U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 September 2003

CASE NUMBER: 2002-LHC-0232

OWCP NUMBER: 15-38571

In the Matter of:

QUENTIN H. TAHARA,
Claimant,

vs.

MATSON TERMINALS, INC.,
Employer,

and

JOHN MULLEN & CO., INC.,
Carrier.

Jay L. Friedheim, Esq.
For Claimant

Scott G. Leong, Esq.
For Employer and Carrier

Before: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER ON REMAND AWARDING BENEFITS

This case arises from a claim under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, (hereinafter referred to as "the Longshore Act" or "the Act"). This case is on remand issued April 10, 2002 from the Benefits Review Board (the "Board" or the "BRB"). Because Judge John C. Holmes, the administrative law judge who issued the Decision and Order in this case, is no longer available, Associate Chief Judge Augustus A. Simpson, Jr. referred it for assignment to the San Francisco Office of Administrative Law Judges on July 24, 2002, after which it was assigned to me. A trial in this matter was noticed on October 9, 2002 and held on

March 4, 2003, in Honolulu, Hawaii. Both parties were represented by counsel and the following exhibits were admitted into evidence: Administrative Law Judge's Exhibits ("ALJX")1, 2 and 3,[1] Claimant's Exhibits ("CX II") 1-35,[2] Respondents' (Matson Terminals / John Mullen) Exhibits ("RX") A-Z; AA-II. Transcript ("Tr") at 9, 11.

On May 15, 2003, the parties' submitted Post-Trial Briefs. These are hereby admitted as ALJX 4 and 5.[3] Correspondence between the court and the parties concerning proposed stipulations of fact and the parties' supplemental argumentation, dated from July 23, 2003 to August 8, 2003, has been marked and admitted as ALJX 6. For ready reference, Judge Holmes' Decision and Order Granting Summary Judgment issued on September 8, 1999, and served by the District Director on September 17, 1999 is marked and admitted as ALJX 7.

PROCEDURAL HISTORY

The Board's summary of the procedural history follows:

> Claimant filed a claim under the Act against both Matson and McCabe. Matson paid claimant temporary total disability benefits from March 30, 1994 through June 5, 1994, and scheduled permanent partial disability benefits for a 100 percent loss of one eye. On August 24, 1995, the district director issued an "Order Memo" recognizing Matsonas claimant 's statutory employer and releasing McCabe from any responsibility under the Act. In May 1995 claimant was placed in protective police custody and shortly thereafter moved to the mainland as part of the witness protection program, pending the trial of his assailant.
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> Following its payment of benefits to claimant in June 1999, Matson submitted a motion for summary decision to the Office of Administrative Law Judges, wherein it sought to conclusively resolve the responsible employer issue. In response, claimant filed his own motion for summary decision seeking to have McCabe named as the responsible employer. In his initial decision, the administrative law judge bifurcated the case at the parties' urging, proceeding only on the responsible employer issue. On that issue, the administrative law judge determined that Matson was claimant's borrowing employer at the time of the accident, and therefore liable for benefits under the Act. Accordingly, he granted Matson's motion for summary decision, and denied claimant's motion for summary decision.

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[1]Administrative Law Judge's Exhibits are Claimant's Pre-Trial Statement ("ALJX 1"), Matson Terminal's Pre-Trial Statement ("ALJX 2"), and McCabe Hamilton & Renny Company, Ltd.'s letter dated March 3, 2003, stating they would be present at the calendar call but would not participate in the hearing ("ALJX 3").

[2]The first volume of the claimant's exhibits, CX I, 1-44, was admitted before Judge Holmes, and a copy thereof was made part of this record.

[3]ALJX 4 is Claimant's Post-Trial Brief and ALJX 5 is Matson's.

On claimant's appeal, the Board affirmed the administrative law judge's finding that Matson was claimant's borrowing employer, and thus liable for claimant's benefits as the responsible employer. *Tahara v. Matson Terminals, Inc.*, BRB No. 00-0383 (Oct. 13, 2000). The Board remanded the case to the administrative law judge "for further proceedings necessary to a final decision on claimant's claim in this case," *id.* at 7, having previously noted that the parties raised as an issue for resolution claimant's entitlement to temporary total disability benefits while he was in the witness protection program, commencing in September 1995. [footnote: Claimant appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit. Matson's motion to dismiss the appeal was granted on February 16, 2001. *Tahara v. Matson Terminals, Inc.* No. 00-71372 (9th Cir. Feb. 16, 2001)] *Id.* at 3.

