

**U.S. Department of Labor**

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**Issue Date: 01 June 2012**

**Case Nos.: 2011-LDA-583  
2011-LDA-584  
2011-LDA-585**

**OWCP Nos.: 02-191350  
02-197930  
02-197931**

**In the Matter of:**

**TERESA WHITAKER,  
Claimant**

**v.**

**SERVICE EMPLOYEES INTERNATIONAL, INC.,  
Employer**

**and**

**CHARTIS WORLDSOURCE,  
Carrier**

**APPEARANCES:**

**GARY B. PITTS, ESQ.,  
On Behalf of the Claimant**

**LIMOR BEN-MAIER, ESQ.,  
On Behalf of the Employer**

**BEFORE: PATRICK M. ROSENOW  
Administrative Law Judge**

**DECISION AND ORDER**

## Procedural Status

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act),<sup>1</sup> brought by Claimant against Employer and Carrier.<sup>2</sup> The matter was referred to the Office of Administrative Law Judges for a formal hearing on 22 Jul 11. All parties were represented by counsel. On 7 Nov 11, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:<sup>3</sup>

### Witness Testimony of Claimant

### Exhibits<sup>4</sup>

Joint Exhibits (JX) 1-2  
Claimant's Exhibits (CX) 1-10  
Employer's Exhibits (EX) 1-6, 8, 15, 17

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witness, and the arguments presented.

## **FACTUAL BACKGROUND**

Claimant was diagnosed with glaucoma in 2001 and has been treated for that condition since. She went to work for Employer in Iraq in 2004, driving a truck in convoys for three years and then spending a year and a half as an administrative assistant. She fell on 4 Jul 09, sought medical attention and left Iraq permanently on 25 Jul 09. Since then, Employer has been providing Claimant temporary total disability benefits for a psychological injury she alleges she sustained on 26 Jan 08.

## **STIPULATIONS**<sup>5</sup>

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<sup>1</sup> 33 U.S.C. §§901 *et seq.*

<sup>2</sup> Henceforth collectively referred to as Employer.

<sup>3</sup> I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

<sup>4</sup> Counsel were cautioned that they must cite the specific page of any exhibits of more than 20 pages (CX-1 and EX-8) or the transcript page of any deposition of a witness who also testified in person during the hearing (EX-4) for those pages to be considered a part of the record upon which the decision is based.

1. The dates of Claimant's injuries, should they be found compensable, are 26 Jan 08 for the psychological, 14 May 09 for the eye, and 4 Jul 09 for the fall.
2. Any injuries suffered at those times occurred during the course and scope of employment and during an Employer/Employee relationship.
3. There was timely notice, controversion, and claim.
4. An informal conference was held on 23 Jun 11.
5. The Claimant's Average Weekly Wage for all alleged injuries was \$1,727.38.<sup>6</sup>
6. Employer has paid the correct amount of total disability to Claimant for her psychological injury since July 2009.<sup>7</sup>

## ISSUES IN DISPUTE & POSITIONS OF THE PARTIES

Claimant argues that her preexisting glaucoma was aggravated by her employment and seeks medical benefits for its treatment, in addition to a finding that it is a totally disabling condition. Employer counters that the current condition of her eyes is the result of the natural progression of her preexisting glaucoma, unrelated to her employment.

Claimant also argues that her fall in July 2009 resulted in carpal tunnel syndrome (CTS) and also renders her totally disabled. She seeks medical treatment, specifically release surgery. Employer argues that her condition is not disabling, surgery is neither reasonable, appropriate, nor necessary, and at most she would have a two percent permanent impairment.

Finally, Claimant argues that the psychological condition for which Employer has paid temporary total disability benefits since 2009 became permanent on 3 Nov 10, and seeks an order to that effect. Employer objects to any such order, arguing that the issue was never properly raised and is not ripe for adjudication.

## LAW

### Causation

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of and in the course of employment[.]"<sup>8</sup> In the absence of substantial evidence to the contrary, it is presumed the claim of an employee comes within the provisions of the Act.<sup>9</sup> The presumption takes effect once a claimant establishes a *prima facie* case by

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<sup>5</sup> JX-1-2; Tr. 7-35.

<sup>6</sup> JX-2 was submitted by the parties post hearing.

<sup>7</sup> There is a dispute as to permanency. See *infra*.

<sup>8</sup> 33 U.S.C. §902(2).

<sup>9</sup> *Id.* at §920(a).

proving that she suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.<sup>10</sup>

A claimant need not affirmatively establish a causal connection between her work and the harm she has suffered, but rather need only show that: (1) she sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which *could have caused* the harm or pain.<sup>11</sup> These two elements establish a *prima facie* case of a compensable injury supporting a claim for compensation.<sup>12</sup>

A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption.<sup>13</sup> The presumption does not apply, however, to the issue of whether physical harm or injury occurred<sup>14</sup> and does not aid the claimant in establishing the nature and extent of disability.<sup>15</sup>

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that the claimant's condition was neither caused by her working conditions nor aggravated, accelerated, or rendered symptomatic by them.<sup>16</sup> "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion.<sup>17</sup> The employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).<sup>18</sup> When the claimant alleges aggravation of or contribution to a preexisting condition, the employer has to establish that the claimant's condition was not caused or aggravated by that employment.<sup>19</sup> Employers accept their employees with the frailties and conditions that predispose them to bodily injury.<sup>20</sup> The testimony of a physician that no relationship exists between an injury and claimant's employment,

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<sup>10</sup> *Gooden v. Dir., OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998).

