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Issue date: 20Jun2002

CASE NUMBER: 1997-LHC-2878

OWCP NO.: 07-134693

IN THE MATTER OF

PETER REAUX,
Claimant

v.

COLUMBIA GULF TRANS CO.,
Employer

and

TRAVELERS INSURANCE CO.,
Carrier

APPEARANCES:

Peter Reaux,
Pro Se

John N. Chappuis, Esq.
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER ON REMAND DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Peter Reaux (Claimant) against Columbia Gulf Trans Co. (Employer), and Travelers Insurance Co. (Carrier). In a previous Decision and Order, dated October 16, 2000, I denied benefits, in part, on the basis that Claimant's psychological condition was not caused or aggravated by his workplace accident. On November 19, 2001, the Board remanded that

issue with instructions to apply the presumptions in Section 20(a) of the Act. 33 U.S.C. § 920(a) (2001). *See generally Lennon v. Waterfront Transport*, 20 F.3d 658 (5th Cir. 1994). Subsequently, I reopened the record to receive testimony from Claimant and his chosen psychologist, Dr. Lynn Aurich on April 25, 2002, in Lafayette, Louisiana. At the hearing Claimant introduced one additional exhibit - the deposition of Dr. Aurich - which was admitted, and Employer, introduced one additional exhibit - the curriculum vitae of Dr. Aurich - which was admitted.

Based upon 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. STATEMENT OF THE CASE

A. Chronology:

As adopted by the Board, the chronology of the present claim is as follows:

> Claimant slipped and fell during the course of his employment on September 29, 1994. Claimant was treated at Our Lady of Lourdes Hospital on October 1, 1994, where he was diagnosed with a back and left knee injury. Claimant was examined by Dr. Budden, who diagnosed a thoracolumbar strain and released claimant to return to work without restriction on October 19, 1994. Employer voluntarily paid medical benefits from the date of injury until October 14, 1994, and compensation for temporary total disability, 33 U.S.C. §§908(b), until October 20, 1994. Claimant never returned to work. On December 16, 1995, claimant was involved in an automobile accident and was transported by ambulance to University Medical Center of Lafayette, where he complained of low back pain and right knee and ankle pain. Claimant underwent a psychiatric examination on June 27, 1997, by Dr. Benbow, who diagnosed chronic depression. Claimant's neck, back, and left knee were examined by Dr. Kucharchuk on August 5, 1997. Dr. Kucharchuk reported no objective findings supporting claimant's symptomatology except for mild cervical and lumbar osteoarthritic changes. Dr. Kucharchuk opined that claimant is sincere, he is not malingering, and that claimant's complaints of pain arise from a psychological overlay and somatization. Dr. Gidman examined claimant on January 30, 1999. He found no objective evidence to explain claimant's reported neck, back, and left knee pain, and he opined there was evidence of psychological factors causing claimant's subjective complaints. At the formal hearing on May 10, 2000, claimant appeared without counsel. After the hearing, the administrative law judge ordered claimant to undergo a psychological evaluation. Claimant was examined by Dr. Aurich, who interpreted test results as indicating chronic psychological maladjustment, somatization in conjunction with neurotic or psychotic disorders, severe depression, and severe anxiety. Dr. Aurich opined that claimant's psychological and emotional problems pre-existed the September 29, 1994, work injury, and that it is possible the work injury aggravated claimant's psychological condition, although he could not state that it did

with a reasonable degree of medical certainty.

Reaux v. Columbia Gulf Transmission Co., BRB N. 01-0267 (Nov. 19, 2001)(unpub.)(slip op. at 2)(citations omitted).

In my original Decision and Order, dated October 16, 2000, I determined: Claimant suffered from a thoracolumbar strain due to his work injury, but Claimant was capable of returning to work on October 19, 1994; Employer was not liable for additional medical costs due to a failure of Claimant to request authorization to change physicians; Claimant did not require additional treatment for his back; and Claimant's psychological condition was not caused or aggravated by his employment. All these findings were affirmed by the Board except my determination that Claimant's psychological condition was not caused or aggravated by his employment, which the Board remanded for application and analysis of the Section 20(a) presumption of causation. Subsequently, I re-opened the records to obtain the testimony of Claimant's psychologist Dr. Aurich.