In his Order of Remand, the administrative law judge stated that the Board's opinion delineated no unresolved issues, that he had gone to great lengths at the initial hearing to get the parties to agree that the only issue before him was the responsible employer issue, and that the parties agreed that "this matter would be concluded based on final determination on this one issue." Order of Remand at 1. Thus, he stated there is no issue before him on remand, and he remanded the case to the district director "in the unlikely instance that one or the other party despite protestations to the contrary wishes to raise additional issues." *Id.*

Claimant moved for reconsideration, stating that the issue of his entitlement to temporary total disability benefits while he was in the witness protection program was unresolved. He requested that the administrative law judge set the issue for a hearing as soon as possible, as he wishe[d] to appeal the responsible employer issue to the court of appeals. The administrative law judge summarily denied claimant's motion for reconsideration.

Claimant appeal[ed to the Board], contending the administrative law judge erred in failing to follow the Board's instruction that he address the remaining issue in this case and enter a final award or denial of benefits. Matson respond[ed], stating it . . . [took] no position with regard to claimant's appeal.

. . . [The Board] agree[d] with claimant that the administrative law judge erred in not addressing the issue of claimant's entitlement to disability benefits, . . . [vacated] the administrative law judge's Order of Remand and the Order Denying Motion for Reconsideration . . . .[and] remanded [the case] to the administrative law judge for resolution of claimant's claim for disability benefits while in the witness protection program.

Tahara v. Matson Terminals Corp. and McCabe, Hamilton and Renny Co., BRB No. 01-05878 (April 10, 2002), p.2-5.

Issues in Dispute:

1. The claimant's entitlement to disability benefits[4] for periods he spent in a state witness protection program from May 4, 1995 through December 31, 1996, and in an unpaid federal program from January 1, 1997 through November 16, 1997;

2. Method of payment of scheduled partial and unscheduled total disability compensation and offset for state witness protection program stipend;[5]

3. The employer's entitlement to offset on compensation for the claimant's state witness protection program stipend;[6]

4. Attorney's Fees and Costs.

SUMMARY OF DECISION

The claimant is entitled to total disability compensation for the period he spent in the witness protections programs. He is also entitled to 160 weeks of compensation for the scheduled permanent partial disability of loss of vision in his left eye, to be paid beginning November 17, 1997, after the claimant had left the witness protection program. The employer is not entitled to an offset or a reduction in the compensation award for the stipend the claimant received while in the state witness protection program. The claimant is entitled to interest on all unpaid installments of compensation, and to reasonable attorney's fees and costs for the portion of his case addressed in this decision and order.

FINDINGS OF FACT

At the trial on March 4, 2003, the parties stipulated to the following facts:

The place of injury was the Matson employee parking lot, and it occurred on March 30, 1994. Disability commenced on the same date, and the claimant became aware the disability was work-related on the same date. On that same date the employer had notice of the injury. This claim is for

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[4]The compensation benefits were characterized as "temporary total" by the parties at the hearing. However, the Benefits Review Board characterized the benefits as simply "disability benefits" in its remand order. See page 5 of Remand Order. My analysis will address the temporary versus permanent nature of the benefits. I accept the parties' contention that the issue concerns "total" and not "partial" disability benefits for the period the claimant spent in the witness protection programs.

[5]This issue was raised in the parties' post-trial pleadings. *See* ALJX 6.

[6]This issue was raised in the parties' post-trial pleadings. *See* ALJX 6.

compensation. The Longshore Act applies to this claim. At the time of injury, an employer-employee relationship existed between the claimant and the employer. The claimant did suffer an injury. The injury arose out of and in the course of employment. The claim was timely noticed and timely filed. The claimant is entitled to compensation and medical benefits. The employer did provide compensation in the form of a scheduled payment, but is no longer providing compensation at this time. The employer is still providing medical benefits. The claimant reached maximum medical improvement on September 15, 1995. The claimant is now working as a longshoreman. The actual injury is a scheduled injury. It was determined to be 100 per cent loss of the left eye, and the employer has accepted the claim and has paid the claimant for that claim. The claimant's average weekly wage is $1,549.00,[7] and that figure is based on his current earnings. Tr 5-6.

The Court accepts all of the foregoing stipulations as they are supported by substantial evidence of record. *See Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 fn. 2 (1985).

The following findings of fact were made by Judge Holmes: Claimant Quentin Tahara was hired by McCabe, Hamilton & Renny Company, to work as a stevedore approximately 10 years prior to the incident in question. He later worked as a winch operator and substitute crane operator. McCabe has numerous such workers, which the company hires out to companies such as Matson that load and unload ships in Hawaii pursuant to a "Labor Loan Agreement." The workers are unionized, both at McCabe and Matson. ALJX-7, p.1-2.