<sup>11</sup> *Id.*, citing *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 331 (1981), *aff'd sub nom. Kelaita v. Dir., OWCP*, 799 F.2d 1308 (9th Cir. 1986).

<sup>12</sup> *Id.*

<sup>13</sup> See *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Dir., OWCP*, 681 F.2d 359 (5th Cir. 1982).

<sup>14</sup> *Devine v. Atl. Container Lines, G.I.E.*, 25 BRBS 15, 19 (1990).

<sup>15</sup> *Holton v. Indep. Stevedoring Co.*, 14 BRBS 441, 443 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112, 119 (1979).

<sup>16</sup> See *Gooden*, 135 F.3d at 1068; *Conoco, Inc. v. Dir. [Prewitt]*, 194 F.3d 684, 690 (5th Cir. 1999), citing *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986).

<sup>17</sup> *Avondale Indus. v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1988), citing *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988); see also *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 287 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of the evidence").

<sup>18</sup> See *Smith v. Sealand Terminal, Incl*, 14 BRBS 844, 845-46 (1982).

<sup>19</sup> *Rajotte v. General Dynamics Corp.*, 18 BRBS 85, 86 (1986).

<sup>20</sup> *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-48 (D.C. Cir. 1967).

however, may be sufficient to rebut the presumption.<sup>21</sup> The Board has held that unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption.<sup>22</sup>

To establish the injury is work-related, the claimant does not have to prove the employment-related dangers or exposures were the sole or even predominant cause of her injury.<sup>23</sup> "Under the 'aggravation rule,' where an employment-related injury combines with, or contributes to, a preexisting impairment or underlying condition, the entire resulting disability is compensable and the relative contributions of the work-related injury and the preexisting condition are not weighed to determine claimant's entitlement."<sup>24</sup>

The mere existence of a prior injury does not establish that the current condition is a result of that injury or that the preexisting condition was not aggravated by the work accident.<sup>25</sup> "Whether circumstances of...employment combined with [a claimant's] disease so to induce an attack of symptoms severe enough to incapacitate him or whether they actually altered the underlying disease process is not significant. In either event his disability would result from the aggravation of his existing condition."<sup>26</sup>

Once an employer offers sufficient evidence to rebut the presumption, it is overcome and no longer controls the outcome of the case.<sup>27</sup> If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.<sup>28</sup>

### Nature and Extent

Once it is determined that a claimant suffered a compensable injury, the burden of proving the nature and extent of the disability rests with her.<sup>29</sup> The question of extent of disability is an economic as well as a medical concept.<sup>30</sup> Total disability is the complete inability to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, the claimant must show that she cannot return to her regular or usual employment due to her work-related injury. "Usual" employment is the claimant's regular duties at the time of injury. The claimant

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<sup>21</sup> See *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129-30 (1984).

<sup>22</sup> *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 15, 20 (1995).

<sup>23</sup> See *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966).

<sup>24</sup> *Johnson v. Ingalls Shipbuilding, Inc.*, 22 BRBS 160, 162 (1989), citing *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986).

<sup>25</sup> *Banks v. Service Employers Int'l, Inc.*, (Unpublished) BRB No. 06-0486 (March 14, 2007).

<sup>26</sup> *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389 (1st Cir. 1981).

<sup>27</sup> *Noble Drilling Co. v. Drake*, 795 F.2d at 481.

<sup>28</sup> *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 262 (4th Cir. 1997).

<sup>29</sup> *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985).

<sup>30</sup> *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840, 842 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

does not need to establish that she cannot return to any employment at this point, only that she cannot return to her former employment.<sup>31</sup>

A permanent disability is one that has continued for a lengthy period of time and appears to be of an indefinite duration, compared to one in which recovery may be expected after a normal healing period.<sup>32</sup> Any disability suffered by a claimant before reaching maximum medical improvement (MMI) is considered temporary in nature.<sup>33</sup>

The most common approach to determining whether an injury is permanent or temporary is to ascertain the date of MMI. The determination of when MMI is reached is largely a question of fact, based on medical evidence presented at hearing and in the record.<sup>34</sup>

The date of maximum medical improvement does not have direct linkage to the question of whether a disability is total or partial, because the nature and extent of a disability require separate analysis.<sup>35</sup> The date on which the employer establishes the existence of suitable alternate employment is the commencement date of the claimant's permanent partial disability benefits, and a claimant may collect permanent total disability benefits from the date of MMI to the date her permanent partial disability award commences.<sup>36</sup>

In evaluating evidence, the ALJ must determine the credibility and weight to be attached to the testimony of the medical witnesses and is entitled to deference in doing so.<sup>37</sup> Generally, the opinion of a treating physician is entitled to greater weight than the opinion of a non-treating physician.<sup>38</sup> However, an ALJ is not bound by the opinion of one doctor and can rely on an independent medical evaluator's opinion and evidence from the medical records over the opinion of the treating doctor.<sup>39</sup> A claimant's credibility may be relevant if in developing their opinions, doctors relied on what the claimant told them.<sup>40</sup>

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<sup>31</sup> *Elliott v. C&P Tel. Co.*, 16 BRBS 89, 91 (1984).