B. Hearing & Deposition Testimony of Dr. Lynn W. Aurich

Dr. Aurich, licensed in clinical psychology and clinical neuropsychology, reviewed his previous evaluation from September 6, 2000, and stated that he had no changes to make to his conclusions. (Tr. 7, 11). Dr. Aurich explained that his diagnosis of undifferentiated somatoform disorder meant that Claimant had some physical complaints that could not be explained by a known general medical condition. (Tr. 11). Such physical complaints are in excess of what would be expected from the patient's history, physical exam and laboratory findings. (Tr. 11). The fact that Claimant was unemployed and involved in litigation helped to influence Dr. Aurich's diagnosis of psychological and environmental problems, and at the time of his examination, in September 2000, Dr. Aurich did not feel that Claimant was disabled. (Tr. 13-14). All of Claimant's psychological conditions pre-dated his accident. (Tr. 14). Specifically, the personality characteristics that contribute to a diagnosis of somatoform disorder are of a long term duration and could not have developed between the date of the accident in 1994 and the date of the date of Dr. Aurich's examination 2000. (Tr. 68, 70). Dr. Aurich considered it "very unlikely" that Claimant's workplace accident aggravated his pre-existing psychological condition. (Tr. 15). Claimant's characteristics are considered long term in nature and Claimant's personality profile is characteristic of emotional reactivity, which is indicative of overacting to minor or mild kinds of problems. (Tr. 16).

The assessment that Claimant's somatofrom disorder was not caused by his work-related injury was further explained in Dr. Aurich's deposition. Dr. Aurich stated that he did not know exactly when Claimant's somatoform disorder arose. (CX 1, p. 20). Explaining his statement "While it is possible that the September 29th, 1994, reported injury aggravated the preexisting personality and emotional problems of this patient, it is difficult to determine that within a reasonable degree of medical certainty," Dr. Auruch stated that it was impossible to tell whether the injury may have aggravated Claimant's symptoms. *Id*. at 41. More likely than not, the nature of Claimant's personality characteristics were part of Claimant's personality prior to the injury. *Id*. Although Dr. Aurich opined that the Claimants' personality characteristics were pre-existing, the somatoform

disorder developed after his workplace injury. *Id*. at 61-62.

At the hearing, Dr. Aurich further explained his earlier statement that he could not rule out all possibilities that Claimant's workplace accident aggravated his pre-existing psychological condition by stating:

> Well, actually, I probably should have worded this differently, Your Honor, but I was trying to say I couldn't rule that in. That there wasn't enough evidence to rule that in . . . as far as a possible factor here. I probably should have worded that differently, and said that it's very unlikely that it would have any effect. And again, that's based on what he presents in his history, which seems consistent with what showed up on test results, and also what we know about the development of personality and certain characteristics. And these tend to be of long duration.
>
> In other words, it didn't just appear overnight or in response to a particular event. Now, the characteristics cause an individual to manifest certain things when they get sick or when they get injured.
>
> They tend to - - this type of personality tends to overreact to all of that. And in this case, as I indicated, there is some strong evidence to suggest that it's of delusional proportions.
>
> Judge Kennington: [L]et's assume, just for the purposes of argument, that it could have been aggravated by the injury, is there anything in his overall medical profile which would prevent him from going back and working - - resuming his former job after he had been released by his medical physician to go back to work?
>
> The Witness: I don't believe so, Your Honor. As I said earlier, he's got some transferable skills. I believe that he could do something. . . . From a medical standpoint, I see nothing in the records or in my examination that would indicate he could not work.
>
> Judge Kennington: Physically? From a psychological standpoint there was nothing to prevent him from going back and resuming his former job?
>
> The Witness: That is correct.

(Tr. 23-25).