After the trial in this matter, the parties stipulated to the following facts:[8]

In March 1994, the claimant reported to his supervisors that Bruce Perry and two other co-workers violated the employer's rules by leaving the waterfront during their shift. Perry was disciplined by the employer for this violation. On March 30, 1994, the claimant reported for work and was confronted by Perry, who beat the claimant until he was unconscious, inflicting serious bodily harm, including a fractured skull, four broken ribs, and loss of sight in the claimant's left eye. The claimant was hospitalized for one week and was incapable of working for nine weeks after this beating. Matson made payments to Claimant for temporary total disability until he returned to work as a wharf clerk on or about June 6, 1994. ALJX 7, p.2. The claimant was physically capable of performing his assigned duties as a wharf clerk. The police arrested and charged Perry with attempted murder, though the charge was later reduced to felony assault. Perry is related to union officials and it was the claimant's understanding that the local police suspected that Perry was connected to organized crime and possibly tied to recent murders. At the urging of the police, the

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[7]Two-thirds of $1,549.00 is $1,032.72, which exceeds the maximum compensation rate under Section 6(b). The maximum compensation rate under Section 6(b) on the date of the injury (March 30, 1994) was $738.30. Therefore, temporary total disability at that time would have been paid at that rate.

[8]For clarity, two of Judge Holmes' findings of facts have been integrated into this paragraph, and are cited as such.

claimant entered a state witness protection program from May 4, 1995 until December 31, 1996. The claimant received monthly payments of between $1,200 and $1,400 under the state program. Matson also paid Claimant scheduled permanent partial disability for the loss of his left eye, amounting to $125,300.06,[9] ALJX 7, p.2, after his date of maximum medical improvement on September 15, 1995. The claimant was initially reluctant to enter the witness protection program. Dr. Byron A. Eliashof performed a psychiatric evaluation of the claimant on August 1, 1995 and concluded, "it was not all together clear whether [the claimant] is denying the risks involved or whether his religious belief had inculcated a profound sense of acceptance. He has been warned of possible retaliation after the criminal trial, but does not want to relocate . . ." The federal government later pursued racketeering charges involving Perry and the police convinced the claimant to enter into an unpaid federal witness protection program from January 1, 1997 to November 16, 1997.

ANALYSIS

Entitlement to Disability Benefits

The disputed issue is whether the claimant is entitled to total disability compensation for periods he spent in two witness protection programs, and whether such compensation is temporary or permanent.

Entitlement to Total Disability

After a thorough review of the evidence presented and the pertinent law, I conclude that the claimant was totally disabled during the periods he spent in the witness protection programs. As a result of Perry's assault, the claimant suffered a work-related injury. The claimant entered the witness protection programs because of his work-related injury, i.e., his regular employment was unavailable during these periods. The claimant's regular work was also unavailable because it constituted an unsafe workplace under federal standards. Finally, the claimant was disabled during these periods because participation in the witness protection programs was necessary to prevent re-injury.

1. Injury under the Act

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter, the "Act"), 33 U.S.C. §901 *et seq.* The claimant suffered an injury as defined by the Act, which is an:

> [A]ccidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

[9]Section 8(c)(5) indicates that a claimant receives 160 weeks of compensation for the loss of an eye.

33 U.S.C. § 902(2). Under Section 20(a), "in the absence of substantial evidence to the contrary," it is presumed "[t]hat the claim comes within" subsection 2(2). 33 U.S.C. § 920(a).

Injuries resulting from workplace assaults involving work-related disputes are considered to arise out of employment. *See Nat'l Union Fire Ins. Co. of Pittsburg v. Britton*, 289 F.2d 454, 454 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 832 (1961) (upholding finding that worker shot by customer suffered an injury "because of his employment" as defined by the Act); *Kielczewski v. Washington Post Co.*, 8 BRBS 428, 431 (1978) (holding that injuries resulting from altercation between co-workers over work performance "arose out of the employment" for purposes of Section 2(2) of the Act). Both parties have stipulated that the claimant suffered an injury to his left eye that arose out of employment and there is substantial evidence in support of this finding. The claimant suffered physical harm caused by a third party, Perry. The claimant was assaulted because he reported Perry's work violation; thus, the assault was directed at the claimant because of his employment.