<sup>32</sup> *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968).

<sup>33</sup> *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 n. 5 (1985), citing *Trask*, 17 BRBS 56.

<sup>34</sup> *Trask*, 17 BRBS at 60-61.

<sup>35</sup> *Rinaldi* 25 BRBS at 130 (remanding case to ALJ to determine the date on which employer established suitable alternative employment, and thus the commencement date of claimant's permanent partial disability benefits).

<sup>36</sup> *Id.* at 131.

<sup>37</sup> *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1990); *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 157 (1993).

<sup>38</sup> *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830 (2003) (in matters under ERISA and the LHWCA, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference, citing *Pietrunti v. Director, OWCP*, 119 F.3d 1035 (2d Cir. 1997)).

<sup>39</sup> *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997).

<sup>40</sup> *Cunningham v. Astrue*, No. C10-1081-RAJ-BAT, 2011 WL 1154543, at \*6 (W.D. Wash., 2011) (Social Security administrative law decision).

## Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.<sup>41</sup>

An employer is liable for all medical expenses which are the natural and unavoidable result of a claimant's work injury. For medical expenses to be assessed against an employer, the expenses must be both reasonable and necessary.<sup>42</sup> Medical care must also be appropriate for the injury.<sup>43</sup> It is the claimant's burden to establish the necessity of treatment rendered for his work-related injury.<sup>44</sup> A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.<sup>45</sup> Section 7 does not require that an injury be economically disabling for a claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.<sup>46</sup>

## Issues Ripe for Adjudication

Generally, all issues should be adjudicated in one proceeding to avoid piecemeal litigation and procedural delays.<sup>47</sup> While formal hearings normally address issues noted by the parties in pre-hearing statements prior to transfer from the District Director, they may be expanded to allow consideration of new issues if the evidence presented warrants their consideration.<sup>48</sup> However, parties must be notified and given the opportunity to present argument and new evidence on a new issue which arises during the course of a hearing.<sup>49</sup>

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<sup>41</sup> 33 U.S.C. § 907(a).

<sup>42</sup> *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).

<sup>43</sup> 20 C.F.R. § 702.402.

<sup>44</sup> See *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

<sup>45</sup> *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984).

<sup>46</sup> *Ballesteros*, 20 BRBS at 187.

<sup>47</sup> 20 C.F.R. § 702.338.

<sup>48</sup> 20 C.F.R. § 702.336(a).

<sup>49</sup> 20 C.F.R. § 702.336(b).

## EVIDENCE

*Claimant testified at the formal hearing and in her deposition in pertinent part:*<sup>50</sup>

She was born in Dallas, Texas, became pregnant at 16, and accelerated her high school studies to earn a diploma. She earned a medication aide certificate from El Central College and a word processing certificate from Houston Community College. Prior to working in Iraq, she was a truck driver and sometimes did dispatch.

After she was diagnosed with glaucoma in 2001 by Dr. Humbata, she went to Maria and Associates to get a medication, Travatan. She first filed for Social Security benefits for glaucoma around 2001. She thought that even though she had no symptoms, because she had a diagnosis, she should not have to work. Her friend was receiving disability benefits for lupus, so she thought she could get a check too. She was told she did not have enough quarters to receive disability benefits, but could apply for Supplemental Income. If she had been awarded Social Security benefits when she first applied, she would not have gone back to work. Her mother receives Social Security for schizophrenia, but also has glaucoma. Claimant continued to apply for benefits. In June 2009, she refiled for benefits and was awarded an amount. She cannot not recall the date listed as the onset of her disability. She kept treating with her eye doctor at least every six months until she went overseas.

In her pre-employment physical, Dr. Parson recommended that she get glasses, but also said she could take her contacts with her. She has worn contacts since the seventh grade and in emergencies she will put water on her contacts. She passed the physical and was accepted as a truck driver. Neither of her doctors voiced concerns for her eyes and working overseas. Before she left for Iraq, she was prescribed Alphagan, an additional medication to take twice a day. She was able to follow their treatment recommendations and use the eye drops as they requested.

When she left for Iraq in 2004, her vision was 20/40, but it kept decreasing over her time there. She worked mostly as a truck driver, but also did a year-and-a-half as an administrative assistant. Her driving job consisted of going on convoys and the temperature would get up to 120 degrees. She took her glaucoma drops with her, but could not keep them refrigerated. She took one medication at night, and two during the day. Some days the convoy would not return to base, so she would

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<sup>50</sup> Tr. 37-109; EX-4, (as cited, see n.4).

not be able to get to her medication that day. However, if she was warned ahead of time that they would not be returning, she would take the medication with her. The convoys were attacked frequently. Over the years, she went on approximately 50 convoys. Ninety percent of those would get delayed, and she would miss her medications.