In taking Claimants' social and medical history, Dr. Aurich stated that Claimant did not tell him that he was arrested on a DWI charge two or three weeks prior to his workplace accident, and did not tell Dr. Aurich that he re-injured himself in a subsequent automobile crash. (Tr. 16, 21-22). The fact that Claimant omitted these details augmented Dr. Aurich's opinion that his workplace injury

was unrelated to Claimant's psychological condition. (Tr. 22). Dr. Aurich also recommended against any treatment or rehabilitation because Claimant was suspicious about treatment and his anger, mistrust, and hostility would not make him a good candidate. (Tr. 22-23). Additionally, Claimant's profile of somatic delusions and thought disorder meant that he would resist psychological interpretation and treatment. (Tr. 23).

On cross-examination, conducted by Claimant, Dr. Aurich explained that Claimant had very serious problems with adjustment in terms of occupation, social, and psychological functioning. (Tr. 29). Claimant was not malingering, but his method of coping with his symptoms had reached delusional proportions because he actually believed what he said concerning his condition. (Tr. 30). Dr. Aurich did not think that Claimant's condition would bar him from returning to his former job. (Tr. 31).

B. Claimant's Testimony

Claimant testified concerning statements he made to Dr. Aurich during the course of his psychological evaluation. Regarding his prior criminal history, Claimant stated that he did not recall a DWI charge in 1998, but acknowledged a DWI charge in 1994. (Tr. 103). For the 1994 charge, Claimant pled "no contest." (Tr. 105). Claimant did relate to Dr. Aurich a battery charge filed by his ex-wife after she had pawned her wedding ring. (Tr. 105-06). Claimant understood Dr. Aurich's question concerning any other injuries only to be related to employment injuries and he did not consider his subsequent car accident an employment injury. (Tr. 106).

Claimant also wanted to correct Dr. Aurich concerning two statements he made that invalidated a portion of his psychological evaluation. Those statements by Claimant were: "I am unusually sensitive to gravity," and "At times I have been followed by government spies." (Tr. 87). Claimant explained those statements as normal based his community and where he grew up because he felt threatened twenty-four hours a day. (Tr. 89). Claimant explained his unusual sensitivity to gravity on the fact that he understood the word "gravity" as "being close to someone else." (Tr. 91).

Additionally, Claimant stated that he did not like Dr. Aurich's tone of voice when Dr. Aurich questioned him. (Tr. 107). He did not like Dr. Aurich demeanor and Dr. Aurich had an aloofness about him. (Tr. 107). Claimant did not think Dr. Aurich ever afforded him the benefit of the doubt after considering the objective medical evidence. (Tr. 107-08). Claimant complained to Dr. Aurich that the tests he was administered were not meant to be taken by a "black man living in the projects, crippled and broke." (Tr. 108).

Claimant also wore shorts to the hearing so that the Court could see that one thigh and one calf muscle was "a whole inch smaller in circumference." (Tr. 110). Claimant also read into the record a recommendation from Claims Examiner Ernst Lawrence, Jr., from 1996 recommending continuing temporary total disability. (Tr. 117-20). Claimant also presented with a rehabilitation report declaring him severely disabled. (Tr. 122). Both were exhibits introduced at the earlier

hearing, and Claimant desired to revisit them in case they were "overlooked." (Tr. 125).

D. Exhibits

(1) Psychological Evaluation of Dr. Lynn W. Aurich

In my October 16, 2000, Decision and Order in this case I summarized Dr. Aurich's September 6, 2000 report that was based on the results of an evaluation of Claimant conducted on August 1, and 3, 2000:

> Extensive medical records provided by Employer's counsel were reviewed by Dr. Aurich in preparation for and completion of Claimant's psychological evaluation. Dr. Aurich recounted the details of Claimant's September 29, 1994 workplace accident, as well as Claimant's social history, employment history, medical history, and educational history based on provided medical records and a clinical interview with Claimant.
>
> Claimant was administered the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) which indicated a pattern of chronic psychological maladjustment. Claimant was also administered the Wahler Physical Symptoms Inventory (WSI), which indicated that Claimant was an individual who somatized in conjunction with neurotic or psychotic disorders. Further, Claimant was administered the Beck Depression Inventory, which indicated severe depression. Claimant was administered the BECK Anxiety Inventory, which indicated severe anxiety. Claimant was administered the Pain Patient Profile (P3), which testing was invalid due to Claimant's extreme score on the Validity Index. Claimant was administered the Battery for Health Improvement (BHI), which testing was also invalid due to Claimant's unusual responses. Claimant's academic achievement levels were consistent with his educational and occupational background.
>
> In sum, clinical interview and psychometric test indicated Claimant was experiencing chronic psychological maladjustment. Dr. Aurich opined that Claimant demonstrated symptom magnification. The medical records did not reflect adequate objective findings to substantiate Claimant's subjective complaints. Clinical and psychometric results indicated that Claimant suffered from Undifferentiated Sonatoform Disorder, minor central disc bulge at L4-5, small disc protrusion at L5-S1, as well as psychological and environmental problems. Dr. Aurich opined that Claimant's personality characteristics were of long duration and pre-morbid in nature. Dr. Aurich could not determined with a reasonable degree of medical certainty that Claimant's September 29, 1994 workplace accident aggravated his pre-existing personality and emotional problems.

Reaux v. Columbia Gulf Transmission Co., 1997-LHC-2878 (October 16, 2000)(unpub.)(slip op.

at 11-12).

II. DISCUSSION

A. Contention of the Parties

Claimant contends that he established a *prima facie* case for total disability because following his work-place accident, Dr. Kucharchuk stated that Claimant was sincere, not malingering and suffering from pain due to psychological overlay and somatization. Claimant also points to a rehabilitation report, not in evidence, listing him as severely disabled, and medical reports from Drs. Bernard and Gidman as indicating he has psychological injuries, and if totally disabled, then his disability is permanent. Claimant further contends that the expert testimony of Dr. Aurich does not support Employer's burden to show substantial evidence that his injuries were not caused by his work-place accident.

Employer contends that Dr. Aurich established that there is no causal relationship between the workplace accident and Claimant's emotional problems. Additionally, Dr. Aurich clearly established that Claimant's psychological problems do not prevent him from performing his former job or any other work activity.

B. Causation

B(1) Section 20 Presumption

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) (2000); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995); *Addison v. Ryan Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 101 (1986). To rebut the Section 20(a) presumption, the Employer must present substantial evidence that a claimant's condition is not caused by a work related accident or that the work related accident did not aggravate Claimant's underlying condition. *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966); *Kubin*, 29 BRBS at 119.

B(1)(a) Prima Facie Case

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 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. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment.

B(1)(a)(i) Existence of Physical Harm or Pain

It is undisputed that Claimant suffers from a psychological harm in that he has undifferentiated somatoform disorder.

B(1)(b) Establishing That an Accident Occurred in the Course of Employment, or That Conditions Existed at Work, Which Could Have Caused the Harm or Pain

Conditions that are due to congenital and degenerative factors do not constitute a compensable injury. *Lennon v,. Waterfront Transport*, 20 F.3d 658, 662 (5th Cir. 1994); *Director v. Bethlehem Steel Corp.*, 620 F.2d 60 (5th Cir. 1980). Thus, 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.

In *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556, 558 (1979), the Board found a compensable injury when the claimant, Gardner, had a pre-existing problem with his legs caused by bilateral venous insufficiency, which was a progressive disease cumulating in symptoms such as ulcers, swelling and dermatitis. The same symptoms formed the basis of Gardner's claim under the Act. *Id*. The employer argued that Gardner's symptoms were a result of neither an accident nor an injury and that the symptoms did not arise out of or occur in the course and scope of employment. *Id*. Regarding the "accident" element, the Board reflected that Gardner merely engaged in his usual and ordinary employment activity, which required prolonged standing. *Id*. at 558-60. Reasoning that it made no difference that Gardner was not exposed to anything out of the ordinary, and that the injury may have occurred wherever Gardner may have been, the Board stated that it was the "unintentional effect of the of the strain or exertion" that was covered by the Act. *Id*. at 561. (Citing *Wheatley v. Adler*, 407 F.2d 307, 311 (D.C. Cir. 1968)); *Glen Falls Indemnity Co. v. Henderson*, 212 F.2d 617 (5th Cir. 1954)). Accordingly, focusing on the employment and not the pre-existing disease, it was of no consequence that Claimant's ultimate injury would result absent any employment, and the proper inquiry is whether Gardner's injury was an unexpected result of his employment. *Id*. Claimant clearly did not intend to injure himself. *Id*. Therefore, the Board determined that Claimant suffered an "accident" within the meaning of the Act. *Id*. at 564.