It could be argued that the claimant's inability to return to work under police protection constitutes a secondary non-physical injury resulting from the assault. It is well established that a claimant need not show a specific physical impairment in order to establish an injury under the Act, but rather must show only something gone wrong with the "human frame." *See, e.g., Wheatley v. Adler*, 407 F.2d 307, 311 n.6 (D.C. Cir. 1968). Thus, a wide variety of work-related psychological impairments are compensable. *See, e.g., Reilly v. Washington Metro. Area Transit Auth.*, 20 BRBS 8, 9 (1987)(awarding benefits based on psychiatric impairment resulting from harassment by claimant's supervisor); *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 256-57 (1984)(finding disability based on work-related depression). The claimant's limited freedom of movement under the witness protection programs is analogous to a medical impairment. Specifically, the claimant's inability to return to work, despite recovery from his physical injuries, closely parallels a work-related psychological impairment. In addition, Dr. Eliashof's psychiatric report notes the danger facing the claimant and the justification for his entering the witness protection programs.

Nevertheless, it is undisputed that the claimant was medically capable of returning to the job during the period he was under police protection. Dr. Eliashof's report constitutes a restatement of police recommendations, rather than an independent description of the dangers facing the claimant. The claimant's injury is not confined to the physical harms he experienced because of the assault but includes the consequences directly related to it: as a direct result of the type of injury the claimant suffered, he had to enter a witness protection program to preserve his life and was therefore unable to return to his regular employment.

2. Disability Under the Act

The claimant was totally disabled during the period he participated in the witness protection programs. Disability is defined in the Act as "an incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. § 902(10). It is a well-established principle that "disability is an *economic* as well as a medical concept." *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 799 (D.C. Cir. 1988) (quoting

Crum v. Gen. Adjustment Bureau, 738 F.2d 474, 479 (D.C. Cir. 1984)) (emphasis added). Therefore, "a determination of wage-earning capacity must not rest solely on an evaluation of the work that an injured employee physically *can* perform; 'there must be taken into consideration . . . the availability of that type of work which he can do.'" *McBride*, 844 F.2d at 799 (quoting *Am. Mut. Ins. Co. v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970)). *See also, Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979). There has been no showing of suitable alternate employment in this case. Three factors support a finding that the claimant was incapable of returning to his regular employment because of his injury.

First, the claimant can show that he was unable to return to his regular employment as a direct result of his work-related injury. Under the Act, a claimant is considered totally disabled if the economic consequences of a claimant's work-related injury cause the claimant's pre-injury job to become unavailable. A determination of disability, therefore, involves an inquiry into economic as well as medical facts. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 1260 (9th Cir. 1990) ("An exclusively physical view of disability defeats the purpose of [the Act]. The statute's equation of disability with 'wage earning capacity' reflects a concern for the economic consequences of job-injuries.") (quoting *McBride*, 844 F.2d 797 at 799. *See also, Palombo v. Director, OWCP*, 937 F.2d 70, 76 (2nd Cir. 1991).

In *McBride*, an injured claimant later recovered, becoming "physically capable of performing his old job as a technical sales representative." *McBride*, 844 F.2d at 798. The employer, meanwhile, intending to retrain the claimant for a less physically demanding position, had assigned his old job to a different worker. *Id.* at 799. The ALJ denied benefits, reasoning that the claimant was no longer disabled because he was medically capable of performing his previous job duties. *Id.* at 798. In reversing this determination, the D.C. Circuit Court of Appeals found that the claimant's injury was the "precipitating factor that rendered his former job unavailable." *Id.* at 799. Since the "unavailability of his job was *due* to his injury," the court held that, in the absence of suitable alternate employment, the claimant was totally disabled under the Act. *Id*. at 799-800.

In the claimant's case, the state pursued assault charges based on the claimant's injuries. The pursuit of these charges increased the danger of retaliation facing the claimant and thus necessitated that he enter the witness protection programs. The claimant's regular employment was unavailable to him under the restrictions of both programs. The claimant's work-related injury, therefore, was the reason the claimant's regular employment became unavailable.

Second, the claimant's regular work was unavailable during his participation in the witness protection programs because his regular employment was unsafe under federal guidelines. Federal policy is aimed at preventing violent acts at an employer's workplace. While there are no specific federal regulations addressing violence in the workplace, employers are required to comply with the general duty clause of the Federal Occupational Safety and Health Act ("OSH Act"). *See* 29 U.S.C. § 654(a). Section 5(a)(1) of the OSH Act provides that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a).