The environment in Iraq was very dusty and dust storms would come through often. She would go to a medic if something flew into her eye and had her eyes washed out many times in May 2008. Her glaucoma worsened that year. The medics she would see were not physicians, so she did not have a glaucoma specialist in Iraq. However, she could see well enough to drive and do her work duties.

Three years into her employment, she no longer went on convoys, and would not be gone all night and miss her medication. She was still subject to the climate, though. She never ran out of her medication or missed doctor appointments while she was overseas and kept her medications in a sealed refrigerator that was not contaminated. Her medicine was never contaminated overseas, but some debris from scrap metal to rocks flew into her eye. On one instance, a fire extinguisher blew up when she was driving her truck.

She went on R&R every six months and would see her glaucoma doctor and make sure she had her medication. Her last R&R was probably 21 days in June 2009. She was on three medications for her eyes at the time, Travatan, Alphagan, and Alstostin. She first started seeing Dr. Kooner in 2009. She treated with Dr. Kooner in Dallas, and he prescribed her a third medication, Alstostin. She kept the Travatan in the refrigerator, and had to access it at night.

On 4 Jul 09, she was on her way into a facility when she fell on her right hand and her knee. She weighed 220 pounds at the time and was wearing a 10-15 pound backpack. She fell like a rocking chair forward onto her hands and with her weight more onto her right side. She fell on both knees, but more on the right knee. The medic refused to take X-rays. Since then, her right hand hurts, tingles, and throbs. It is hard to position herself, sleep, and grip. Prior to the fall, she felt no right hand or arm pain. She is right-handed. She also hurt her knee at the time and it is still swollen.

Between her July accident and the time she left Iraq, she did keep working as an administrative assistant, but her hand was swollen. The work was just monitoring and she just had to show up.

She left Iraq on 25 Jul 09 and arrived in the States a few days later, around 27 Jul 09. She went home because of her injury, but told Employer that she left for personal reasons, not for her wrist. Her husband told her he was going through open heart surgery, but that was not true. She came home to get X-rayed and see if she had broken anything.

In the Dubai airport, she had dry eyes which caused a little tear. She had no contact solution and put water in her eye. She slept in the airport with her luggage already taken, because she was not willing to give up her passport for a room to stay in. She went to the emergency room straight from the airport in Houston, but because she was a patient at Maria and Associates right across the street, they sent her over there. At that point, the doctor diagnosed Claimant with a tear in her eye. Upon returning to the U.S., Claimant could not see out of her right eye.

She has received checks from Employer since July 2009 and her psychiatric treatment has been covered.

On her 26 Jan 2008 LS-203, Claimant listed a stress disorder. On 14 May 2009, Claimant stated she had vision loss, and her eye was deteriorating. On 4 Jul 2009, Claimant stated she fell onto her right side, injuring her hand.

In October 2009, she circled on a diagram at the doctor's office that she had pain in the right hand and right knee. In March 2010, she noted to Dr. Griffith that she had pain in her right hand, arm, and knee. She still experiences swelling and aching in her right knee.

She has had two glaucoma surgeries and two cataract surgeries. Her last surgery was in November 2010 for cataracts in her right eye. Six months prior to that, she had glaucoma surgery. The pressure in her eye had built up and she was told that without surgery she would go blind. At the hearing, Claimant's physician had discontinued the Travatan and Alphagan. She is taking Prednisone and Alstostin and has eye drops for irritated, itchy eyes. The medications she brought to the hearing included: Alphagan, Travatan, Prednisolone Acetate Ophthalmic Suspension, Ciprofloxacin, Hydrochloride Ophthalmic solution, and Dorzolamide HCL/Timolol Maleate Ophthalmic solution. Claimant commenced taking the Prednisolone after her surgery, and Ciprofloxacin is an antibiotic.

She has glaucoma in both eyes, cannot see anything out of her right eye, and cannot drive anymore because she is legally blind. She couldn't go back to work for Employer, even just to type.

***Reports from Dr. Karanjit S. Kooner and UT Southwestern Medical center state in pertinent part:***<sup>51</sup>

He is a board-certified ophthalmologist and associate professor at UT Southwestern Medical Center and first treated Claimant on 10 Jun 09. He diagnosed Claimant with borderline glaucoma with ocular hypertension, primary open-angle glaucoma, and glaucoma associated with unspecified ocular disorder. When he saw her again on 15 Jun 09, he clarified his assessment as advanced glaucoma. He saw her again on 14 Aug 09 and performed surgery on 3 Sep 09. On 11 Sep 09, he determined she was recovering well from the surgery. On 10 Jun 10, he inserted a shunt and saw her for follow ups on 11, 18, and 30 Jun 10. She returned for visits on 23 Jul 10 and again in October 2010 to treat a cataract.

On 10 Dec 10, in response to a request from Claimant's attorney, he stated she had been initially diagnosed with glaucoma in 2001 and was prescribed medication. He noted she had worked in Iraq from 2005-2009, did not get adequate treatment for her advanced glaucoma, and continued to lose her vision. He reported that when he first saw her in June 2009, she was legally blind, and required several procedures. He opined that she did not receive the care she deserved while in Iraq.