Concerning the "arising out of" and "in the course and scope of" elements of Gardner's claim, the employer argued that there was no "aggravation" of Gardner's pre-existing disease because there was no evidence that the natural progression of Gardner's disease was caused or hastened by his employment. *Gardner*, 11 BRBS at 565. Under the aggravation rule, the Board reasoned that all a claimant had to show was that employment aggravated a symptom of the process, not that employment hastened the natural progression of a disease. *Id*. The Board held that the employer

failed to present enough evidence to rebut Gardner's presumption of causation because the Board , and the ALJ, credited the reports of various physicians that the symptoms were related to employment. *Id*. at 566

Likewise, the Fifth Circuit in *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863, 865-66 (5th Cir. 1949), determined that a claimant who suffered from coronary thrombrosis was entitled to compensation when the conditions of his employment required him to climb a ladder to exit a vessel and he suffered a heart attack. The Fifth Circuit elaborated:

> The Act gives compensation for accidental injury or death arising out of and in the course of employment; it does not say caused by the employment. There is no standard or normal man who alone is entitled to workmen's compensation. Whatever the state of health of the employee may be, if the conditions of his employment constitute the precipitating cause of his death, such death is compensable as having resulted from an accidental injury arising out of and in the course of his employment. If the workman overstrains his powers, slight though they be, or if something goes wrong within the human frame, such as the straining of a muscle or the rupture of a blood vessel, an accident arises out of the employment when the required exertion producing the injury is too great for the man undertaking the work; and the source of the force producing the injury need not be external.

Id. at 866 (citations omitted).

Here, Claimant established through the testimony of Dr. Aurich that Claimant's personality characteristics were pre-existing, but he did not have somatoform disorder until after his work-place accident. Dr. Aurich stated that it was "very unlikely" that Claimant work-place accident aggravated his psychological condition. (Tr. 15). Nevertheless, the standard for establishing a *prima facie* case is not whether the work-place injury aggravated Claimant's underlying psychological condition, but whether it could have cause an aggravation. Accordingly, inasmuch as Dr. Aurich acknowledged that Claimant's psychological condition could have been aggravated by his employment accident, Claimant established a *prima facie* case of causation.

B(2) Rebuttal of the Presumption

"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.*, 194 F.3d at 687-88 (citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). 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, Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999)(stating that the hurdle is far lower than a "ruling out" standard).

I find substantial evidence in the record to rebut the Section 20(a) presumption of causation. Dr. Aurich stated at trial that Claimant's disorder could not have developed between the date of his accident in 1994 and the date of his psychological assessment. (Tr. 70). Dr. Aurich considered it "very unlikely" that Claimant's workplace accident could have aggravated Claimant's underlying psychological condition. (Tr. 15). Contrary to Claimant's argument, I do not find that Dr. Aurich's testimony to be incredible based on "flip-flopping." Accordingly, there is substantial evidence in the record that Claimant's psychological condition could not have been caused by his work-related accident.

B(3) Causation Based on the Record as a Whole

Once the employer offers sufficient evidence to rebut the Section 20(a) presumption, the claimant must establish causation based on the record as a whole. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1981). If, based on the record, the evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994).