In an advisory statement, the Occupational Safety and Health Administration provides guidance on complying with this provision:

> In a workplace where the risk of violence and serious personal injury are significant enough to be "recognized hazards," the general duty clause would require the employer to take feasible steps to minimize those risks. Failure of an employer to implement feasible means of abatement of these hazards could result in the finding of an OSH Act violation . . . . Whether or not an employer can be cited for a violation of Section 5(a)(1) is entirely dependent upon the specific facts, which will be unique in each situation. The recognizability and foreseeability of the hazard, and the feasibility of the means of abatement are some of the critical factors to be considered.

OSHA Policy Regarding Violent Employee Behavior. Letter of Richard A. Clark, Director, of Compliance Programs (December 10, 1992) available at *http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951*. *See also United States Postal Serv. v. National Ass'n of Letter Carriers*, 839 F.2d 146, 147-49 (3rd Cir. 1988)(acknowledging a federal policy of preventing violence in the workplace which allows courts to vacate arbitration orders on public policy grounds); *G.B. Goldman Paper Co. v. United Paperworkers Inter'l Union*, 957 F. Supp. 607, 618 (E.D. Penn 1997)(citing OSH Act general duty clause in support of a finding of federal policy of preventing violence in the workplace).

The claimant's regular employment was unsafe under the general duty clause. Retaliation constituted a "recognized hazard" because Perry was a known violent individual who police suspected of being connected to organized crime and possibly to local area murders. The claimant did not return to work at the urging of law enforcement officials, who suspected that the claimant faced danger and should participate in the witness protection programs. The claimant's regular employment was therefore unavailable because it was unsafe under federal standards.

Third, the claimant was totally disabled while participating in the witness protection programs because his participation was necessary to prevent re-injury.

A finding of total disability may be based on a physician's opinion that a claimant's return to his regular employment would aggravate his condition. *See Downs v. Director, OWCP*, 152 F.3d 924, 924 (9th Cir. 1998), *unpublished*, (allowing determination of total disability based on work restrictions aimed at reducing risk of "reinjury"). *See also Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988); *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407, 409 (1983); *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257, 261 (1978). *But see Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989)(observing that a recommendation against further exposure to coal dust is not the same as a finding of disability)*; contra Van Dyke v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 388, 391-94 (1978)(finding that claimant was not totally disabled merely because his regular employment would harm his health).

Similarly, alternate employment within the employer's facility is not considered available if it is likely to cause recurrence of the injury. *See Crum v. Gen. Adjustment Bureau*, 738 F.2d 474, 479-80 (D.C. Cir. 1984)(determining that job with employer was not available because employer refused to alter the working conditions in order to avoid recurrence of the injury); *Poole v. Nat'l Steel & Shipbuilding Co.*, 11 BRBS 390, 397-400 (1979)(holding that alternate employment at employer's work site is not suitable unless it meets all of the claimant's work restrictions).

The psychiatric report of Dr. Eliashof provides some medical documentation of the danger of re-injury. Moreover, the local police were in a position equally authoritative as that of a physician in judging the medical dangers facing the claimant if he returned to work. The medical risk of re-injury centered on the likelihood of a future assault. The police were in the best position to make this assessment, just as physicians are typically in the best position to judge the likelihood of other risks of re-injury.

A finding that returning to work presented a medical risk of re-injury is allowed even though the claimant returned to work for several months. A claimant may be determined unable to perform his regular employment, even if he performed his job for some period after the injury. *See Nguyen v. Ebbtide Fabricators, Inc.*, 19 BRBS 142, 144 (1986)(upholding finding that claimant could not perform his regular job because of his unresolved ear problems, even though claimant performed his job for several months after the injury). The claimant here returned to work prior to the initiation of Perry's criminal trial. The claimant faced a risk of re-injury once the trial started and it was around this time that he entered the witness protection program.

In addition to the merits of following the advice of the police, the claimant also had an obligation under the Act to take reasonable precautions against re-injury. A claimant can be denied compensation for aggravation of his injuries if the claimant fails to take reasonable precautions to guard against re-injury. *See Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454, 457 (9th Cir. 1954) (remanded for a determination of whether claimant failed to take reasonable precautions to guard against re-injuring his leg); *Grumbley v. Eastern Associated Terminals Co.*, 9 BRBS 650, 652 (1979) (denying benefits for second leg injury incurred at home where claimant failed to take adequate precautions against falling off his roof). A claimant is generally not entitled to compensation for injuries resulting from a refusal to submit to reasonable treatment where the refusal aggravates an underlying condition. *See generally* LARSON, WORKERS' COMPENSATION LAW, § 10.10. In addition, Section 7(d)(4) of the Act allows for the suspension of compensation for any period of time when the claimant "unreasonably refuses to submit to medical or surgical treatment . . ." 33 U.S.C. §7(d)(4). While a claimant's duty to prevent future injury under subsection 7(d)(4) is generally limited to submitting to medical treatment, this subsection also has been applied to a claimant's refusal to undergo a medical vocational rehabilitation evaluation. *See Mendez v. Bernuth Marine Shipping*, 11 BRBS 21, 27 (1979).