On 21 Jan 11, in another letter to Claimant's attorney, he added that the glaucoma eye drops are temperature and environment sensitive and extreme temperatures and dusty environments in Iraq may have adversely affected them.

***The records of Dr. Norman B. Medow state in pertinent part:***<sup>52</sup>

He is a board-certified ophthalmologist with more than 30 years of experience in treating, lecturing, and teaching. On 9 Nov 11, at the request of Employer, he reviewed Claimant's ophthalmic records from UT Southwestern Medical Center between 10 Jun 09 and 10 Dec 10 and determined that he did not need to physically examine her. He opined that to a reasonable degree of medical certainty she had aggressive glaucoma that poorly responded to maximum medical therapy and required surgical intervention. Despite treatment, she had substantial visual loss in both eyes, worse in the right eye.

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<sup>51</sup> CX-1, 10; EX-8 (as cited, see n.4).

<sup>52</sup>EX-5-6.

He noted that:

Glaucoma can be caused or aggravated by trauma, but only if it is substantial and significant, such as a hemorrhage or a tear of the inside of the eye. Wind, blowing fans, dusty environment and/or the environment in Iraq could not aggravate or worsen preexisting glaucoma. They could affect the eye externally with an irritated eye or a foreign body sensation, but would not affect glaucoma. Dust and sand cannot aggravate glaucoma; they just cause irritation.

He concluded that:

If her medication was not contaminated and properly refrigerated, there was no basis to conclude the conditions in Iraq led to damage of her medications. If Claimant followed her doctor's instructions regarding treatment, had the medications that were offered to her, kept her medical appointments, and used her eye drops as indicated, there is no basis to conclude that her treatment was inadequate.

***Records from Dr. Duane Lee Griffith state in pertinent part:***<sup>53</sup>

Claimant presented on 16 Oct 09 with complaints of right hand pain stemming from a work-related injury on 7 Jul 09. She reported doing physical therapy three times a week, but having numbness and tingling in her hand. Her right hand had decreased range of motion (ROM) at her wrist with swollen fingers, was cooler than her left, and had marked dysthetic sensation on the palmar surface.

On 21 Oct 09, Dr. Griffith recommended an injection, an EMG, PTSD treatment, and referred her to Dr. Camp. On 27 Oct 09, he noted she had a work-related injury with possible complex regional pain syndrome (CRPS) in her hand. He wanted her to see Sheri Stillwell for pain coping skills and C-2 evaluation. On 4 Nov 09, Claimant received a stellate ganglion injection to her right hand.

Claimant presented for a follow-up on 31 Mar 10. He noted decreased ROM with flexion and extension of her wrist and poor grip strength. He opined she had CRPS of her right hand, with swelling and pain but no identifiable pathology. He also diagnosed her with right carpal tunnel syndrome. He planned to have Dr. Camp reevaluate her for carpal tunnel syndrome, continue her medications, and have a follow-up in four months. He explained that he did not agree with the opinions of Dr. Singleton, the independent medical examiner. Specially, he insisted that Claimant had CRPS in her right hand despite a negative bone scan and negative MRI, because MRI findings are not diagnostic criteria for CRPS and

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<sup>53</sup> CX-1, pp. 8-16, 19, 36, 37; EX-8, pp. 64-67.

bone scan findings are not an absolute for CRPS. Moreover, he believed her non-response to the stellate ganglion block did not exclude a diagnosis of CRPS.

On 29 Aug 10, he again saw her and continued to diagnose possible CRPS of the right hand and right carpal tunnel syndrome. He recommended that Claimant see Dr. Camp for her carpal tunnel syndrome.

***The Records from Axis Spine Care state in pertinent part:***<sup>54</sup>

On 12 Nov 09, Claimant treated with Dr. Ellisiv Lien at the referral of Dr. Griffith. Dr. Lien noted Claimant was referred for electrodiagnostic evaluation of right arm pain and complained of neck pain. She stated her symptoms began four months post-injury and were worsening. Her symptoms included numbness of her whole hand, weakness of the right upper extremity, and shooting pain. An EMG was performed and Dr. Lien found evidence of right carpal tunnel syndrome. He prescribed her a neutral wrist splint and referred her to Dr. Camp for a surgical evaluation. Also, Dr. Lien noted symptoms of CRPS type I. He recommended prednisone for 10 days, and prescribed some occupational therapy for desensitization and range of motion.

Claimant returned to Dr. Lien on 10 Dec 09, reporting improved symptoms with outpatient therapy three times a week. She had tested positive for THC, but claimed it came from the house of her sister, who smoked marijuana daily. He reviewed the EMG, and diagnosed her with work-related injury of the right upper extremity causing CRPS of her hand, as well as right carpal tunnel syndrome. He planned to continue Claimant on Neurontin and increase the Ultram, get a C-2 evaluation and pain coping skills from Sheri Stillwell, and a surgical evaluation from Dr. Camp. He recommended a follow-up in two months.

