and travel expenses to and from her physicians since the summer of 2011.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. Section 1961.

5. Claimant' s counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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

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CLEMENT J. KENNINGTON
Administrative Law Judge