Given the warnings of the police, it would have been unreasonable for the claimant to return to his regular employment. Again, the police were in the best position to advise the claimant on the risk of re-injury, just as physicians are normally in the best position to make this assessment. Were

the claimant to have been assaulted or killed because he ignored the warnings of the police, the employer would have a strong claim that these harms no longer arose out of employment and that the claimant failed to take reasonable precautions against re-injury. It would undermine the goal of the Act, therefore, to deny compensation to a claimant who prudently took those precautions.

I therefore conclude that the claimant is entitled to total disability compensation while in the witness protection programs from May 4, 1995 through November 16, 1997. It is now necessary to determine the nature of the disability compensation, whether permanent or temporary.

Permanent Versus Temporary Disability

The date on which a claimant's condition becomes permanent is primarily a medical determination. The medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985); *Rivera v. Nat'l Metal & Steel Corp.*, 16 BRBS 135, 137 (1984). It is the medical evidence that determines the start of a permanent disability, regardless of economic or vocational considerations. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988). Here, the parties have stipulated that the claimant's date of maximum medical improvement is September 15, 1995. Thus, the claimant status is *permanent* on that date.

Therefore, the claimant was in a temporary total disability status from May 4, 1995, the date he commenced the state witness protection program, until September 14, 1995. On September 15, 1995, the claimant's date of maximum medical improvement, and the date he became *permanent*, he commenced a period of permanent total disability which continued through the last day of the federal witness protection program on November 16, 1997.

Disability Awards – Manner of Payment

Consecutive vs. Concurrent Awards

There is no dispute that the claimant is entitled to a scheduled award of 160 weeks for the loss of sight in his left eye. I have determined, in addition, that the claimant is entitled to total disability for the periods he spent in the witness protection programs. The issue remains as to when and in what form such awards should be paid, i.e., should they be paid concurrently or consecutively? After researching the law, I have determined that the claimant will be paid consecutive awards of temporary total disability, permanent total disability, and scheduled permanent partial disability for the loss of vision in his left eye. The claimant will be paid temporary total disability from May 4, 1995 through September 14, 1995, the day before he reached maximum medical improvement. Beginning on September 15, 1995, the claimant is entitled to two awards, one for permanent total disability and one for permanent partial disability in the form of a scheduled award; they will be paid consecutively based on the analysis below.

When a claimant is concurrently entitled to a scheduled award and a non-scheduled permanent total disability award at the maximum allowed, he does not receive payment for the scheduled award, but only for the maximum allowed for the permanent total disability. "The mandatory language in Section 8(c), that an employee 'shall be paid,' means that a scheduled award shall be paid, provided the employee is not already receiving the maximum amount of compensation payable under the LHWCA for a disability that is both total and permanent." *Tisdale v. Owens-Corning Fiber Glass Co.*, 13 BRBS 167, 171 (1981), *aff'd mem. sub nom. Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983).

An administrative law judge may make "whatever adjustments" are necessary to prevent overpayment. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000), *citing ITO Corp. v. Green*, 185 F.3d 239 (4th Cir. 1999) and *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419 (9th Cir. 1995). "Whatever adjustments" includes making awards consecutively rather than concurrently to fully compensate the claimant for his injuries. In *Matson Terminals v. Berg*, 279 F.3d 694 (9th Cir. 2002), the claimant injured his right and left knees in a single industrial trauma. The court determined that the claimant was entitled to consecutive awards for two separate 104-week benefit periods for scheduled injuries to his right and left knees, in spite of the employer's argument that the awards should be made concurrently.

In *Darden v. Newport News Shipbuilding and Dry Dock Co.*, 18 BRBS 224 (1986), the Board determined that the ALJ could award the claimant a period of permanent total disability followed by a scheduled award for a 10% permanent partial disability to his right foot.

In *ITO Corp. of Baltimore v. Green*, 185 F.3d 239 (4th Cir. 1999), the court awarded a concurrent award for benefits up to the maximum (i.e., not to exceed that allowed for a total disability) for scheduled and unscheduled permanent partial disability awards, and subsequent to the scheduled award running out, payment for the unscheduled permanent partial disability award only. The court was concerned with fairly compensating the claimant for the partial loss of function in both his ankle (scheduled award) and his shoulder (unscheduled award).