***The records of Dr. John T. Camp state in pertinent part:***<sup>55</sup>

Claimant presented on 15 Dec 09 with right hand pain. He thought her condition sounded like full-blown reflex sympathetic dystrophy (RSD). He noted she was markedly guarded on physical examination, but with coaxing and much encouragement could flex her fingertips into the palm readily without evidence of locking. She had a positive Tinel's at the wrist flexion crease, and some hyperhidrosis. Dr. Camp noted Claimant had 80 degrees of dorsiflexion of the wrist passively, and palmarly, her wrist got down to 60 degrees. An X-ray of her wrist was normal. He assessed her as having right hand reflex sympathetic dystrophy and right carpal tunnel syndrome. He recommended she continue

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<sup>54</sup> CX-1, pp. 20-24; EX-8, pp. 45, 47, 49.

<sup>55</sup> CX-1, pp. 25-26, 29, 30, 50-51; EX-8, pp. 57, 58, 115, 116.

therapy and return to Dr. Griffith for injections, adding that if she improved her guarding, he would consider a carpal tunnel release. However, he noted that surgery in the face of full blown RSD would only make things worse. He released her to full work from the perspective of her wrist, but noted that she would be off work through her treating doctor.

On 12 Jan 10, Claimant returned to Dr. Camp with right hand complaints. He reviewed the results of her MRI and bone scan. She had a normal MRI and minimal uptake into her right hand with the bone scan. On physical examination, she was much less guarded than on her last visit, but had a positive Tinel's at the wrist flexion crease, and a positive carpal compression test. He assessed Claimant with significant right carpal tunnel syndrome, but no evidence of RSD. He planned to proceed with a surgical right carpal tunnel release, but wanted her to use her hand normally as tolerated until the surgery date. He planned to keep her off work until her stitches came out, postoperatively.

On 28 Jan 10, he noted that although an IME report stated Claimant was at MMI with a 1% total body impairment, she would benefit from a carpal tunnel release due to "significant carpal tunnel syndrome," even though her RSD had improved significantly.

On 16 Sep 2010, Dr. Camp noted Claimant's RSD was under control. Claimant presented with complaints of numbness and tingling in her right hand, and stated she had been burning herself because of it. She came to Dr. Camp to schedule a carpal tunnel release, and had been diagnosed with post traumatic stress disorder (PTSD). On physical examination of her right wrist and hand, she had a positive Tinel's at the wrist flexion crease, subjective numbness in the median nerve distribution, and her Thenar strength was weak at about 3-4/5. He diagnosed her with significant and longstanding right carpal tunnel syndrome. Dr. Camp wanted to proceed with surgery, and he kept her off work because of her multiple medical problems, along with being legally blind and having PTSD.

***IME records of Dr. Wright Singleton show in pertinent part:***<sup>56</sup>

He examined Claimant on 17 Dec 09. He took her history and she presented with complaints of right hand pain, burning with loss of range of motion in the wrist, and numbness in her index and long finger with painful movement of fingers. He reviewed a three-phase bone scan, which revealed no evidence of RSD. He found increased activity within the soft tissues of the left hand, but no correlation in the right hand. An MRI of her right hand showed focal inflammatory signals at the palmar aspect of the hand between the middle and ring fingers. Also, it revealed

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<sup>56</sup> EX-15.

an isolated margin of erosion, associated with the proximal aspect of the fourth finger metastatic.

After a physical examination, he diagnosed Claimant with a right hand and right knee contusion, and mild right carpal tunnel syndrome. He noted that her right knee was normal, and he ruled out RSD due to the negative bone scan in her right hand, wrist, and upper extremity. He opined that any further treatment to her right hand/wrist would be purely elective. Moreover, he stated surgery was not recommended for mild CTS by the Official Disability Guidelines. Opining that no further treatment was needed for her knee, he concluded that that no further treatment or diagnostic tests were needed or recommended for her 4 Jul 09 injury.

He noted that Claimant exhibited self-limiting behaviors in the FCE, and found she could return to full, unrestricted duty work by 7 Jan 10. He believed she had reached maximum medical improvement by 17 Dec 09. Since she had no muscle wasting, no evidence of significant neuropathy, normal range of motion, and no evidence of allodynia, causalgia, reflex sympathetic dystrophy, joint hypertrophy, angulation, or other impairable abnormality of the right hand/wrist he determined she had a 2% impairment of her upper extremity and no impairment to her knee.

***The records of Dr. M. Ricardo C. Schack state in pertinent part:***<sup>57</sup>

He conducted a psychiatric evaluation of Claimant on 3 Mar 10. He took her history and diagnosed her with recurrent major depression, alcohol dependence, and acute stress disorder.

On 3 Nov 10, he found she was very brittle, easily overwhelmed by even minimal stressors and could not work at all. He noted he did not expect that condition to change. He thought Claimant was not competent to perform her usual job because of overwhelming anxiety, poor judgment, and very low tolerance to stressors. He opined that she was totally and permanently disabled.

On 26 Jan 11, he saw her again and opined she was having PTS symptoms.

***Various Department of Labor forms state in pertinent part:***<sup>58</sup>

Claimant filed claims for stress disorder, loss of vision, right hand injury and injury to her body in general. At the informal conference, the examiner noted Employer was paying disability on the psychological claim, but controverting the eye claim based on causation. The informal conference recommendation did not

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<sup>57</sup> CX-1 (as cited, see n.4); EX-8 (as cited, see n.4).