Based on the record as a whole, I find insufficient evidence to establish by a preponderance that Claimant's workplace accident could have caused his present psychological condition. Dr. Aurich opined in his deposition that it was impossible to tell whether the injury aggravated Claimant's symptoms and that Claimant did not have somatoform disorder until after his workplace injury. (CX 1, p. 41, 61-62). At hearing, Dr. Aurich clearly explained why he did not believe Claimant's workplace accident did not aggravate Claimant's underlying psychological disorder:

> Well, actually, I probably should have worded this differently, Your Honor, but I was trying to say I couldn't rule that in. That there wasn't enough evidence to rule that in . . . . as far as a possible factor here. I probably should have worded that differently, and said that it's very unlikely that it would have any effect. And again, that's based on what he presents in his history, which seems consistent with what showed up on test results, and also what we know about the development of personality and certain characteristics. And these tend to be of long duration.
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> In other words, it didn't just appear overnight or in response to a particular event. Now, the characteristics cause an individual to manifest certain things when they get sick or when they get injured.

> They tend to - - this type of personality tends to overreact to all of that. And in this case, as I indicated, there is some strong evidence to suggest that it's of delusional proportions.

(Tr. 23-24).

Accordingly, as Dr. Aurich did not find enough evidence to "rule in" Claimant's workplace accident as a possible cause of his current psychological state, I find that Claimant has not carried his burden of proof by a preponderance of the evidence and I find it appropriate to DENY benefits.

Should the Board reverse my finding on causation, however, I find it appropriate to discuss the remaining issue in the case.

III. ALTERNATIVE FINDING

A. Nature and Extent of Claimant' Injuries

Claimant seeks continuing total disability wage benefits from the date of his workplace accident. 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, 23 BRBS (CRT)(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).

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 longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS

156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, the parties stipulated that Claimant cannot perform his former job.

(1) Nature of Claimant's Injury

The nature of Claimant's work-place injury is that he suffers from undifferentiated somatoform disorder.

(2) Extent of Claimant's Injury

As established by Dr. Aurich:

> Judge Kennington: [L]et's assume, just for the purposes of argument, that it could have been aggravated by the injury, is there anything in his overall medical profile which would prevent him from going back and working - - resuming his former job after he had been released by his medical physician to go back to work?
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> The Witness: I don't believe so, Your Honor. As I said earlier, he's got some transferable skills. I believe that he could do something. . . . From a medical standpoint, I see nothing in the records or in my examination that would indicate he could not work.
>
> Judge Kennington: Physically? From a psychological standpoint there was nothing to prevent him from going back and resuming his former job?
>
> The Witness: That is correct.

(Tr. 23-25).

Accordingly, the extent of Claimant's psychological injury does not prohibit him from performing his former job, thus, Claimant has failed to establish a *prima facie* case for total disability under the Act. Furthermore, even if Claimant's psychological condition was caused by his employment, Claimant has not established entitlement to psychological treatment. (Tr. 22-23, CX 1, p. 64) (stating that Claimant would not be a good candidate for rehabilitation because he is rigid, opinionated, petulant and argumentative and would be resistant to any treatment).

IV. CONCLUSION

Claimant established a *prima facie* case for compensation under Section 20 of the Act inasmuch as Dr. Aurich acknowledged that Claimant's psychological condition could have been aggravated by his employment accident. Employer rebutted this presumption by presenting substantial evidence, through Dr. Aurich that it was "very unlikely" that Claimant's workplace accident could have aggravated Claimant's underlying psychological condition that was pre-morbid in nature. Based on the record as a whole, Claimant failed to prove by a preponderance of the evidence that his work-related accident could have caused his psychological injuries because Dr. Aurich found insufficient evidence to rule the workplace accident in as a possible cause of his psychological injury. In the alternative, the extent of Claimant's psychological injury caused no loss of wage earning capacity and Claimant is psychologically able to resume his former job. Also in the alternative, Claimant is not entitled to medical benefits in the form of psychological treatment because the only recommendation in the record is that Claimant would not benefit from counseling.

V. ORDER

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

Claimant's entitlement to benefits under the Act is DENIED based on Claimant's failure to show that his current psychological injuries could have been caused by his workplace accident.

A

CLEMENT J. KENNINGTON
Administrative Law Judge