Based on the foregoing cases, I have determined that the law allows for whatever adjustments need be made to fully compensate the claimant for all of the injuries he has sustained, but without exceeding *in any one payment* the amount allowed for total disability, and/or by Section 6(b). Thus, the claimant will be paid temporary total disability from May 4, 1995 through September 14, 1995, the day before he reached maximum medical improvement. He will then be paid permanent total disability from September 15, 1995 through November 16, 1997, his last day in the witness protection program. Thereafter, he will be paid 160 weeks of scheduled permanent partial disability for the loss of his left eye.

Section 6(b)

Two-thirds of $1,549.00, the claimant's average weekly wage at the time of injury, is $1,032.72 which is the claimant's entitlement to compensation but for Section 6(b) of the Act which mandates a national maximum. Section 6(b) of the Act limits a claimant's compensation for disability

to 200 percent of the applicable national average weekly wage ("NAWW"). "Claimant's combined awards cannot exceed the amount prescribed for total disability under Section 8(a), plus Section 10(f) adjustments, nor can they exceed the statutory maximum under Section 6(b)." *Price v. Stevedoring Services of Am.*, 36 BRBS 56, 63 n.12 (2002).

If two-thirds of a claimant's actual average weekly wage is greater than 200 percent of the applicable NAWW, the claimant receives the latter.[10] The claimant is not limited to the maximum rate at the time of injury for permanent total disability. *Marko v. Morris Boney Co.*, 23 BRBS 353, 361 (1990). Each year, the Secretary of Labor recalculates the NAWW and 200 percent of this amount becomes the new statutory maximum compensation rate on October 1. 33 U.S.C. § 906(b)(3). As long as two-thirds of a claimant's actual average weekly wage remains higher than 200 percent of the new NAWW, a claimant receiving permanent total disability or death benefits is entitled to receive the new maximum pursuant to Section 6(c).[11] *Id.* However, periods of temporary total disability and permanent partial disability (scheduled in this case) revert to the maximum rate allowed under Section 6(b) at the time of injury. See *Puccetti v. Ceres Gulf and ESIS/INA*, 24 BRBS 25, 31-32 (1990).[12] Therefore, the claimant will be paid $738.30 for temporary total disability from May 4, 1995 through September 14, 1995, the period he spent in the witness protection program while still in a temporary medical status; he will be paid permanent total disability following his date of maximum medical improvement and while he remained in the witness protection program, at the maximum rate per Section 6(b), as follows: (1)September 15 - September 30, 1995: $760.92;[13] (2) October 1, 1995 - September 30, 1996: $782.44; (3) October 1, 1996 - September 30, 1997: $801.06; (4) October 1, 1997 - November 16, 1997: $835.74. Commencing on November 17, 1997, and continuing until the employer pays the claimant 160 weeks of scheduled permanent partial disability for the loss of his left eye, the claimant is entitled to a maximum weekly compensation rate of $738.30, since he is no longer in a permanent total disability status as of that date.

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[10]If the claimant's average weekly wage is less than 200 percent of the applicable NAWW, the claimant's actual average weekly wage becomes the basis for the permanent total disability compensation rate, see generally 33 U.S.C. § 908(a), and the claimant is then entitled to Section 10(f) adjustments in the amount of the lesser of the percentage increase in the NAWW as determined under Section 6(b)(3) or five percent. 33 U.S.C. § 910(f).

[11]Per 33 U.S.C. § 906(c): "Determinations under subsection (b)(3) with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period."

[12]"[C]laimants receiving temporary total disability benefits must be considered to have been 'newly awarded compensation' when benefits commence, generally at the time of injury. Temporarily totally disabled claimants thereafter would remain at the maximum in effect at this time; the following October 1, because they would not be 'currently receiving' permanent total disability or death benefits, they would not be entitled to the new maximum." *Puccetti*, 24 BRBS at 31-32.

[13]The claimant's compensation rate is bumped up to the maximum allowed under Section 6(b) once he moves from temporary total disability ($738.30) to permanent total disability ($760.92)status. *See Gutierrez v. Int'l Transp. Services*, 37 BRBS 227 (ALJ)(2003).

Offset for State Witness Protection Program Stipend

The parties stipulated that the claimant received monthly payments of between $1200 and $1400 under the state witness protection program. The employer argues (ALJX 6, p.5) that this income should be treated as earning capacity and thus should be deducted from the claimant's award. The employer's rationale is that the Ninth Circuit prohibits "double dipping" under *Brady-Hamilton Stevedore Co. v. Director*, 58 F.2d 419, 29 BRBS 101, 103 (CRT)(9th Cir. 1995). First, *Brady-Hamilton* is inapposite, since it addresses how to pay two *awards*, and says nothing about wages, suitable alternate employment or any other kind of income that is not an award. Furthermore, the stipend the claimant received during the state witness protection program ("wpp stipend") is not properly characterized as earnings, wages, or "alternative employment." It appears to be more analogous to unemployment compensation, i.e., something you receive when you are unable to work.