<sup>58</sup> CX-2, 4-5, 7 (not considered for the substance of any recommendation made therein), 8; EX-1-3.

address causation or nature and extent of any psychological disability. It did address causation as to the glaucoma, average weekly wage and nature and extent of the hand injury. Claimant's pre-hearing statement notes that Claimant suffered a worsening of her psychological condition, an aggravation of preexisting glaucoma, and a right hand injury. It reported the parties had reached agreement that Claimant had suffered a psychological and hand injury, was temporarily totally disabled, and was not yet at MMI for all conditions. It listed nature and extent, fact of eye injury, and causation as issues for adjudication.

## ANALYSIS

The primary focus of the litigation at formal hearing was on whether Claimant's employment in Iraq aggravated her preexisting glaucoma, the nature and extent of any disability due to her hand injury, and whether her requested surgery is reasonable, appropriate, and necessary. The parties now also dispute whether or not Claimant has reached maximum medical improvement (MMI) for her psychological condition. Claimant insists that she has and seeks a ruling to that effect. Employer objects that the question of MMI for the psychological condition was not properly raised.

### Psychological Injury Nature and Extent

The record clearly demonstrates that Employer accepted the claim for the psychological injury and has been compensating Claimant for a total disability. The Claimant's prehearing statement was somewhat vague as to the issues presented for adjudication. In the abstract, it might be read broadly enough to indicate that the nature and extent of the psychological injury was an issue for litigation and adjudication. However, the recommendation from the informal conference indicates that there was no dispute about whether Claimant had reached MMI for her psychological injury. Indeed, a reading of the transcript confirms that at the hearing, Employer understood that permanency was not an issue and Claimant's Counsel's initial responses appeared consistent with that understanding.<sup>59</sup>

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<sup>59</sup> Tr. 9-12

JUDGE ROSENOW: Okay. And the psychiatric component?

MS. BEN-MAIER: There shouldn't be any issue as to that.

JUDGE ROSENOW: There shouldn't be?

MR. PITTS: There's not an issue on it.

JUDGE ROSENOW: Okay.

MR. PITTS: They're accepting that.

MS. BEN-MAIER: We're paying her 1,009.05 ... Temporary total benefits ...

MR. PITTS: We contest the AWW. . . .

JUDGE ROSENOW: Okay. But everybody agrees as we're sitting here today she's temporary total.

MR. PITTS: Correct.

JUDGE ROSENOW: Okay. So we can -- I mean, to a certain extent we're stipulating to that -- at least as of today. I mean, you're not locked in -- that would just lock you in I guess from -- and you're not looking on your client's behalf for any back comp or anything like that.

Employer now objects to any adjudication and finding as to the permanency of the psychological injury because it was not on notice that it was an issue and not prepared to offer evidence on the matter. That could be resolved with an opportunity to reopen the record and submit evidence and legal argument. However, neither party suggested doing that and I decline to do so *sua sponte*, recognizing that such a reopening might require lengthy medical expert reviews and additional depositions or reconvening for additional testimony. Moreover, that would not address the other major problem, which is that the issue was never raised before the district director and considered at informal conference. Consequently, with no ripe dispute as to nature and extent of the psychological injury pending, I deny Claimant's request for a finding in that regard.

### Glaucoma Causation

Claimant alleges that: (1) she has advanced glaucoma; (2) in the course of her job in Iraq she was (a) exposed to environmental dust, dryness, and debris, (b) unable to properly maintain or use her medication, (c) missed doctors' appointments, and (d) had to take her contacts out and clean them with water on her redeployment trip; and (3) Those various factors could have aggravated her preexisting glaucoma to lead to her present condition. In order to invoke the presumption of causation, she must establish (1), (2) and (3). There is no dispute that she has advanced glaucoma. There is significant disagreement as to (2) and (3).

I first note that Claimant was not a credible witness. Her deposition testimony was at times in direct contradiction to her hearing testimony. The most probative evidence related to Claimant's credibility was her statement that she believed she was entitled to disability benefits for her glaucoma, even if the condition was asymptomatic. The most candid and credible thing she said was that she felt that since her friend was

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MR. PITTS: No, other than the -- you know, the difference between the AWW.

JUDGE ROSENOW: Well, yeah, I understand that. ... once we resolve whatever I say the average weekly wage is no one's going to have any other squawks about payment up through today.

MR. PITTS: That's correct.

JUDGE ROSENOW: And actually looking forward because you're not really arguing about that. Is she at MMI for -- what are you paying her the disability for?

MS. BEN-MAIER: The psych claim.

JUDGE ROSENOW: The psych claim.

MR. PITTS: And --

JUDGE ROSENOW: And is she at MMI for that?

MR. PITTS: She probably --

JUDGE ROSENOW: No, obviously not because you're paying her temp.

MR. PITTS: Well, she's not at MMI regarding the hand is our position.

MS. BEN-MAIER: Our position is she is at MMI regarding the hand, but because she still has the psych component she's at temporary.

MR. PITTS: But I thought we had somebody saying she's at MMI on the psych. Is that not true? We were asking for -- let's see. Yeah, we have an OWWCP5A from November 3 of '10 saying that she's totally permanently disabled regarding the psych claim.

getting benefits for lupus, she should get some for her glaucoma and that if she had been able to obtain disability benefits, she would not have gone to work for Employer.

As demonstrated in the conflicts between her deposition and hearing testimony, Claimant demonstrated a willingness to say whatever she believes is in her best interests. She told Employer that she left her job in Iraq for personal reasons, but then later said it was to see if her wrist was broken. She modified what she recalled may have happened to her eyes based on subsequent medical opinions. Although no doctors stated Claimant was malingering with respect to her pain complaints, she exhibited self-limiting behavior during her FCE. Claimant conceded at deposition she never ran out of medication or missed doctor appointments while she was overseas, and her medications were not contaminated, but now asserts that her medication was not refrigerated and that she was unable to consistently take her medication while overseas, worsening her condition.

Moreover, Claimant only worked as a truck driver for the first three years of her time in Iraq. For the remainder of her employment overseas, she did administrative work. Consequently, for over the last year Claimant was in Iraq, she was not going on convoys and would have had access to her refrigerated medicine. She testified that she never ran out of her medication, and she kept it in a sealed refrigerator that was not contaminated. As a result, I do not give significant weight to her testimony, particularly that given during the hearing. I therefore find that she failed to establish that she was unable to properly maintain or apply her medication or that she was unable to obtain proper care from her doctors.<sup>60</sup>

That leaves the remaining allegations of various traumas and environmental conditions directly affecting her eyes. Again, I find her incredible testimony to be insufficient to establish those factors existed. However, even if they did, Dr. Kooner never stated that environmental conditions, dust and wind, could have accelerated Claimant's glaucoma. He said that the conditions in Iraq could have played havoc with Claimant's *drops*, because they are temperature and environment sensitive. Moreover, Dr. Medow reviewed Claimant's records and determined that glaucoma can only be aggravated by a substantial or significant tear, and not by environmental conditions. He opined that dust, wind, and blowing fans could only irritate the eye itself, but would not cause glaucoma to accelerate.

Therefore, I find that Claimant failed to establish a *prima facie* case that her glaucoma was aggravated in Iraq.<sup>61</sup>

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<sup>60</sup> While her doctor based his opinion on a contrary finding, he was clearly relying on the history she gave him.

<sup>61</sup> However, even if Claimant was determined to have invoked the presumption of causation, Dr. Medow's opinion is sufficient to rebut it and the weight of the evidence would have been that her glaucoma was not aggravated by her time or work in Iraq.

## Hand Injury

While Employer does not dispute the fact that Claimant fell and sustained some type of injury to her right hand, the parties disagree on the nature and extent of that injury, and the appropriate medical care for it.

Claimant argues that carpal tunnel release surgery is reasonable, appropriate, and necessary, that she consequently has not reached maximum medical improvement (MMI), that her hand injury alone would prevent her from returning to her original job, and she is therefore temporarily totally disabled. Employer responds that the surgery is not required and that she reached MMI for her hand no later than December 2009, with at most a two percent permanent partial impairment.

Claimant's treating physician, Dr. Camp, has not assigned work restrictions based on her hand. He did note at one point she was unable to work, but cited multiple medical problems, including PTSD and being legally blind. Moreover, he wanted her to continue using her hand as tolerated prior to the surgery. No doctor assigned any restrictions to Claimant based on the use of her right hand. Given her lack of credibility, I give her subjective claims that her hand would prevent her from working no significant probative weight. I find that Claimant has failed to establish her hand prevents her from returning to her original job and that she has no disability related to the hand.

However, Dr. Camp also wanted to proceed with a carpal tunnel release. While Dr. Singleton opined surgery was not necessary and not recommended under the Official Disability Guidelines, he only saw Claimant on one occasion. Dr. Camp has treated Claimant's right hand multiple times, and continuously mentioned surgery in his plans for her. Moreover, Dr. Griffith believed Claimant's carpal tunnel syndrome was severe enough to refer her to Dr. Camp for the condition. Dr. Lien also referred Claimant to Dr. Camp for a surgical evaluation. Thus, the weight of the medical evidence is that the surgery is reasonable, appropriate, and necessary. As a result, she has not yet reached MMI for her hand.

### **ORDER AND DECISION**

1. Claimant's average weekly wage at all relevant times was \$1,727.38.
2. The claim for disability and medical benefits for glaucoma is denied.
3. The claim for past disability related to the hand injury is denied. Employer shall pay medical expenses in accordance with Section 7 relating to her right hand/wrist, specifically including the surgery as recommended by Dr. Camp.

4. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorneys' fees.<sup>62</sup> 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. In the event Employer elects to file any objections to said application, it must serve a copy on Claimant's counsel, who shall then have fifteen (15) days from service to file an answer thereto.

**ORDERED** this 1<sup>st</sup> day of June, 2012 at Covington, Louisiana.

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**PATRICK M. ROSENOW**  
**Administrative Law Judge**

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<sup>62</sup> Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524, 527 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 823 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director.