First, the wpp stipend does not fit the definition of "wages" under the Act. Under Section 2(13), wages are defined as

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C. §3101 *et seq.*] (relating to employment taxes).

33 U.S.C. §902 (13).

A wage is a money rate received as compensation from an employer, for services rendered by the employee. Thus, the money rate paid to an employee must be traceable to an employer and not to a social program administered by the state. *Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5, 9 (1988); *McMennamy v. Young & Co.*, 21 BRBS 351, 354 (1988). In addition, the money rate must be received under a contract of hire. No evidence was offered to show that the claimant was working under a contract of hire in the wpp, nor was the claimant shown to be an employee of the state while he participated in the wpp. The stipend he received does not fit the definition of "wages" in the Longshore Act. Thus, it is not proper to consider it as suitable alternate employment and no offset on compensation is due the employer. Nor does such income render the claimant partially disabled during the time he received it and it does not figure into the calculation under Section 8(21).

In addition, the wpp stipend is analogous to unemployment insurance compensation, which case law specifically excludes from the statutory definition of wages. *See Strand v. Hansen Seaway Serv., Ltd.*, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980), *remanding* 9 BRBS 847 (1979) (the amount received was not for services rendered); *Barber v. Tri-State Terminals*, 3 BRBS 244, 250-51 (1976), *aff'd sub nom Tri-State Terminals v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

I therefore conclude that the wpp stipend is not subject to an offset nor does it reduce the disability compensation award.

Attorney's Fees and Costs

Under Section 28 of the Act, a claimant may recover reasonable and necessary attorney's fees and costs associated with the "successful prosecution" of his or her claim. 33 U.S.C. § 928. Claimant is entitled to reasonable attorney's fees and costs for work done on the issues upon which he prevailed.

CONCLUSION

The claimant is entitled to total disability compensation for the period he spent in the witness protections programs. He is also entitled to 160 weeks of compensation for the scheduled permanent partial disability of loss of vision in his left eye, to be paid beginning November 17, 1997, after the claimant had left the witness protection program. The employer is not entitled to an offset or a reduction in the compensation award for the stipend the claimant received while in the state witness protection program. The claimant is entitled to interest on all unpaid installments of compensation, and to reasonable attorney's fees and costs for the portion of his case addressed in this decision and order.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and based upon the entire record, the Court issues the following order:

1. Matson Terminals shall pay the claimant temporary total disability for the following periods at the weekly compensation rate of $738.30: March 30, 1994 through June 5, 1994; May 4, 1995 through September 14, 1995;

2. Matson Terminals shall pay the claimant permanent total disability for the following periods and at the following weekly rates: (a) September 15 - September 30, 1995: $760.92 ; (b) October 1, 1995 - September 30, 1996: $782.44; (c) October 1, 1996 - September 30, 1997: $801.06; (d) October 1, 1997 - November 16, 1997: $835.74;

3. Matson Terminals shall pay the claimant scheduled permanent partial disability for the loss of vision in his left eye for 160 weeks, commencing on November 17, 1997, at the weekly compensation rate of $738.30.

4. Matson Terminals shall pay interest on each unpaid installment of compensation from the date the compensation became due. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date this Decision and Order is filed with the District Director. See 28 U.S.C. §1961;

5. Matson Terminals is entitled to a credit for benefits already paid;

9. All computations are subject to verification by the District Director who in addition shall make all calculations necessary to carry out this Order;

10. Matson Terminals shall pay all Section 7 medical benefits related to the claimant's industrial injury of March 30, 1994, and its sequelae;

12. Counsel for the claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on counsel for the employer within 21 days of the date this Decision and Order is served. Counsel for the employer shall provide the undersigned and the claimant's counsel with a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within 10 calendar days after service of the Statement of Objections, counsel for the claimant shall initiate a verbal discussion with counsel for the employer in an effort to amicably resolve as many of the employer's objections as possible. If the two counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of the employer's Statement of Objections, the claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for the employer, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for the employer no later than 30 days after service of the employer's Statement of Objections. Within 14 days after service of the Final Application, the employer shall file a Statement of Final Objections and serve a copy on counsel for the claimant. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

IT IS SO ORDERED.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge