No. 11-926

In the Supreme Court of the United States

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BERNARD D. BOROSKI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, disabled maritime workers are paid compensation based on their average weekly wage at the time of their disabling injury. See 33 U.S.C. 908, 910. This compensation is subject to a maximum of twice the "applicable" fiscal year's national average weekly wage. 33 U.S.C. 906(b)(1). The Secretary of Labor determines the national average wage for each fiscal year, 33 U.S.C. 906(b)(3), and that determination applies "to employees or survivors * * * newly awarded compensation during such period." 33 U.S.C. 906(c). The question presented is whether the "applicable" Secretarial determination is the national average wage for the year during which an employee suffers a disabling injury or the year during which a formal compensation order is issued.

PARTIES TO THE PROCEEDING

Petitioner is Gary A. Steinberg, Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Respondents are: Bernard D. Boroski, DynCorp International and Insurance Company of the State of Pennsylvania.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-37a) is reported at 662 F.3d 1197. The decision of the district court (App., *infra*, 38a-45a) is unreported. The decisions of the Benefits Review Board (App., *infra*, 46a-59a), the District Director (App., *infra*, 60a-64a), and the Administrative Law Judge (App., *infra*, 65a-119a) (all of the United States Department of Labor) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2011. The court of appeals filed an amended decision and new judgment on November 16, 2011. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 906(b) and (c) of the Longshore and Harbor Workers' Compensation Act (Longshore Act or Act), 33 U.S.C. 901 *et seq.*, provide:

> (b) Maximum rate of compensation
>
> (1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).
>
> (2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.
>
> (3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

(c) Applicability of determinations

Determinations under subsection (b)(3) of this section 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.

STATEMENT

1. The Longshore Act establishes a federal workers' compensation system for an employee's disability or death arising in the course of covered maritime employment. 33 U.S.C. 903(a), 908, 909. Disability, defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury," 33 U.S.C. 902(10), is "in essence an economic, not a medical, concept." *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 297 (1995). Accordingly, the Longshore Act has from the beginning provided that "the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation." 33 U.S.C. 910; see 33 U.S.C. 910 (Supp. I 1928) (same). A totally disabled worker's basic compensation rate is two-thirds of that average weekly wage. 33 U.S.C. 908.[1]

[1] Partially disabled employees, who are able to work after their injuries at a diminished wage, are typically entitled to two-thirds of the difference between their pre-disability average weekly wage and their "residual earning capacity" (*i.e.*, the wages they earn or could earn through suitable alternative employment). See 33 U.S.C. 908(c)(21). In addition to this classification of disabilities as total or partial, disabilities under the Act are also categorized as "temporary" or "permanent." A disability is "temporary" if the claimant's medical condition is improv-

a. The Act has always placed upper and lower limits on compensation rates, applied after the calculation of two-thirds of the worker's average weekly wage at the time of injury. As originally enacted in 1927, the Longshore Act provided that "[c]ompensation for disability shall not exceed $25 per week nor be less than $8 per week: *Provided, however*, That if the employee's wages at the time of injury are less than $8 per week he shall receive his full weekly wages." 33 U.S.C. 906(b) (Supp. I 1928). Congress subsequently enacted several increases to the minimum and maximum benefit levels under the Longshore Act. See Act of June 24, 1948, ch. 623, § 1, 62 Stat. 602 (increasing maximum weekly benefit level to $35 and minimum level to $12); Act of July 26, 1956, ch. 735, § 1, 70 Stat. 654-655 (maximum to $54 and minimum to $18); Act of July 14, 1961, Pub. L. No. 87-87, § 1, 75 Stat. 203 (maximum to $70).

Throughout this period, Congress was aware that "economic changes * * * affect[ing] the levels of wages and living costs" made periodic increases in the maximum and minimum benefit levels necessary because the Act lacked a "self-adjustment feature." H.R. Rep. No. 2067, 84th Cong., 2d Sess. 1-2 (1956); see S. Rep. No. 481, 87th Cong., 1st Sess. 2 (1961). Without such a feature, maximum and minimum benefit levels eroded over time, and the only remedy was for Congress to amend the Act. Thus, "[t]he $70 maximum on death and disability benefits, established in 1961, gradually lost

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ing, and it becomes "permanent" when the claimant reaches maximum medical improvement. See 33 U.S.C. 908(a)-(e); see also *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 273-274 (1980); *Watson* v. *Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969).

real value as inflation exacted its annual toll, and in 1972 Congress moved to give covered workers added protection." *Director, OWCP* v. *Rasmussen*, 440 U.S. 29, 32 (1979) (footnote omitted).

b. When Congress amended the Longshore Act in 1972, it not only made the maximum and minimum benefit levels more generous, but also provided a self-adjustment mechanism. See 33 U.S.C. 906. The result was to make later statutory revisions of maximum and minimum benefit levels unnecessary. The 1972 amendments provided that the previous fixed-dollar maximum and minimum benefit levels would be replaced with calculations based on the "applicable national average weekly wage." 33 U.S.C. 906(b)(1) and (2); see 33 U.S.C. 902(19) (defining "national average weekly wage" as "the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls"); *Rasmussen*, 440 U.S. at 32.

The national average weekly wage is determined by the Secretary of Labor each year, and is "applicable" for the "period," or fiscal year (FY), from October 1 of that year until September 30 of the next. 33 U.S.C. 906(b)(3). After a gradual phase-in period, Congress provided that the maximum benefit rate under the Longshore Act would be 200% of the national average weekly wage. 33 U.S.C. 906(b)(1) (Supp. II 1972). Congress likewise used the national average weekly wage as the basis for calculating minimum benefits under the Act, providing that compensation for total disability shall not be less than 50% of the national average weekly wage (unless

the employee's own average weekly wage was below that figure). See 33 U.S.C. 906(b)(2).[2]

The Act provides that the national average weekly wage for a particular year "shall apply to employees or survivors *currently receiving* compensation for permanent total disability or death benefits during such period," and "those *newly awarded* compensation during such period." 33 U.S.C. 906(c) (emphases added).

c. The Act obligates an employer to pay compensation "promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." 33 U.S.C. 914(a). If an employer that does not file a notice controverting liability fails to start payments within 14 days of receiving notice of a disabling injury from the employee, it must pay an additional ten percent of the overdue amount. 33 U.S.C. 914(e). While the employee must give notice of disability to the employer in order to be entitled to benefits, see 33 U.S.C. 912; 20 C.F.R. 702.211(a), the employee need not file a claim with the Department of Labor's Office of Workers Compensation Programs (OWCP) if the employer commences payments and there is no disagreement about the amount. See 33 U.S.C. 913(a) (one-year deadline to file a claim tolled if employer is making payments to claimant).

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[2] The historical list of national average weekly wages may be found at Office of Workers' Compensation Programs, U.S. Dep't of Labor, *Division of Longshore and Harbor Workers' Compensation, National Average Weekly Wages* (last visited Jan. 24, 2012) http://www.dol.gov/owcp/ dlhwc/NAWWinfo.htm. The national average weekly wage for the current fiscal year (October 1, 2011 to September 30, 2012) is $647.60, resulting in a maximum Longshore Act weekly benefit of $1295.20 and a minimum of $323.80.

2. From January 2000 to April 2002, respondent Bernard Boroski worked for respondent DynCorp International as a sheet metal mechanic in Tusla, Bosnia. See App., *infra*, 2a. During that time, Boroski was exposed to various chemicals. *Ibid*. On April 19, 2002, Boroski was in an airport terminal on his way home from Bosnia when he became aware that his vision was limited to seeing only light and dark. *Id*. at 70a. He became legally blind and stopped working in April 2002. *Id*. at 2a. The private parties stipulated that Boroski has been permanently and totally disabled since then. *Id*. at 66a.

3. Boroski was eligible for Longshore Act benefits pursuant to the Defense Base Act, 42 U.S.C. 1651 *et seq*. (extending Longshore coverage to employees working at American military bases overseas). See App., *infra*, 3a. On February 15, 2008, a Department of Labor administrative law judge (ALJ) found that Boroski was entitled to permanent total disability compensation from "April 20, 2002 and continuing at the maximum compensation rate." *Id*. at 118a.

The ALJ did not specify the precise dollar amount of the award. The ALJ also awarded Boroski interest on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. App., *infra*, 118a. The ALJ further ordered that "[a]ll monetary computations made pursuant to this Decision and Order are subject to verification by the District Director." *Ibid*.[3]

[3] District directors are officials in the OWCP responsible for the day-to-day administration of the Act, including attempts to informally resolve disputes. Because awards by ALJs are not effective until filed by a district director, 33 U.S.C. 921(a), district directors are frequently charged with the responsibility to calculate the amount of compensation due under ALJ decisions. The statute uses the term "deputy commis-

4. After the ALJ's order was issued, DynCorp began paying Boroski's compensation. App., *infra*, 3a. All parties agreed that two-thirds of Boroski's average weekly wage at the time of his injury exceeded the statutory maximum benefit level, *id.* at 2a, but they disagreed as to which year's maximum applied. DynCorp's insurer paid compensation beginning with the maximum compensation rate in effect on the date Boroski became disabled (FY 2002), rather than the higher maximum rate in effect on the date the ALJ issued his compensation order (FY 2008). *Id.* at 3a-4a. Pursuant to the provision of the Act providing for cost-of-living increases for some claimants, the insurer "increased the benefits it paid to Boroski annually beginning October 1, 2002." *Id.* at 4a; see 33 U.S.C. 910(f) (providing for increase in benefits to those receiving "compensation or death benefits payable for permanent total disability or death," mirroring increase in national average weekly wage). Boroski disagreed with those compensation rates, contending that he should have received the FY 2008 maximum rate for all years because that is when his compensation order issued. App., *infra*, 4a-5a. He thus asked the district director to issue a supplementary compensation order under Section 918(a) of the Act declaring that DynCorp was in default of its payment obligations. *Id.* at 4a.

On September 16, 2008, the district director issued an amended supplemental order finding that DynCorp had properly compensated Boroski at the initial maximum compensation rate in effect in fiscal year 2002 ($966.08 per week) and continuing with appropriate annual adjustments under Section 910(f). App., *infra*, 60a-

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sioner" rather than "district director," but the authority of the position remains unchanged. See 20 C.F.R. 701.301(a)(7).

64a. He therefore declared that the Employer was not in default under Section 918(a). *Id.* at 61a-62a.[4]

The district director implicitly found that, for each fiscal year in which Boroski was disabled, he was entitled to that fiscal year's maximum rate. App., *infra*, 61a-62a; see *id.* at 59a. Thus, Boroski was entitled to: the FY 2002 maximum rate of $966.08 from April 20, 2002, when he became disabled, through September 30, 2002; the FY 2003 maximum rate beginning October 1, 2002; and each subsequent fiscal year's maximum rate each ensuing October 1. See *ibid.*; see also 33 U.S.C. 910(f); 33 U.S.C. 906(c) ("currently receiving" clause, which ensures that those receiving death benefits or benefits for permanent total disability at the statutory maximum receive the cost-of-living increase provided for by Section 910(f)).

5. Boroski, DynCorp, and DynCorp's insurance carrier, the Insurance Company of the State of Pennsylvania, appealed to the Benefits Review Board.[5] Boroski challenged the district director's finding that DynCorp was not in default under Section 918(a). Although he

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[4] The district director did find that the employer had failed to timely pay the compensation due to Boroski (pursuant to the 2008 ALJ Order) from June 3, 2008 through July 8, 2008, but also found that the employer had paid the additional amounts due under 33 U.S.C. 914(f) for its late payments. App., *infra*, 61a.

[5] DynCorp and its insurer appealed the ALJ's determination that they were not entitled to relief under 33 U.S.C. 908(f), which limits an employer's liability where the employee had a pre-existing permanent partial disability. That issue is currently pending before the Board. If DynCorp is ultimately found to be entitled to relief under 33 U.S.C. 908(f), it will be liable for only the first 104 weeks of Boroski's disability payments. The remainder would be paid to Boroski by a Special Fund administered by the Secretary of Labor. See 33 U.S.C. 944(a) and (i)(2).

conceded that the district director's maximum-rate calculations were consistent with the Board's decision in *Reposky* v. *International Transp. Servs.*, 40 Ben. Rev. Bd. Serv. (MB) 65 (Oct. 20, 2006), Boroski nonetheless argued that the compensation paid by DynCorp was incorrect under Section 906 of the Act. The Board, relying on *Reposky*, affirmed the district director's determination that DynCorp had paid the correct compensation. App., *infra*, 57a-59a.

In *Reposky*, the Board—adopting the longstanding position of the Director, OWCP, who administers the Act, see *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997)—held that a claimant is "newly awarded" compensation for purposes of Section 906(c) "when benefits commence," which is "generally at the time of injury." 40 Ben. Rev. Bd. Serv. (MB) at 74. Accordingly, the Board in *Reposky* rejected the contention that the applicable national average weekly wage is the one in effect at the time a formal compensation order is issued. *Id*. at 74-76. The Board agreed with the Director's position that applying the national average weekly wage for the year of the disabling injury "maintains consistency in the statute and yields rational results." *Id*. at 76; see *ibid*. (approach "achiev[es] consistent results for all claimants").

6. On December 3, 2010, the district court affirmed the Board's decision, concluding that the district director's denial of a Section 918(a) order declaring default was correct. App., *infra*, 40a-44a.[6] It rejected Boroski's

[6] The Eleventh Circuit has held that judicial review of Defense Base Act claims starts in district court, not the court of appeals. See *ITT Base Servs.* v. *Hickson*, 155 F.3d 1272, 1275 (1998); accord *Lee* v. *Boeing Co., Inc.*, 123 F.3d 801, 805 (4th Cir.1997); *AFIA/CIGNA Worldwide* v. *Felkner*, 930 F.2d 1111, 1115-1116 (5th Cir.), cert. denied,

argument that the date of the ALJ's order controls which fiscal year's maximum rate to apply, as well as his reliance on *Wilkerson* v. *Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 906 (5th Cir. 1997), as support for that argument. App., *infra*, 42a-44a. The court concluded that the maximum rate applicable to a given claimant is determined by the date his disability commences, at which point he becomes entitled to compensation. *Ibid.*

The district court held that Section 906 was "not ambiguous when viewed against the structure of the entire statute." App., *infra*, 41a. The court relied on the Ninth Circuit's recent decision in *Roberts* v. *Director, OWCP*, 625 F.3d 1204 (2010), cert. granted, 132 S. Ct. 71 (2011) (argued Jan. 11, 2012), in which that court rejected many of the arguments made by Boroski. App., *infra*, 42a-44a. The district court, like the Ninth Circuit, held that the language of Section 906(c) must be considered in light of "the language and design of the statute as a whole," *id.* at 44a (quoting *United States* v. *Baxter Int'l, Inc.*, 345 F.3d 886, 887 (11th Cir. 2003)), and thus agreed with the Ninth Circuit's conclusion that the interpretation "that an employee is 'newly awarded' compensation when he first becomes disabled accords with the structure of the [Longshore Act], which identifies the time of injury as the appropriate marker for other calculations relating to compensation." *Ibid.* (quoting *Roberts*, 625 F.3d at 1207). It thus found that the district director

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502 U.S. 906 (1991); *Home Indem. Co.* v. *Stillwell*, 597 F.2d 87, 88-90 (6th Cir.), cert. denied, 444 U.S. 869 (1979). But see *Service Employees Int'l, Inc.* v. *Director, OWCP*, 595 F.3d 447, 451-455 (2d Cir. 2010) (judicial review of compensation orders arising under the Defense Base Act begins in the courts of appeals); *Pearce* v. *Director, OWCP*, 603 F.2d 763, 765-771 (9th Cir.1979) (same).

and Board had correctly determined the maximum compensation rate applicable to Boroski.

7. The court of appeals reversed. App., *infra*, 37a. Saying that it "disagree[d] with the holding of the Ninth Circuit Court of Appeals as set out in *Roberts*," *id.* at 26a, the court of appeals held that Boroski was "newly awarded" compensation for purposes of Section 906(c) at the time of the ALJ's order in February 2008, and thus was entitled to the FY 2008 maximum rate of $1160 from the date he became disabled in FY 2002 through FY 2008, *id.* at 36a.

REASONS FOR GRANTING THE PETITION

This case presents the question whether a claimant is "newly awarded" compensation for purposes of application of the Longshore Act's maximum benefit level when he becomes disabled and is thus newly entitled to compensation, or instead when an ALJ issues a formal compensation order, if such an order is issued, in his case. See 33 U.S.C. 906(c). This Court granted a petition for a writ of certiorari in *Roberts* v. *Sea-Land Services, Inc.*, No. 10-1399 (argued Jan. 11, 2012), to decide that question. If the Court holds in *Roberts* that a claimant is "newly awarded" compensation when he becomes entitled to compensation by force of the Act, then the decision of the Benefits Review Board in this case was correct, and the court of appeals erred in holding otherwise. Accordingly, the Court should hold this petition pending its decision in *Roberts*, and then dispose of the petition as appropriate in light of that decision.[7]

[7] As the proper agency party-respondent in the court of appeals, see *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 519 U.S. 248, 264-270 (1997), the Director is a "party" for purposes of 28 U.S.C. 1254(1), which provides that a writ of certiorari may be "granted upon the

CONCLUSION

This petition for a writ of certiorari should be held pending the Court's decision in *Roberts* v. *Sea-Land Services, Inc.*, No. 10-1399 (argued Jan. 11, 2012), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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JANUARY 2012

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petition of any party" to a civil case in the courts of appeals. See *Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297, 304 n.13 (1983) (*Perini*). Separate from that statutory question, the Court in *Perini* found it unnecessary to decide whether the Director had Article III "standing as an aggrieved party to seek review" of a court of appeals decision in this Court because a private party aggrieved by that decision was a party respondent. *Id*. at 302-305. Here, too, a private party aggrieved by the court of appeals decision (DynCorp) is a party respondent to the Director's petition. In addition, the possibility that the Special Fund administered by the Secretary of Labor would pay benefits to Boroski, see n.5, *supra*, provides the Director with standing to seek review of the court of appeals' decision. Cf. *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 128 n.3 (1995).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-10033

D.C. Docket No. 3:09-cv-00240-HES-JRK

BERNARD D. BOROSKI, PLAINTIFF-APPELLANT

v.

DYNCORP INTERNATIONAL, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE, DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Middle District of Florida

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Filed: Nov. 16, 2011

Before: EDMONDSON and PRYOR, Circuit Judges, and HOPKINS,[*] District Judge.

HOPKINS, District Judge:

This is a case of statutory construction. The question presented by this appeal under the Longshore and Har-

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[*] Honorable Virginia Emerson Hopkins, United States District Judge for the Northern District of Alabama, sitting by designation.

bor Workers' Compensation Act (the "LHWCA" or the "Act"), as amended, 33 U.S.C. §§ 901-950 (2006), is which date—the date on which disability occurred, or the date on which the injured employee was awarded benefits for such disability—determines the maximum weekly rate of compensation for a permanently totally disabled employee who is "newly awarded compensation." Applying long-standing principles of statutory construction, we find that the maximum weekly rate of compensation is governed by the rate in effect at the time of the award. Therefore, we reverse the decision of the district court and remand for calculation of the sum to be paid.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

A. Facts

The facts are not in dispute. Bernard Boroski ("Boroski") worked for DynCorp International ("DynCorp"), in Tusla, Bosnia, as a sheet metal mechanic from January 2000 to April 2002. Boroski was exposed to various chemicals during his employment and stopped work on April 20, 2002, after his vision had become severely impaired. Boroski is now legally blind in both eyes and has been permanently and totally disabled since April 20, 2002. DynCorp contested that it was the cause of Boroski's blindness and submitted an application for § 8(f) relief, 33 U.S.C. § 908(f). The parties have not stipulated as to Boroski's wages at the time of the injury, but they agree that his wages were high enough that he would be entitled to the applicable statutory maximum level of compensation.

B. Procedural History

Boroski timely applied for workers compensation benefits under the LHWCA, which applied to him by operation of the Defense Base Act (the "Base Act"), 42 U.S.C. §§ 1651-55 (2006).

Because DynCorp contested liability, Boroski's claim was adjudicated before an administrative law judge ("ALJ").[1] On February 15, 2008, the ALJ held that Boroski was entitled to compensation for permanent and total disability beginning April 20, 2002 (the "Compensation Order"). He ordered DynCorp "to pay permanent total disability compensation to [Boroski] from April 20, 2002[,] and continuing at the maximum compensation rate." The ALJ did not specify the maximum compensation rate that was applicable or calculate the amount owed to Boroski. The ALJ also awarded Boroski interest on all accrued compensation and penalties, computed from the date each payment was originally due.[2]

DynCorp's insurer, Insurance Company of the State of Pennsylvania ("ICSOP"), began to pay compensation to Boroski in 2008, after the Compensation Order was filed. Relying on 33 U.S.C. § 906, ICSOP based its payment of disability benefits for April 20, 2002, through September 30, 2002, on the maximum compensation rate

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[1] The Base Act incorporates the LHWCA's claims procedures. 42 U.S.C. § 1651 (a); 20 C.F.R. § 704.001.

[2] Because DynCorp timely contested liability, it did not have to begin making payments to Boroski while his claim was being adjudicated. *See* 33 U.S.C. § 914(b) (providing that the employer must either controvert the claim or commence voluntary payments within fourteen days after notification or knowledge of a claim or of injury or death).

that was in effect for that period, $966.08 per week.[3] Pursuant to 33 U.S.C. § 910(f), ICSOP increased the benefits it paid to Boroski annually beginning October 1, 2002.

Subsequent to the Compensation Order, Boroski applied to the District Director, Office of Workers' Compensation Programs, United States Department of Labor ("District Director") for a supplemental order declaring DynCorp in default. Boroski alleged that DynCorp delayed benefit payments as of June 3, 2008, and that DynCorp used an inappropriate maximum compensation rate. On September 16, 2008, the District Director stated that DynCorp did not make timely payments from June 3, 2008, to July 8, 2008, but that, on August 6, 2008, DynCorp had "voluntarily," after receipt of a show cause order, paid Boroski the additional compensation due. The District Director found that such August 6, 2008, payment "render[ed] the request for a finding of default moot for such periods." Further, the District Director found that, "[a]s Ordered, compensation is due [Boroski] for permanent total disability benefits from April 20, 2002[,] at the maximum compensation rate, and . . . [that ICSOP] has complied with the Decision and Order paying compensation as it became due." Thus, the District Director implicitly agreed with ICSOP that the maximum compensation rate applicable to Boroski was determined by reference to the date when benefits became payable (April 20, 2002), and not

[3] *See* Division of Longshore and Harbor Workers' Compensation, U.S. Dep't of Labor, National Average Weekly Wages, Minimum and Maximum Compensation Rates, and Annual October Increases, *available at* http://www.dol.gov/owcp/dlhwc/nawwinfo.htm (last visited Sept. 23, 2011) (listing $966.08 as maximum compensation rate for period beginning October 1, 2001, and ending September 30, 2002).

by reference to the date on which benefits were awarded to him (February 15, 2008). The District Director did not explain or discuss why he found such maximum compensation rate appropriate.

Boroski appealed the decision of the District Director to the Benefits Review Board of the United States Department of Labor ("Benefits Review Board"). DynCorp and ICSOP cross-appealed the order of the ALJ that found that Boroski was entitled to benefits. The Benefits Review Board affirmed the decision of the ALJ in part (as to the issue before us) and vacated and remanded in part (as to issues not before us). In accordance with the Benefits Review Board's prior decision in *Reposky v. International Transportation Services*, 40 Ben. Rev. Bd. Serv. (MB) 65 (2006), the Benefits Review Board affirmed the decision of the District Director, rejecting Boroski's argument that he was entitled to compensation for the years 2002-2008 at the 2008 maximum compensation rate. The Benefits Review Board explained that *Reposky* held "that the maximum compensation rate for permanent total disability benefits pursuant to [33 U.S.C. § 906(b)(2)] is that in effect at the time benefits commence, subject to subsequent adjustments."

Boroski appealed to the United States District Court for the Middle District of Florida. Applying principles of statutory construction, the district court affirmed the decision of the Benefits Review Board. The district court was persuaded by the decision of the United States Court of Appeals for the Ninth Circuit in *Roberts v. Director, Office of Workers' Compensation Programs*, 625 F.3d 1204 (9th Cir. 2010), *petition for cert. granted sub nom. Roberts v. Sea-Land Services, Inc.*, 80 U.S.L.W. 3179 (Sept. 27, 2011) (No. 10-1399). The *Rob-*

erts decision had expressly rejected the holding of the United States Court of Appeals for the Fifth Circuit in *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (5th Cir. 1997). *Roberts*, 625 F.3d at 1207 ("We are not persuaded by *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (5th Cir. 1997), which holds that an employee is 'newly awarded compensation' at the time of a formal compensation order.").

Boroski timely filed a notice of appeal. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and § 921(c) of the LHWCA, as incorporated by 42 U.S.C. § 1653.

II. STATUTORY BACKGROUND

In 1927, Congress enacted the LHWCA to provide a workers compensation system for covered workers. *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 257-58, 97 S. Ct. 2348, 2354, 53 L. Ed. 2d 320, 329 (1977) ("[C]onvinced that the only way to provide workmen's compensation for longshoremen and harborworkers injured on navigable waters was to enact a federal system, Congress, in 1927, passed the LHWCA.").

The LHWCA originally specified a specific dollar limit as the maximum compensation that a disabled worker could receive; Congress increased these limits in 1948, 1956, and 1961. From 1962 to 1972, maximum compensation was limited to $70 per week. Historical and Statutory Notes, 33 U.S.C.A. § 906 (West 2011).

In 1972, Congress comprehensively revised the LHWCA to accommodate the competing interests of shipowners, maritime employers, and maritime employees. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86

Stat. 1251, 1251-65. "The [1972] amendments: a) increased benefit amounts for longshoremen, b) eliminated the vessel owner's liability to longshoremen for unseaworthiness, and c) eliminated the vessel owner's indemnity action against the stevedore based on breach of an implied warranty of workmanlike service." Joel K. Goldstein, *Wrongful Death: Negligence Remedy Available to Estate of Longshoreman.*, 32 J. Mar. L. & Com. 175, 182 (2001) (reviewing *Garris v. Norfolk Shipbuilding & Drydock Corp.*, 210 F.3d 209 (4th Cir. 2000)); *see also Caputo,* 432 U.S. at 261-62, 97 S. Ct. at 2356, 53 L. Ed. 2d at 332 (recognizing that in the 1972 amendments, Congress "specifically eliminat[ed] suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlaw[ed] indemnification actions and 'hold harmless' or indemnity agreements; continu[ed] to allow suits against vessels or other third parties for negligence; and rais[ed] benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act") (internal quotation marks and parenthesis omitted).

As to § 906, the 1972 amendments, *inter alia*, "added subsec[tions] (b) to (d) and struck . . . former subsec[tion] (b) compensation . . . which prescribed a $70 per week" maximum compensation for all disabilities, and the lower of $18 per week or the employee's average weekly wages, as computed under § 910, for employees who were totally disabled. Historical and Statutory Notes, 33 U.S.C.A. § 906 (West 2011). As amended in 1972, subsection (b)(1) set out a schedule of progressive percentages for the years 1973 through 1975. Pub. L. No. 92-576, 86 Stat. at 1252 § 5. Subsections (b)(2) and (3) are set out in the current version of the LHWCA,

except that subsection (b)(2) now reads "under paragraph 3." 33 U.S.C. § 906(b)(2)-(3).

Subsection (d) (now (c)), added to § 906 in 1972, governs the application of the annually determined national average weekly wage. 33 U.S.C. § 906(c). This subsection states that the maximum and minimum rate of compensation "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." 33 U.S.C. § 906(c).

As part of the same legislation, Congress also added § 910(f). Pub. L. No. 92-576, 86 Stat. at 1258 § 11. Specifically, Congress added language that provided that compensation paid "for permanent total disability or death . . . shall be increased" each year by the same percentage that the national average weekly wage increased over the past year. *Id.* (codified at 33 U.S.C. § 910(f)).[4]

In 1984, Congress again amended the LHWCA. *See generally* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, 1639-55. It substituted the current subsection 906(b)(1) maximum, struck subsection (c) and redesignated subsection (d) as subsection (c), and amended subsection (b)(2) by substituting "under subsection (b)(3) of this section" for "under this subsection." Historical and Statutory Notes, 33 U.S.C.A. § 906 (West 2011).

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[4] Section 910 further provides that compensation shall not be reduced as a result of these annual adjustments. 33 U.S.C. § 910(g).

As to § 910(f), Congress, as part of the same legislation, "substituted 'subject to this chapter' for 'sustained after October 27, 1972,' and inserted 'the lesser of—' following 'by' in the introductory language, designated the balance of the existing provisions as par. (1), substituted '; or' for a period at the end of par. (1) as so designated, and added par. (2)." Historical and Statutory Notes, 33 U.S.C.A. § 910 (West 2011).

Thus, after the 1972 and 1984 amendments, compensation for various injuries generally is based on a worker's average weekly wage at the onset of disability, with annual adjustments to increase that compensation, unless otherwise provided by the Act. *See* 33 U.S.C. § 910 ("Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation . . . "). Sections 908 and 906(b) "otherwise provide" in this instance, as explained below.

Section 908 provides that a worker who is totally disabled is entitled to receive two-thirds of the average weekly wage he earned prior to his injury, which may be permanent. 33 U.S.C. § 908(a)-(b). A worker who is permanently but only partially disabled is entitled to two-thirds of his pre-injury average weekly wage for a fixed period of weeks, with the number of weeks based on the type of injury or the part of his body injured. 33 U.S.C. § 908(c)(1)-(20). If a worker is permanently and partially disabled but his injury is not one of those listed in subsections 908(c)(1)-(20), he is entitled to two-thirds of the difference between his pre-injury average weekly wage and his "wage earning capacity" thereafter. 33 U.S.C. § 908(c)(21).

However, under subsection 906(b), these benefits are subject to minimum and maximum limits based upon a percentage of the annually-adjusted average *national* weekly wage:[5]

> **(b) Maximum rate of compensation**
>
> (1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).
>
> (2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.
>
> (3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The

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[5] The minimum limits prescribed in the LHWCA expressly are not applicable to claims by workers covered by the DBA rather than the Act itself, such as Boroski. 42 U.S.C. § 1652(a).

> initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

33 U.S.C. § 906(b).

Further, subsection 906(c) sets out how determinations under subsection 906(b)(3) are to be applied:

> **(c) Applicability of determinations**
>
> Determinations under subsection (b)(3) of this section 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.

33 U.S.C. § 906(c).

Thus, pursuant to subsection 906(b)(1), all permanently totally disabled workers, such as Boroski, are subject to an annually-adjusted statutory maximum rate of compensation, that is, "an amount not to exceed 200 per centum of the applicable national average weekly wage as determined by the Secretary under paragraph (3)." 33 U.S.C. § 906(b)(1).

III. STANDARD OF REVIEW

This Court reviews "a question of pure statutory interpretation" by a district court on a *de novo* basis. *Burlison v. McDonald's Corp.*, 455 F.3d 1242, 1245 (11th Cir. 2006); *see also Williams v. Homestake Mortg. Co.*, 968 F.2d 1137, 1139 (11th Cir. 1992) ("We note at the outset that a district court's rulings 'on the interpretation and application of [a] statute are conclusions of law subject to *de novo* review.'") (quoting *Young v. Comm'r*, 926 F.2d 1083, 1089 (11th Cir. 1991)).

We review *de novo* both decisions of the Benefits Review Board, *U.S. Steel Mining Co. v. Dir., Office of Workers' Comp. Programs*, 386 F.3d 977, 984 (11th Cir. 2004), and supplemental orders issued by district directors under 33 U.S.C. § 918(a), *Pleasant-El v. Oil Recovery Co.*, 148 F.3d 1300, 1301 (11th Cir. 1998). As this Court has explained the standard applicable to appellate review under the LHWCA:

> We review the Board's decisions to determine whether the Board has adhered to its statutory standard of review and whether it has erred in interpreting the law. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 718 (11th Cir. 1988). This court, and the Board, must uphold the factual determinations of the ALJ if they are supported by substantial evidence in the record as a whole, *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1261 (11th Cir. 1990). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1262 (quoting *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971)). Because the Board is essentially an adjudicator, rather than an administrator, its interpretations are entitled to no special deference. *See Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Programs*, 449 U.S. 268, 278 n.18, 101 S. Ct. 509, 514-15 n.18, 66 L. Ed. 2d 446 (1980); *William[s] Bros. v. Pate*, 833 F.2d 261, 264 (11th Cir. 1987). We owe deference to official expressions of policy by the Director, who does administer the statute, *Lollar v. Alabama By-Products Corp.,* 893F.2d 1258, 1262 [. . .], but settled law precludes us from affording deference to an agency's litigating position. *McKee v.*

> *Sullivan*, 903 F.2d 1436, 1438 n.8 (11th Cir. 1990); *William[s] Bros.*, 833 F.2d at 265.

Ala. Dry Dock and Shipbuilding Corp. v. Sowell, 933 F.2d 1561, 1563 (11th Cir. 1991), *abrogated on other grounds by Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 506 U.S. 153, 162-63, 113 S. Ct. 692, 698, 121 L. Ed. 2d 619, 630-31 (1993); *accord Equitable Equip. Co. v. Dir., Office of Workers' Comp. Programs*, 191 F.3d 630, 631 (5th Cir. 1999) ("This court reviews the [Benefit Review Board]'s interpretation of the LHWCA, an issue of law, *de novo*, affording no special deference to the [Benefit Review Board]'s construction because it is not a policymaking agency.").

The Director of the Office of Workers' Compensation Programs has expressed his position in a brief to us, and the District Director took the same position in his compensation orders. The parties agree that this interpretation is entitled to deference under *Skidmore v. Swift & Co.* 323 U.S. 134, 140, 65 S. Ct. 161, 164, 89 L. Ed. 124, 129 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."). We agree.

"Under *Skidmore*, an agency's interpretation may merit some deference depending upon the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Buckner v. Fla. Habilitation Network, Inc.*, 489 F.3d 1151, 1155 (11th Cir. 2007) (quo-

ting *Skidmore*, 323 U.S. at 140, 65 S. Ct. at 164, 89 L. Ed. at 129).

While this Court has previously held that the "mere litigating position" of the Director is not entitled to "deference," *Williams Bros. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) ("[W]e do not agree that the Director's mere litigating position is due to be given deference."), that decision does not preclude application of *Skidmore* deference, which is the deference we give to any nonbinding agency authority that is nonetheless persuasive.[6] Unlike the administrator in *Williams Bros.*, the Director is not articulating a "novel position," 833 F.2d at 265, or a post hoc rationalization of a past decision. *Cf. Auer v. Robbins*, 519 U.S. 452, 462, 117 S. Ct. 905, 912 137 L. Ed. 2d 79 (1997) ("The Secretary's position is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack . . . ") (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S. Ct. 468, 474, 102 L. Ed. 2d 493 (1988)). The Director has taken his position in the past. *See, e.g.*, *Roberts*, 625 F.3d at 1206 (summarizing issues on appeal); *Reposky*, 40 Ben. Rev. Bd. Serv. (MB) 65; *cf. Puccetti v. Ceres Gulf*, 24 Ben. Rev. Bd.

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[6] This Court has explained in *dicta* that the Director's interpretations of statutes in legal briefs are "entitled to only *Skidmore* deference." *See Pittsburg & Midway Coal Mining Co. v. Dir., Office of Workers' Comp. Programs*, 508 F.3d 975 (11th Cir. 2007); *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1091 n.7 (11th Cir. 2004); *see also Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136, 117 S. Ct. 1953, 1962, 138 L. Ed. 2d 327, 342 (1997) ("[T]he Director's reasonable interpretation of the Act brings at least some added persuasive force to our conclusion . . . " (citing *Skidmore*, 323 U.S. at 140, 65 S. Ct. at 164)). *But see Bianco v. Ga. Pac. Corp.*, 304 F.3d 1053, 1056 n.3 (11th Cir. 2002) (refusing to give deference to litigating position of the Director).

Serv. (MB) 25, 31 (1990) ("[D]uring a yearly period when a given national average weekly wage is in effect, those 'currently receiving' benefits for permanent total disability or death are entitled to that year's new maximum, as are those 'newly awarded' compensation during that period.").

Therefore, because the nature of this particular LHWCA appeal "presents questions of law only," we engage in a *de novo* examination. *Pleasant-El*, 148 F.3d at 1301 (reviewing *de novo* district court's decision regarding meaning of ten days, *i.e.*, calendar days or business days, under § 914(f) of LHWCA). Further, we have accorded *Skidmore* deference to the Director's position.[7]

IV. ANALYSIS

Boroski argues, as he did before the district court and the Benefits Review Board, that the plain language of 33 U.S.C. § 906(c), as applied to permanently totally disabled claimants, such as himself, two-thirds of whose pre-disability average weekly wage exceeds the maximum compensation set out in § 906(b)(1), and who are

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[7] It is worth noting here that the Ninth Circuit still extends deference under *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), to the Director's litigating positions interpreting the LHWCA. *See Price v. Stevedoring Servs. of Am., Inc.*, 627 F.3d 1145 (9th Cir. 2011) (O'Scannlain, J., concurring specially), *rehearing en banc granted*, No. 08-71719, 2011 WL 3251481, at *1 (Aug. 1, 2011). We agree with Judge O'Scannlain that such deference is ill-founded and indeed "conflicts with the Supreme Court's decision in *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)." *Price*, 627 F.3d at 1150. Neither this Court nor the Fifth Circuit accords *Chevron* deference to the Director's litigating positions interpreting the LHWCA. This fundamental difference in approach may explain in part the divergence of opinions between the Fifth and Ninth Circuits on the issue currently before us.

"newly awarded compensation" for such disability, unambiguously provides that the applicable maximum compensation for such worker is 200 percent of the national average weekly wage in effect at the time of the award,[8] adjusted each October 1 thereafter. DynCorp, joined by its insurer, ICSOP, and the Director, argue that it is the date of onset of the disability, and not the date on which a permanently totally disabled worker is awarded compensation, that determines the worker's applicable maximum compensation, adjusted annually thereafter.

A. Rules of Statutory Construction

"As in any case of statutory construction, our analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S. Ct. 755, 760, 142 L. Ed. 2d 881, 891-92 (1999) (citation omitted). Additionally, "[a]ny ambiguity in the statutory language must result from the common usage of that language, not from the parties' dueling characterizations of what Congress 'really meant.'" *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 (11th Cir. 2001).

Thus, in interpreting § 906(c),"[o]ur 'starting point' is the language of the statute itself:"

> We assume that Congress used the words in a statute as they are commonly and ordinarily understood, and we read the statute to give full effect to each of its provisions. We do not look at one word or term in isolation, but instead we look to the entire statutory

[8] The LHWCA provides for payment of compensation without an award where liability is not controverted by the employer. 33 U.S.C. § 914(a).

> context. We will only look beyond the plain language of a statute at extrinsic materials to determine the congressional intent if: (1) the statute's language is ambiguous; (2) applying it according to its plain meaning would lead to an absurd result; or (3) there is clear evidence of contrary legislative intent.

Harrison v. Benchmark Elecs. Huntsville, Inc., 593 F.3d 1206, 1212-13 (11th Cir. 2010) (second alternation in original) (citations omitted) (quoting *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999)). Further, this Court has clarified the relationship between the plain meaning rule and other canons of construction as follows:

> On occasion, this Court has referred to the plain meaning rule itself as a one of the canons of construction. *See, e.g.*, *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185-86 (11th Cir. 1997). While this may be true, we believe that the clear language of a statutory provision holds a status above that of any other canon of construction, and often vitiates the need to consider any of the other canons. Therefore, if the plain meaning rule is a canon of construction, it is the largest caliber canon of them all.

CBS, 245 F.3d at 1225 n.6.

> *B. The Plain Language of the Statute Establishes that Boroski Is Entitled to Compensation at the Maximum Rate in Effect at the Time of the Administrative Award.*

Under the LHWCA, the compensation to which an injured covered worker is entitled generally is determined by reference to his or her average weekly wage at the time of the injury. 33 U.S.C. § 910. Further, the

average weekly wage of an employee is 1/52 of his or her average annual earnings. 33 U.S.C. § 910(d).

Section 908 sets out a schedule for compensation for specified injuries. Where the disability is both permanent and total, § 908(a) provides:

> (a) Permanent total disability: In case of total disability adjudged to be permanent[,] 66 2/3 per centum of the [disabled employee's] average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

33 U.S.C. § 908(a).

Section 906(a) sets out when compensation is *allowed* to commence:[9]

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[9] If liability is controverted, as in this case, compensation is not *required* to commence unless and until compensation is awarded (by a compensation order), although the employer may voluntarily advance payments to the worker while the claim is pending. *See* 33 U.S.C. § 914(a) ("Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer."); *id.* § 914(b), (f) (describing installment payments and penalties for late payments under the Act); *id.* § 914(j) ("If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due."); *id.* § 921(a) ("A compensation order shall become effective when filed in the office of the deputy commissioner. . . . "); *see also Carillo v. La. Ins. Guar. Ass'n*, 559 F.3d 377, 382 (5th Cir. 2009) (holding that compensation becomes "due" so as to trigger the measuring date applicable to penalties for late payment when "the initial acts by

> **(a) Time for commencement**
>
> No compensation shall be allowed for the first three days of the disability, except the benefits provided for in section 907 of this title: *Provided, however*, That in case the injury results in disability of more than fourteen days the compensation shall be allowed from the date of the disability.

33 U.S.C. § 906(a).[10]

However, § 906(b)(1) "caps" the compensation paid. This "cap" applies only when the injured worker's compensation, as computed under § 908, exceeds "200 per centum of the applicable national average weekly wage, as determined by the Secretary under [§ 906(b)(3)]." 33 U.S.C. § 906(b)(1).

Section 906(b)(3) requires the Secretary to determine the national average weekly wage annually:

> (3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year.

33 U.S.C. § 906(b)(3).

Section 906(c) mandates when the annually determined national average weekly wage "shall apply."

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the District Director [*awarding* the compensation] have occurred-such as the formal dating of the order and its filing in the office").

[10] Section 907 deals with medical services and supplies.

(c) Applicability of determinations

> Determinations under subsection (b)(3) of this section 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.

33 U.S.C. § 906(c).

Boroski was "newly awarded compensation" at the tiem of the ALJ's award and was not receiving voluntary compensation. Thus, under a plain reading of the statute, we agree that the maximum compensation rate applicable to Boroski must be determined by reference to the national average weekly rate applicable to "such period" on which he received his award, that is, February 15, 2008.

We are aware that the Fifth Circuit has decided this issue in a manner consistent with the result urged by Boroski, but that the Ninth Circuit and the Benefits Review Board have reached a contrary result. An analysis of these cases explicates that the result reached by the Fifth Circuit is correct.

1. The Fifth Circuit's *Wilkerson* Decision

The Fifth Circuit interpreted § 906(c) in *Wilkerson,* 125 F.3d 904. *Wilkerson* involved a claim brought in 1992 for a permanent partial disability (bilateral partial hearing loss) suffered prior to enactment of the 1972 amendments to the LHWCA. As the Fifth Circuit explained, "[a] person suffering hearing loss after prolonged exposure to excessive noise is deemed to have been injured on the last day he was exposed. Here, the

last exposure was the day of Wilkerson's retirement on October 6, 1972." 125 F.3d at 905 n.3 (citation omitted). The employer began making payments to the claimant in 1992, within 14 days of the claim, although the parties disputed the maximum compensation rate that applied. The court framed the facts and procedural posture as follows:

> At the time of Wilkerson's retirement [and thus the time of his injury], the LHWCA allowed a maximum benefit of only $70 per week: much less than the $111.80 to which Wilkerson would otherwise have been entitled under § 908. After Wilkerson retired but before he filed his claim, Congress amended the LHWCA to provide a much higher maximum benefit, determined yearly by the Department of Labor as a factor of the national average wage. *See* 33 U.S.C. § 906. Thus, on November 26, 1972, the cap jumped to $167 and has been increasing with inflation ever since.

Wilkerson, 125 F.3d at 905.

The Fifth Circuit set out the relevant issue as follows:

> The petition for review presents two distinct questions. The first-made apparent by the above recitation of facts-is whether Wilkerson should receive compensation according to the maximum rate in effect at the time of his injury (his retirement), or instead according to the maximum at some later time. This question is easily resolved, as the statute makes plain that compensation is governed by the maximum rate in effect at the time of an award.

Id. at 906.

Our sister circuit then held:

> The LHWCA, as amended, calls for the Secretary of Labor yearly to calculate the "national average weekly wage" and provides that 200% of this sum be the maximum compensation available under the LHWCA. 33 U.S.C. § 906(b). The same statutory provision resolves the question before us. It provides that a given year's maximum compensation "shall apply to employees or survivors . . . *newly awarded compensation* during such [year]. 33 U.S.C. § 906(c) (emphasis added).
>
> Wilkerson was "newly awarded compensation" by the ALJ on November 10, 1993. The maximum weekly compensation available during that year was $738.30. Wilkerson's scheduled compensation of $111.80 falls well below that maximum. Therefore, he is entitled to the full amount of scheduled compensation under § 908(c)(13)(B), the amount originally paid by Ingalls: 38.46 weeks at $111.80 per week, or $4,299.83.

Id. Thus, the Fifth Circuit not only held that the 1972 weekly maximum rate of $70, which was in effect at the date of Wilkerson's retirement (and therefore of his injury) did not apply, but that the maximum in effect on the date Wilkerson was "newly awarded benefits"—November 10, 1993—*did* apply to determine his compensation due: $110.80 per week.

In his brief to us, the Director scarcely mentions *Wilkerson*, other than to say that the district court rejected Boroski's reliance on it and to quote the Ninth Circuit's opinion finding it unpersuasive because "[t]he *Wilkerson* court] . . . did not engage in any analysis

. . . [but rather] resolved the issue summarily without expressing any reasoning," *Roberts*, 625 F.3d at 1207. DynCorp and ICSOP say even less about *Wilkerson*, only quoting the same section of *Roberts* quoted by the Director and criticizing Boroski's "fail[ure] to recognize that such a narrow reading of section 6(c) is inconsistent with the overall process of determining benefits under the Act, and would breed conflicting results among the claimant population." However, when the language of the statute itself is clear, "assum[ing] that Congress used the words in . . . [it] as they are commonly and ordinarily understood, and . . . read[ing] the statute to give full effect to each of its provisions[,] . . . look[ing] to the entire statutory context[,]" *Harrison*, 593 F.3d at 1212 (internal quotation marks omitted) (citations omitted) (quoting *DBB*, 180 F.3d at 1281), the analysis is complete.

As explained below, having performed this complete analysis, we agree with *Wilkerson*.

2. The Board's *Reposky* Decision

In *Reposky*, the Benefits Review Board pointed out that *Wilkerson* was a Fifth Circuit case, and therefore not binding on it outside the Fifth Circuit. 40 Ben. Rev. Bd. Serv. 65. It then distinguished *Wilkerson*, stating that the *Wilkerson* court did not have before it the issue of statutory interpretation of § 609(c), and therefore the decision was also not persuasive as to that issue. *Id.* at 75 ("Thus, in *Wilkerson*, claimant's award was entered after the effective date of the 1972 Amendments and the prior maximum compensation rate thus was not applicable as a matter of law."); *id.* ("There was no issue regarding the statutory interpretation of Section 6(c) before the court."); *id.* ("Under these circumstances, the

single sentence in *Wilkerson* is not persuasive authority for overruling *Puccetti*.").[11]

In *Reposky*, the Benefits Review Board relied on its prior decisions in *Puccetti*, 24 Ben. Rev. Bd. Serv. (MB) 25, and *Kubin v. Pro-Football, Inc.*, 29 Ben. Rev. Bd. Serv. (MB) 117 (1995), for its holding that, pursuant to § 906(c), the applicable maximum compensation rate is the one in effect when the disability commences. *See Reposky*, 40 Ben. Rev. Bd. Serv. at 75 ("Both cases hold that the applicable maximum rate is the one in effect when the disability commences."); *id.* ("In *Puccetti*, the Board commented that this *generally* is when the *injury* occurs, but these cases, as well as the legislative history, provide that the applicable maximum rate is determined by the date benefits *commence*.") (some emphasis added).

Reposky involved a claimant who suffered an injury in 1995 that caused a temporary total disability. 40 Ben. Rev. Bd. Serv. at 66. The employer began voluntary payment of compensation in 1995, *id.* at 66, but a compensation award was not entered until 2005, *id.* at 74. The Benefits Review Board held that the claimant was subject to the compensation limit in effect in 1995 and 1996 for Reposky's temporary total disability. *See id.* at 76 ("We affirm the administrative law judge's finding that claimant's temporary total disability awards are subject to the maximum rates in effect in 1995 and 1996."). As made clear below, the Benefits Review Board's reliance in *Reposky* on its prior holding in *Puccetti* is misplaced.

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[11] This reading of *Wilkerson* is flatly contradicted by the Fifth Circuit's holding.

Specifically, *Puccetti* held that § 906(c) mandates that the national average weekly wage that is determined annually each October 1 pursuant to § 906(b)(3) applies, as to the maximum rate of compensation for any particular disability claimant, as of the date that compensation is "newly awarded." *Puccetti*, 24 Ben. Rev. Bd. Serv. at 31 ("Acceptance of the Director's position requires that we ignore the plain language of Section 6(c) which differentiates between those '*currently receiving* compensation for permanent total disability or death benefits' during a period and those '*newly awarded* compensation' during the period.").

Further, the Benefits Review Board's passing reference in *Reposky* to *Kubin*, is unhelpful. In *Kubin*, although the Benefits Review Board affirmed the ALJ's decision to base the claimant's applicable maximum compensation under § 906(c) on the date the "award commenced," that is, August 1, 1986, the day after the claimant was forced by his disability to retire (because the disability was latent until then), and rejected the employer's argument that such maximum compensation should have been based on the claimant's earlier injury date, there was no argument that the date of the award itself should not have been the controlling date. *See Kubin*, 29 Ben. Rev. Bd. Serv. at 122 ("[W]e disagree with [the] employer that the applicable rate is that in effect at the time of claimant's October 14, 1981, injury."). Indeed, the claimant urged affirmance of the award. Thus, the issue that is before us (and the same issue that was before our sister circuits in *Wilkerson* and in *Roberts*) was not before the Benefits Review Board in *Kubin*. Finally, *Reposky* reads § 906(b)(1) in the abstract, without reference to § 906(c) and its limit-

ing effects on § 906(b)(1). In sum, we find *Reposky* unpersuasive.

3. The Ninth Circuit's *Roberts* Decision

We also disagree with the holding of the Ninth Circuit Court of Appeals as set out in *Roberts*.[12] The facts and procedural posture of *Roberts* are copied here from the Ninth Circuit's opinion.

> On February 24, 2002, while working as a gatehouse dispatcher in Dutch Harbor, Alaska, for Sea-Land Services, Inc., Dana Roberts slipped on a patch of ice. Having injured his neck and shoulder, Roberts ceased work on March 11, 2002, and sought compensation under the LHWCA.
>
> After initially making some payments to Roberts, Sea-Land and its insurer stopped paying him compensation in May 2005. The matter subsequently came before an administrative law judge ("ALJ"). In a de-

[12] This opinion is binding authority in the Ninth Circuit and has been followed in *Price*. 627 F.3d at 1148 ("As explained in our recent opinion in *Roberts v. Director, OWCP*, 33 U.S.C. § 906(b) and (c) require us to apply the maximum compensation rate from the fiscal year in which the individual becomes entitled to compensation (*i.e.*, the date of injury), not the rate in place for the fiscal year when the ALJ issues a formal compensation award. Therefore, the Board and the ALJ did not err by capping Price's compensation by the fiscal year 1991 rate."). However, Judge O'Scannlain, who participated in both *Roberts* and *Price*, wrote a concurring opinion in *Price* in which he criticized the Ninth Circuit's continued *Chevron* deference to the Director's litigating position, *Price*, 627 F.3d at 1150-51, and "respectfully suggest[ed] that the time is ripe for [the Ninth Circuit] to revisit our circuit's law governing the deference we owe the Director's litigating positions." *Id.* at 1151. Additionally, after oral argument was held in this case, the Ninth Circuit ordered that *Price* be reheard en banc. *Price v. Stevedoring Servs. of Am.*, — F.3d —, 2011 WL 3251481 (9th Cir. Aug. 1, 2011).

cision issued on October 12, 2006, the ALJ found that Roberts's disability was temporary total from March 11, 2002, to July 11, 2005; permanent total from July 12, 2005, to October 9, 2005; and permanent partial beginning on October 10, 2005. The ALJ calculated Roberts's average weekly wage at the time of injury to be $2,853.08 and his residual wage-earning capacity while partially disabled to be $720.00 per week. Based on these figures alone, Roberts was entitled to weekly compensation in the amount of $1,902.05 during his periods of permanent total and temporary total disability, and $1,422.05 during his period of permanent partial disability. The ALJ concluded, however, that the applicable maximum rate with respect to each of Roberts's periods of disability was $966.08 per week-200% the national average weekly wage for fiscal year 2002, the year Roberts first became disabled. Because the compensation to which Roberts would have otherwise been entitled exceeded the applicable maximum rate, the ALJ ordered Sea-Land and its insurer to pay Roberts $966.08 per week for all periods of disability.

Roberts filed a motion for reconsideration of the ALJ's decision. The ALJ denied the motion but determined that he had applied the wrong maximum rate to Roberts's permanent total disability during the period between October 1, 2005, and October 9, 2005. According to the ALJ, the applicable maximum rate for that period was not $966.08, but rather $1,073.64-200% of the national average weekly wage with respect to fiscal year 2006. The Benefits Review Board affirmed the ALJ's decision and his order denying reconsideration.

Roberts, 625 F.3d at 1205-06.

The Ninth Circuit framed and answered the issues before it as follows:

> This case presents two questions regarding the interpretation of section 6(c) of the LHWCA. The first concerns when an employee is "newly awarded compensation." According to Roberts, the ALJ erred by holding that he was "newly awarded compensation" in fiscal year 2002, when he first became disabled. Roberts argues that he was not "newly awarded compensation" until fiscal year 2007, when the ALJ issued his decision making a formal award of compensation, and that therefore the ALJ should have used the national average weekly wage with respect to fiscal year 2007 in calculating the maximum rate that governs his compensation for temporary total and permanent partial disability. We disagree.

Id. at 1206.

The Ninth Circuit pointed out that the terms "award" and "awarded" are not expressly defined in the LHWCA. *Id.* Citing *Astrue v. Ratliff*, 130 S. Ct. 2521, 177 L. Ed. 2d 91 (2010), the Ninth Circuit noted that the Supreme Court held in that case that "[t]he transitive verb 'award' has a settled meaning in the litigation context: It means '[t]o give or assign by sentence or judicial determination.'" *Roberts*, 625 F.3d at 1206 (alterations in original) (quoting 130 S. Ct. 2521, 2526 (2010) (quoting *Black's Law Dictionary* 125 (5th ed. 1979))).

The Ninth Circuit further observed that some sections of the LHWCA use the term "award" consistently with this settled meaning, but others do not. *Roberts*,

625 F.3d at 1206. The court in *Roberts* then focused on §§ 908 and 910 of the Act.

As to § 908, the Ninth Circuit concluded that Congress could not mean the term "award" or "awarded" to have in that section the meaning assigned to it in *Ratliff* or *Black's Law Dictionary*, that is, "assigned by formal order in the course of adjudication," because:

> [E]mployers are obligated to pay such compensation regardless of whether an employee files an administrative claim. Section 908 thus uses the terms "award" and "awarded" to refer to an employee's entitlement to compensation under the Act generally, separate and apart from any formal order of compensation.

Id. at 1206-07.

As to § 910, the Ninth Circuit similarly concluded that "[s]ection 10 . . . uses the term 'awarded' to refer to an employee's entitlement to compensation, irrespective of a formal compensation order. . . . [Thus,] Congress apparently used 'awarded compensation' and 'entitled to compensation' to mean the same thing." *Roberts*, 625 F.3d at 1207.

Finally, the Ninth Circuit determined that:

> Section 6 [§ 906] uses "awarded" like sections 8 [§ 908] and 10 [§ 910]. Like sections 8 and 10, section 6 governs determinations of compensation under the Act. Like sections 8 and 10, moreover, compensation governed by § 906 is due without a formal compensation order. *See id.* §§ 904(a), 914(a). Thus, "awarded" as used in section 6 does not mean "assigned by formal order in the course of adjudication." Consistent with the meaning of "awarded" in sections 8 and 10,

> "newly awarded compensation" in section 6 means "newly entitled to compensation."

Roberts, 625 F.3d at 1207.

We find that our sister circuit, perhaps because it applies *Chevron* deference to the Director's litigating positions,[13] has made too much out of too little. The LHWCA unequivocally was adopted to provide a federal traditional workers' compensation scheme for non-seaman maritime workers commonly known as "longshoremen, [that is,] land-based workers who perform a variety of tasks for, on, and around vessels." Thomas J. Schoenbaum, 1 Admiralty & Mar. Law § 7-1, at 533-34 (5th ed. 2011). The fact that various sections interrelate on the issue of how and when compensation is due to such workers does not override the clear and express language of § 906. The Ninth Circuit either has forgotten, or disagrees, that "if the plain meaning rule is a canon of construction, it is the largest caliber canon of them all." *CBS*, 245 F.3d at 1225 n.6.

Further, the Ninth Circuit, in attempting to avoid what it considers to be potential inequitable results, substituted what it thinks Congress should have said for the plain language that Congress used. This Court's binding law dictates otherwise. *See id.* at 1225 ("Any ambiguity in the statutory language must result from the common usage of that language, not from the parties' dueling characterizations of what Congress 'really meant.'").

Additionally, in *Roberts* the Ninth Circuit construed the term "award" to mean (in §§ 906, 908, and 910) "entitled to compensation," which the court admitted is not the ordinary and common meaning ascribed to that

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[13] *See supra* notes 7, 12.

term, yet allowed the same term to have its ordinary and common meaning in other sections of the LHWCA. We are not inclined to engage in such a contorted construction of the term "award."

The LHWCA discusses the review of "any action, award, order, or decision." 33 U.S.C. § 928(c). These terms designate administrative action, not rights or obligations that automatically arise upon the occurrence of certain events. The use of "award" in §§ 913 and 914 is similarly incompatible with an interpretation of "award" as meaning, as found by the district court and *Roberts* and as urged by the Director, DynCorp, and DynCorp's insurer, "entitlement," because §§ 913 and 914 anticipate the payment of compensation by an employer *without* entry of an award. Section 913 provides that a claimant must file a claim within one year of the injury but "[i]f payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment." 33 U.S.C. § 913(a). Section 914 provides that an employer must pay an injured employee promptly and "without an award" unless liability is contested. 33 U.S.C. § 914(a). Section 914 also provides for assessment of a 10 percent penalty when an employer fails to provide "compensation payable without an award,"[14] 33 U.S.C. § 914(e), and a 20 percent penalty when an employer fails to provide "compensation[] payable under the terms of an award[.]" 33 U.S.C. § 914(f). The LHWCA also treats an "award" as something provided by an administrative order, as opposed to automatically arising, when it discusses the filing of "[t]he order re-

[14] That is, compensation when the employer has not contested liability, as provided in 33 U.S.C. § 914(a).

jecting the claim or making the award (referred to in this chapter as a compensation order)." 33 U.S.C. § 919(e). Similarly, another section provides that "[a]n award of compensation for disability may be made after the death of an injured employee." 33 U.S.C. § 919(f); *see also* 33 U.S.C. § 928(b) (discussing payment of attorney's fees when "the employer or carrier pays or tenders payment of compensation without an award").

Further, the legislative history of the Act also suggests that "newly awarded" does not mean mere entitlement to compensation. Senate Report 92-1125 to Pub. L. No. 92-576 clarified that "determinations of national average weekly wage made with respect to a period apply to employees or survivors currently receiving compensation . . . as well as those who begin receiving compensation for the first time during the period." *Dir., Office of Workers' Comp. Programs v. Rasmussen*, 440 U.S. 29, 42-43, 99 S. Ct. 903, 911, 59 L. Ed. 2d 122, 133 (1979) (emphasis omitted) (quoting S. Rep. No. 92-1125, at 18 (1972)) (internal quotation marks omitted).

The *Roberts* decision also is inconsistent with the Supreme Court's holding in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S. Ct. 2589, 120 L. Ed. 2d 379 (1992), in which the Supreme Court specifically rejected the converse of the argument relied on in *Roberts* — that "person entitled to compensation" could be read to encompass only claimants receiving compensation or having an award of compensation at the relevant time. *See Cowart*, 505 U.S. at 475, 112 S. Ct. at 2594, 120 L. Ed. 2d at 389 ("Cowart claims that he is not subject to the approval requirement because in his view the phrase 'person entitled to compensation,' . . . limits the reach of § 33(g)(1) to injured workers who are either

already receiving compensation payments from their employer, or in whose favor an award of compensation has been entered."). As pointed out by Boroski, *Cowart* affirmed that § 933(g) of the LHWCA, as amended by the same 1972 amendment as the provisions involved here, provides that a "person entitled to compensation" who enters into a settlement with a liable third party without first obtaining the employer's approval forfeits the right to compensation and medical benefits from the employer. *See id.* at 475, 112 S. Ct. at 2594, 120 L. Ed. 2d at 389 ("We agree . . . and hold that under the plain language of § 33(g), Cowart forfeited his right to further LHWCA benefits by failing to obtain the written approval . . . prior to settling. . . . ").

The Director and the Benefits Review Board considered the consequences of applying the statutory terms according to their natural meaning, thereby including unpaid claimants, anomalous and unduly harsh, and therefore had construed "entitled to compensation" to mean "receiving compensation or having been awarded it." The Ninth Circuit and the Fifth Circuit had agreed in unpublished opinions with this contorted construction, *id.* at 488-89, 112 S. Ct. at 2601, 120 L. Ed. 2d at 397, but a panel of the Fifth Circuit followed by a divided Fifth Circuit sitting en banc subsequently held that the unambiguous meaning of the phrase employed by Congress controlled and therefore foreclosed this paid-or-awarded reading, *id.* at 491, 112 S. Ct. at 2602, 120 L. Ed. 2d at 399. The Supreme Court agreed. "Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the

person satisfies the prerequisites attached to the right." *Id.* at 477, 112 S. Ct. at 2595, 120 L. Ed. 2d at 390.

The Supreme Court held that the forfeiture provision applied unambiguously to a claimant who did have a right to compensation under the Act when he settled a third-party tort claim, even though the employer was denying such entitlement, and no award had been entered or payments made, at the time. *Id.* at 475, 112 S. Ct. at 2594, 120 L. Ed. 2d at 389. "[T]he stark and troubling possibility" that the statute would have harsh results, "creat[ing] a trap for the unwary" and providing a tool for employers to avoid liability for disabling injuries suffered in their employ, *id.* at 483, 112 S. Ct. at 2598, 120 L. Ed. 2d at 394, was an insufficient ground for avoidance of its clear terms, as the Supreme Court concluded:

> It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

Id., 505 U.S. at 483-84, 112 S. Ct. at 2598, 120 L. Ed. 2d at 394.

By a parity of reasoning, the normal meaning of "those newly awarded compensation" requires more than that the claimant qualifies for compensation, *i.e.*, is entitled to it. Just as "entitled to compensation" cannot be read to mean "awarded or receiving compensation," *Cowart*, 505 U.S. at 475, 112 S. Ct. at 2594, 120 L. Ed. 2d

at 389, "newly awarded compensation" cannot be read as "newly entitled to" compensation.

Further, application of the clear meaning of the statutory terms in this case will not have any harsher effect than construing it as the Ninth Circuit did in *Roberts*; it will simply favor the disabled employee over the employer, rather than the employer over the employee, in the event of significant delay. Following the statute as written will provide a claimant with a higher benefit, at a concomitant cost to the employer, if entry of an award is substantially delayed. Adopting the Roberts construction would result in a lower benefit, at a concomitant gain to the employer, if entry of an award is substantially delayed. The fact that Congress has chosen to encourage employers to pay promptly by imposing penalties for nonpayment of claims that result in awards unless a claim is timely controverted does not make the disabled employee whole, since controversion is totally within the control and discretion of the employer. We therefore decline to follow the Ninth Circuit's decision to substitute the meaning of the terms "award" and "awarded" as used in §§ 908 and 910 in lieu of the plain meaning of the term as used in § 906(c).

The Director also contends that Boroski cannot obtain additional compensation even if "award" refers to an administrative order because the term "during such period" in § 906(c) can be read to mean "for such period" and Boroski was awarded compensation "for" 2002-2008. This argument fails because "during" is best understood to have a meaning more consistent with "in" than "for." "During" means "enduring, lasting, continuing" and also "[t]hroughout the whole continuance of; hence, in the course of, in the time of." *Oxford English Dictionary*

1134 (2d ed. 1989). The Director cites *Black's Law Dictionary* for the proposition that "during" is a meaning of "for," but this citation is misleading. The full entry for the cited definition of "for" is "[d]uring; throughout; for the period of, as where a notice is required to be published 'for' a certain number of weeks or months." *Black's Law Dictionary* 644 (6th ed. 1990). The Director then notes that § 908 provides in several places that compensation shall be paid "during the continuance" of a disability. The Director contends that "during" must be read to mean "for" because compensation may be paid after a disability ends when liability was disputed. However, the Director's argument ignores the significance of the object of the word "during." Section 906 says that a determination of the national average weekly wage for a period is applicable to "those newly awarded compensation during such period." The object of "during" is the period in which a claimant was "newly awarded compensation," not the period in which a claimant suffered an injury that gave him a claim for compensation.

V. CONCLUSION

A plain reading of subsections 906(b) and (c) compels our holding that a person, such as Boroski, who has never received compensation for a covered disability that commenced in 2002, and who is "newly awarded compensation" in 2008, is entitled to have his maximum compensation rate determined by reference to the national average weekly rate applicable to the date on which he received his award. Because the parties stipulated, and the ALJ agreed, that Boroski's "average weekly wage" was at all relevant times "the maximum average weekly wage," his benefits should have been

computed at the maximum average weekly rate in effect in 2008—the year of his award—for each of the years spanning the 2002-2008 time period.

For the foregoing reasons, we **REVERSE** the district court's order entered December 3, 2010, affirming the Benefits Review Board's January 30, 2009, decision with respect to the finding that Boroski was compensated at the proper maximum rate and **REMAND** to the district court for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 3:09-cv-240-J-20JRK

BERNARD D. BOROSKI, PETITIONER

v.

DYNCORP INTERNATIONAL, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

[Filed: Dec. 3, 2010]

ORDER

Before this Court is Petitioner, Bernard D. Boroski's, Petition for Review of a decision by the U.S. Department of Labor's Benefits Review Board ("Board") (Doc. 1, filed March 13,2009). Petitioner filed a legal memorandum in opposition to the Board's decision (Doc. 19, filed August 12, 2010). On August 26, 2010, Petitioner's former employer, Dyncorp International ("Dyncorp"), and its insurance carrier, Insurance Company of the State of Pennsylvania/AIG Worldsource ("Insurer"), filed a memorandum in support of the decision (Doc. 20).

Subsequently, the Director, Office of Workers' Compensation Programs, Untied States Department of Labor ("Director"), filed his memorandum in support of the decision (Doc. 23, filed October 1, 2010).

I. Facts[1]

This case originates out of Bernard D. Boroski's ("Petitioner") claim for disability benefits brought under the Defense Base Act, 42 U.S.C. § 1651 et seq., which extends coverage of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"), to individuals working on military bases outside the United States. While a summary of the relevant facts is recited below, they are discussed in greater detail in the Order (Doc. 18), issued August 11, 2010.

While working for Dyncorp, Petitioner became disabled and sought disability benefits from his last day of employment on April 19, 2002. On February 15, 2008, an administrative law judge issued a Decision and Order Granting Benefits ("Compensation Order") for permanent total disability from April 20, 2002, and continuing at the maximum compensation rate, without specifying the precise dollar amount of the award. Petitioner was also awarded interest on all accrued benefits and penalties, computed from the date each payment was originally due. Accordingly, Petitioner's Employer paid him the accrued compensation and interest, calculated at the initial maximum compensation rate in effect in fiscal year 2002, and continuing with the appropriate periodic adjustments made under § 10(f).

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[1] This Court's use of the word "facts" is solely for purposes of deciding the motion and are not necessarily the actual facts. *Kelly v. Curtis*, 21 F.3d 1544, 1546 (11th Cir. 1994) (citation omitted).

Nevertheless, on July 15, 2008, Petitioner requested that a district director issue a supplemental order, pursuant to § 918(a) of the LHWCA, declaring Dyncorp and its Insurer in default for payments due under the Compensation Order. Petitioner asserted that the companies had been paying compensation at the maximum compensation rate calculated from the date of injury, while they should have been making payments at the higher maximum rate in effect at the time the Compensation Order was issued. He claimed they were in default for the difference between the two rates.

On September 16, 2008, the district director entered an Amended Supplemental Compensation Order, finding that Petitioner had been compensated at the proper maximum rate and that no portion of the award due to Petitioner was in default. In January 2009, the Board affirmed the district director's order, concluding that it was in accord with the Board's determination in *Reposky v. Int'l Transp. Serv.,* 40 BRBS 65 (2006) that "the maximum compensation rate for permanent total disability benefits pursuant to Section 6 is that in effect at the time benefits commence, subject to subsequent Section 10(f) adjustments." (Doc. 23-4, filed October 1, 2010, at 6). Petitioner now seeks review of the Board's decision.

II. Discussion

According to Petitioner, the issue presented in this case is one of statutory construction. (Doc. 19 at 5). The only question before this Court is whether the district director and the Board erred in finding that "the applicable 'maximum compensation rate' under § 6(b)-(c) of the [LHWCA] was that in effect at the time the disability commenced. . . . " *Id.* at 6. Petitioner argues that

"[t]he terms of Longshore Act § 6(c) are 'plain' and 'unequivocal': the time the award is entered determines which year's maximum rate applies. . . . " *Id.* at 9.

In reviewing decisions of the Board, this Court reviews questions of law *de novo*. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 1563 (11th Cir. 1991); *Barscz v. Director, OWCP*, 486 F.3d 744, 749 (2nd Cir. 2007). Generally, an unofficial statutory interpretation by an administering agency is entitled to judicial deference if it is reasonable. *Cowart v. Niklos Drilling Co.*, 505 U.S. 469, 476 (1992); *Herman v. NationsBank Trust Co.*, 126 F.3d 1354, 1363 (11th Cir. 1997). Here, however, this Court does not reach the issue of deference as the meaning of § 906(c) is not ambiguous when viewed against the structure of the entire statute. *Cf. Cowart*, 505 U.S. at 476-77; *United States v. Baxter Int'l, Inc.* 345 F.3d 866, 886-87 (11th Cir. 2003); *Herman*, 126 F.3d at 1363.

Under the LHWCA, individuals suffering from a permanent total disability are entitled to weekly compensation equal to two-thirds of their average weekly wage at the time of injury, subject to annual adjustments based on the increase in the national average weekly wage. 33 U.S.C. §§ 908, 910. The LHWCA, however, limits the amount of weekly compensation available to 200% of the national average weekly wage. 33 U.S.C. § 906(b). Section 906(c), the provision at issue in this case, determines which period's average weekly wage should be used to determine a claimant's maximum rate. Specifically, the Act provides: "Determinations under subsection (b)(3) of this section 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*." 33 U.S.C. § 906(c) (emphasis added).

Petitioner argues that the language, "newly awarded compensation during such period," establishes that the compensation order's date of entry controls which period's maximum rate to apply. (Doc. 19 at 9). He claims that his position is supported by *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 906 (5th Cir. 1997), wherein the court concluded that "the statute makes plain that compensation is governed by the maximum rate in effect at the time of an award[.]" (Doc. 19 at 8-9). In response, the Respondents maintain that *Wilkerson* summarily resolved this issue and provided no analysis of the language of § 906(c) or the statute as a whole. (Doc. 20 at 11; Doc. 23 at 16). They contend that § 906(c), once fully considered, must be interpreted so as to make the applicable maximum compensation rate that in effect at the time disability commences—the date a claimant is initially entitled to compensation. (Doc. 20 at 13; Doc. 23 at 14).

The statute does not specifically define the term "awarded" for purposes of § 906(c). Recently, however, the Ninth Circuit directly addressed the section's meaning in *Roberts v. Director, OWCP*, No. 08-70268, 2010 WL 4483972 (9th Cir. Nov. 10, 2010) (per curiam). There, it was determined "that an employee is 'newly awarded compensation' within the meaning of section 6(c) when he first becomes entitled to compensation." *Id.* at *4. In reaching its decision, the court espoused many of the arguments presented in this action. For instance, the court rejected the idea that the term "awarded" refers to a formal compensation order simply be-

cause it does so in other sections of the statute. *Id.* at *2-3; *cf.* Doc. 23 at 15. It explained that, elsewhere in the Act, the term "awarded" is also used to reference an employee's mere entitlement to compensation. *Roberts*, 2010 WL 4483972, at *2-3 (noting, in reference to § 908, that the term "awarded" could not mean "'assigned by formal order in the course of adjudication,' given that employers are obligated to pay such compensation regardless of whether an employee files an administrative claim"); *see also id.* at *3 ("Consistent with the meaning of 'awarded' in sections 8 and 10, 'newly awarded compensation' in section 6 means 'newly entitled to compensation'"). Further, the statute's specific designation of instances where the term "award" means a formal order would be unnecessary if only a single definition were contemplated. *Id.* at *3.

In line with the Director's contention, see Doc. 23 at 17-18, the view was also expressed in *Roberts* that it would be illogical for § 906(c) to strictly pertain to the issuance of a formal order in the course of adjudication given that "compensation governed by § 906 is due without a formal compensation order." 2010 WL 4483972, at *3. Similarly, the court noted that Petitioner's proposed construction "would have the potential for inequitable results: Two claimants injured on the same day could be entitled to different amounts of compensation depending on when their awards are entered." *Id.* at *4 n.1; *cf. Heuer v. U.S. Sec'y of State*, 20 F.3d 424, 427 (11th Cir. 1994) (per curiam) ("[I]nterpretations of statutes which lead to illogical or self-defeating results should not be imputed to the Legislature as the intended meaning of the statute.").

Lastly, as argued by the Respondents and recognized in *Roberts*, the language of § 906(c) must be considered in conjunction with "the language and design of the statute as a whole." *Baxter*, 345 F.3d at 887 (internal quotation marks omitted); *see Roberts*, 2010 WL 4483972, at *3. The interpretation "that an employee is 'newly awarded' compensation when he first becomes disabled accords with the structure of the LHWCA, which identifies the time of injury as the appropriate marker for other calculations relating to compensation." *Roberts*, 20I0 WL 4483972 at *3 (citing 33 U.S.C. §§ 910, 908(c)(21)). As such, this Court finds Respondents' interpretation and the *Roberts* case persuasive and concludes that the Board did not err in its determination regarding the maximum compensation rate applicable to Petitioner.

Accordingly, it is ORDERED and ADJUDGED:

1. The Benefits Review Board's January 30, 2009, decision is AFFIRMED with respect to the finding that Petitioner was compensated at the proper maximum rate.

2. The Clerk of the Court is directed to enter judgment consistent with this Order, and thereafter to CLOSE this case.

DONE and ENTERED this 30 day of Dec., 2010, in Jacksonville, Florida.

/s/ HARVEY E. SCHLESINGER
HARVEY E. SCHLESINGER
United States District Judge

Copies to:
Paul M. Doolittle, Esq.
Roger A. Levy, Esq.
William R Wicks, III, Esq.

APPENDIX C

BRB No. 08-0550

B. B., CLAIMANT-RESPONDENT

v.

DYNCORP

AND

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE

EMPLOYER/CARRIER-PETITIONER

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

RESPONDENT

BRB No. 08-0875

B. B., CLAIMANT-PETITIONER

v.

DYNCORP

AND

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE

EMPLOYER/CARRIER-RESPONDENT

[Filed: Jan. 30, 2009]

DECISION AND ORDER

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits and Denying Relief Under Section 8(f) of the Longshore Act and the Decision and Order Denying Employer's Motion for Reconsideration (2004-LHC-02359) of Administrative Law Judge Richard K. Malamphy and claimant appeals the Amended Supplemental Compensation Order (Case No. 02-131801) of District Director Charles D. Lee rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The determinations of the district director must be affirmed unless he has been shown to have abused his discretion, or his findings are arbitrary, ca-

[1] Claimant has filed a timely Notice of Appeal of the district director's Amended Supplemental Compensation Order, which was filed by the district director on September 16, 2008. This appeal is assigned the docket number BRB No. 08-0875. All correspondence pertaining to this appeal must bear this number. We consolidate this appeal with BRB No. 08-0550 for purposes of decision. 20 C.F.R. § 802.104(a).

pricious or not in accordance with law. *Durham v.Embassy Dairy*, 40 BRBS 15 (2006).

Claimant worked for employer in Bosnia beginning in January 2000 as a helicopter mechanic responsible for repairing rotor blades. Employer's blade shop was poorly ventilated, and claimant was exposed to chemical vapors. Employer did not provide claimant with protective eyewear or respiratory equipment, and claimant's eyes would become irritated and water. In April 2002, claimant's vision was reduced to distinguishing shapes and he lost color vision. His visual acuity was initially measured at 20/400 in each eye. Claimant was diagnosed with atrophic maculopathy with reduced cone function and pigmentary dystrophy. Claimant sought benefits for permanent total disability, 33 U.S.C. §908(a), from his last day of employment on April 19, 2002. The parties agreed that claimant is permanently totally disabled and that he would be entitled to benefits under the Act at the maximum compensation rate. Employer contested the
cause of claimant's eye condition, and it submitted an application for Section 8(f) relief, 33 U.S.C. §908(f).

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), based on his severe eye impairment and the opinions of Drs. Roberts and Meggs that claimant's vision loss is attributable to his working conditions of chemical exposure and poor ventilation. The administrative law judge found that the opinions of Drs. Becker and Goldberg are sufficient to rebut the presumption. The administrative law judge credited the opinion of Dr. Goldberg that claimant has a genetic eye disorder. However, the administrative law judge credited the

opinions of Drs. Roberts and Meggs to conclude that claimant's working conditions aggravated his underlying genetic eye impairment. The administrative law judge next addressed employer's application for Section 8(f) relief. The administrative law judge found the medical records establish positive signs of an eye disorder sufficient to establish a pre-existing disability. However, the administrative law judge found that significant vision loss was not apparent to claimant or employer prior to April 2002. Accordingly, the administrative law judge found that claimant's pre-existing disability was not manifest, and he denied the application for Section 8(f) relief. The administrative law judge ordered employer to pay claimant benefits for permanent total disability at the maximum compensation rate.

Subsequent to the administrative law judge's decision, claimant applied for a supplemental order declaring employer in default pursuant to Section 18(a) of the Act, 33 U.S.C. §918(a). Claimant alleged that employer delayed benefit payments as of June 3, 2008, and that employer used an inappropriate maximum compensation rate. The district director stated that employer did not make timely payments from June 3 to July 8, 2008, but that employer had voluntarily paid claimant the additional compensation due under Section 14(f) of the Act, 33 U.S.C. § 914(f). The district director rejected claimant's contention that employer improperly calculated the maximum compensation rate, and he therefore rejected claimant's request for a default order.

On appeal, employer challenges the administrative law judge's finding that claimant's genetic eye disorder was aggravated by his working conditions. BRB No. 08-0550. Claimant responds, urging affirmance. Em-

ployer also appeals the denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs responds, urging affirmance. Claimant appeals the district director's denial of a default order under Section 18.[2] BRB No. 08-0875. Employer responds, urging affirmance.

Employer contends the administrative law judge erred by invoking the Section 20(a) presumption. Specifically, employer argues claimant presented no credible evidence that his working conditions could have caused or aggravated his eye impairment. The aggravation rule provides that employer is liable for the totality of the claimant's disability if the work injury aggravates a pre-existing condition. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. Claimant is not required to affirmatively prove that his working conditions in fact caused or aggravated the harm; rather, claimant need only establish that the working conditions could have caused or aggravated the harm alleged. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Damiano v. Global Terminal & Container Service.*, 32 BRBS 261 (1998); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982).

It is uncontested that claimant suffered a harm, *i.e.*, loss of central vision acuity to 20/400 in each eye and

[2] In his Petition for Review, claimant also moved for an expedited decision. Claimant's motion is rendered moot by this decision.

color blindness. In finding the Section 20(a) presumption invoked, the administrative law judge credited the testimony of claimant and his coworkers, Warren Griggs and Roland Hill, that claimant was exposed to chemical solvents in a poorly ventilated workplace. Tr. at 71-72, 84-92, 199-200, 232-234; *see also* CXs T at 19-20, U at 19, 41. The administrative law judge also credited the testimony of Dr. Roberts and Dr. Meggs. Dr. Roberts opined that claimant's working conditions led to the induction of, or the acceleration of, the damage to his eyes. Tr. at 328; CX R at 6. Dr. Meggs opined that claimant has organic solvent induced macula atrophy with cone dysfunction. Tr. at 444, 476; CXs S at 5, Z at 48-49. As substantial evidence supports the administrative law judge's finding claimant established that his working conditions with employer could have caused or aggravated claimant's eye injury, we affirm the administrative law judge's finding claimant established his *prima facie* case, and his consequent invocation of the Section 20(a) presumption that claimant's eye injury is related to his working conditions. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005).

Employer next challenges the administrative law judge's finding, based on the record as a whole, that claimant's eye condition is related to his working conditions. Where, as here, the administrative law judge finds that the Section 20(a) presumption is invoked and rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See*

Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

In weighing the evidence as a whole, the administrative law judge relied on the opinion of Dr. Goldberg that claimant has a genetic eye disorder. However, he also credited the opinions of Drs. Roberts and Meggs, who disagreed with Dr. Goldberg's opinion that claimant's exposure to solvents could not have contributed to his eye disorder. In this regard, these doctors found it significant that claimant has cone dysfunction with normal rod dysfunction, a condition which they stated is associated with organic solvent exposure. Tr. at 328, 446-447. They stated that attributing this type of vision loss to chemical exposure is based on peer-reviewed research and is widely accepted within the scientific community. CX R at 2; *see* Tr. at 445, 453. Moreover, their opinions are based on claimant's having no family history of sudden vision loss. Tr. at 450; CX R at 2. Dr. Roberts specifically opined that claimant's vision loss was either caused or was at least accelerated by his working conditions. Tr. at 328; CX R at 6. The medical experts in this case agreed that chemical exposure can cause color blindness, Tr. at 303, 529; EXs 20, 42 at 157, and that claimant has blue/yellow color vision loss. CX LL. Finally, the administrative law judge found claimant to be a credible witness; he testified that he had minimal vision problems prior to working for employer in Bosnia and that he experienced sudden vision loss upon leaving there. Tr. at 107, 143.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are sup-

ported by the record. *See Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *see also Duhagon v. Metropolitan Stevedore Co.,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP,* 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In this case, employer's specific challenges to the administrative law judge's finding of a work-related injury essentially urge the Board to reweigh the voluminous medical evidence presented by both parties and the credentials of the expert medical witnesses, which is beyond our scope of review. Employer does not challenge the administrative law judge's finding that claimant was exposed to chemical solvents in a poorly-ventilated, enclosed work space. The reports of Drs. Roberts and Meggs are substantial evidence linking claimant's eye condition, at least in part, to his work exposure to these chemical solvents.[3] *See Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65 (CRT) (5th Cir. 1999). Thus, based on these opinions and claimant's testimony of the sudden onset of his vision problems, the administrative law judge rationally found that claimant's eye condition is related, at least in part, to his

---

[3] Employer argues that the administrative law judge was obligated to credit the causation opinion of Dr. Goldberg, since he stated that he would defer to his expertise as a board-certified ophthalmologist. The administrative law judge credited Dr. Goldberg's diagnosis that claimant has a genetic-based eye disorder. However, merely because the administrative law judge recognized the credentials of Dr. Goldberg does not preclude him from crediting the causation opinions of Dr. Roberts, who has a doctorate in organic chemistry, and Dr. Meggs, who is board-certified in internal medicine and toxicology, to find that claimant's eye disorder was aggravated by his working conditions. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30 (CRT) (9th Cir. 1988).

workplace chemical solvent exposure. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the administrative law judge's finding is rational and supported by substantial evidence, we affirm his conclusion claimant established that his eye condition is related to his employment in Bosnia. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999). Accordingly, we affirm the award of permanent total disability benefits.

Employer next argues the administrative law judge erred by denying its application for Section 8(f) relief. Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§ 908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that claimant had a preexisting permanent partial disability, that the preexisting disability was manifest to employer prior to the compensable injury, and that the compensable disability is not due solely to the subsequent injury. *C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84 (CRT) (11th Cir. 1994); *see also Pennsylvania Tidewater Dock Co. v. Director, OWCP,* 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992). The administrative law judge found evidence of a preexisting eye disability. He found that there were positive signs of a severe eye disorder as early as 1988, and that such signs were more apparent by 2000. Decision and Order at 29. The administrative law judge found, however, that claimant's pre-existing disability was not manifest because significant vision

loss was not apparent to claimant or to employer before April 2002. Decision and Order at 30. Employer's motion for reconsideration of the administrative law judge's manifest finding was summarily rejected. Recon. at 4.

We cannot affirm the administrative law judge's denial of Section 8(f) relief as he did not discuss the medical evidence or make sufficient findings of fact regarding either the pre-existing permanent partial disability or manifest elements. The administrative law judge stated only that "there were positive signs of a severe eye disorder as early as 1988. Such signs were more apparent by 2000." Decision and Order at 29. The administrative law judge, however, did not discuss the medical evidence or state exactly what condition constituted the eye disorder. A specific finding in this regard is necessary so that it can be determined if the identified condition was manifest to employer. With regard to the manifest element, the administrative law judge stated that "significant visual loss was not apparent" prior to the work injury.

A pre-existing disability need not result in economic harm and has been defined as "such a serious physical disability in fact that a cautious employer . . . would [be] motivated to discharge the . . . employee because of a greatly increased risk of employment-related accident and compensation liability." *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513, 6 BRBS 399, 415 (D.C. Cir. 1977). The mere existence of a prior condition is not sufficient to satisfy this element. *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT) (D.C. Cir. 1985); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir.

1982), *cert. denied*, 459 U.S. 1104 (1983). However, a medical condition that is controlled or asymptomatic, such as hypertension, may be a pre-existing disability if it is serious and lasting. *Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989); *see also Greene v. J.O. Hartman Meats,* 21 BRBS 214 (1988) (case remanded for administrative law judge to determine if degenerative disc condition was manifest, pre-existing permanent partial disability). On remand, therefore, the administrative law judge must first make an explicit finding as to the pre-existing permanent partial disability element.

If this element is satisfied, the administrative law judge should address, with reference to specific medical evidence, whether the manifest element is met with regard to that specific condition.[4] The pre-existing disability will meet the manifest requirement of Section 8(f) if, prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence from which the condition was objectively determinable. *Director, OWCP v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452, 8 BRBS 498 (3d Cir. 1978). The medical records pre-existing the subsequent injury, however, need not indicate the severity or precise nature of the pre-existing condition in order for the condition to be manifest; rather, medical records will satisfy this requirement as long as they contain sufficient and unambiguous information regarding the existence of a serious, lasting physical

[4] In the event that the pre-existing permanent partial disability and manifest elements are satisfied, the administrative law judge should address the contribution element, *i.e.,* whether employer established that claimant's current disability is not due solely to the subsequent injury but was contributed to by the pre-existing disability. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99 (CRT) (5th Cir. 2004).

problem. *C.G. Willis, Inc.*, 31 F.3d at 1116, 28 BRBS at 87-88 (CRT); *Bunge Corp. v. Director, OWCP,* 951 F.2d 1109, 25 BRBS 82 (CRT) (9th Cir. 1991); *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989). A post-hoc diagnosis of a pre-existing condition is insufficient to meet the manifest requirement for Section 8(f) relief. *Transbay Container Terminal v. U.S. Dep't of Labor, Benefits Review Board*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998); *Callnan v. Morale, Welfare & Recreation, Dep't of the Navy*, 32 BRBS 246 (1998). Therefore, as the administrative law judge did not make findings of fact sufficient for the Board's review, we vacate the denial of Section 8(f) relief and remand the case for findings consistent with this decision. *Ceres Marine Terminal v. Director, OWCP,* 118 F.3d 387, 31 BRBS 91 (CRT) (5th Cir. 1997).

We next address claimant's appeal of the district director's Amended Supplemental Compensation Order. BRB No. 08-0875. Claimant appeals the district director's conclusion that employer is not in default under Section 18(a). Claimant asserts that employer improperly calculated the compensation rate, pursuant to the administrative law judge's finding that he is entitled to permanent total disability at "the maximum compensation rate." *See* 33 U.S.C. § 906. Employer responds, urging affirmance.[5]

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[5] Employer also responds that claimant's appeal should be dismissed for lack of jurisdiction because claimant agrees that the denial of his motion for a default order is in accordance with the law as stated in *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006). We reject this contention. Claimant appropriately raised before the district director the issue of the proper compensation rate in view of the administrative law judge's statement that employer is to pay claimant permanent total disability compensation "at the maximum compensation rate," without

In his appeal, claimant acknowledges that, absent reconsideration by the Board of its decision in *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006), the district director's finding that employer complied with the administrative law judge's order that employer compensate claimant at the maximum compensation rate is in accordance with law. In *Reposky*, the Board held that the maximum compensation rate for permanent total disability benefits pursuant to Section 6 is that in effect at the time benefits commence, subject to subsequent Section 10(f) adjustments.[6] *Reposky*, 40 BRBS at 73-77.

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specifying the precise dollar amount. *See Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981). The district director ruled against claimant and an appeal was properly taken. *See* 33 U.S.C. § 921(b)(3); 20 C.F.R. § 802.201. That claimant has acknowledged precedent contrary to his position does not negate the propriety of his appeal.

[6] Section 6 provides:

(b)(1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).

* * *

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

(c) Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death bene-

In his order, the district director stated that employer furnished evidence of compensation payments at the initial compensation rate of $966.08, which is the maximum rate in effect in 2002, and at rates thereafter incorporating the appropriate Section 10(f) adjustments. *See* A BRBS 3-155 (2008). Claimant does not challenge the accuracy of employer's compensation payments pursuant to *Reposky*, and we decline to reconsider our holding in that case. Therefore, we affirm the district director's finding that employer has properly compensated claimant at the maximum compensation rate, and the district director's consequent declaration that employer is not in default under Section 18(a).

Accordingly, the administrative law judge's denial of Section 8(f) relief is vacated and the case is remanded for further findings on this issue. The administrative law judge's award of benefits to claimant is affirmed, as is the district director's Amended Supplemental Compensation Order.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

---

fits during such period, as well as those newly awarded compensation during such period.

33 U.S.C. § 906(b)(1), (3), (c).

APPENDIX D

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS
SIXTH COMPENSATION DISTRICT

Case No. 02-131801

In the matter of the claim for compensation under the Longshore & Harbor Workers' Compensation Act

BERNARD D. BOROSKI, CLAIMANT,

DYNCORP INTERNATIONAL, EMPLOYER,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE, INSURANCE CARRIER

AMENDED SUPPLEMENTAL COMPENSATION ORDER

On February 22, 2008, a Decision and Order, issued by Administrative Law Judge Richard Malamphy, was filed directing the employer and insurance carrier to pay compensation benefits to claimant for permanent total disability from April 20, 2002 and continuing at the maximum compensation rate. Such benefits are subject to adjustment under Section 10(f) of the Act each October 1.

Claimant applied for a Supplemental Compensation Order for a declaration of default pursuant to Section 18(a), 22 U.S.C. 918(a), plus an additional amount of 20 percent asserting the carrier was in default of the Order

by delaying the payment of benefits from June 3, 2008 and continuing as well as using an inappropriate maximum compensation rate. The insurance carrier was notified of this request by Order to show Cause dated July 29, 2008, and given ten days to respond. The insurance carrier was called upon to furnish evidence of payment of the award in accordance with the Order filed February 22, 2008, and has advised the underpayment of compensation benefits was issued on August 6, 2008. The insurance carrier also furnished evidence of payment of the award at the maximum compensation rate of $966.08.

Its response carrier contended it fully compensated claimant for the delay of benefits and the request for a finding of default under § 18(a) is not proper regarding the interpretation of the maximum compensation rate pursuant to Section 6(c).

I have considered the matter on the claimant's request for default and the carrier's response, together with the form filed reporting the payment of compensation benefits (LS-208). Having made such further investigation as considered necessary, I hereby make the following determinations.

FINDINGS AND FACTS

1. The insurance carrier did not timely pay all compensation due as directed by the Order filed on February 22, 2008, for the period from June 3, 2008 through July 8, 2008. However, carrier voluntarily paid additional compensation as prescribed by Section 14(f) of the Act rendering the request for a finding of default moot for said periods.

2. As Ordered, compensation is due the claimant for permanent total disability benefits from April 20, 2002 at the maximum compensation rate, and I find the insurance carrier has complied with the Decision and Order paying compensation as it became due.

Upon the foregoing findings of fact, the District Director makes the following:

DECLARATION

Under the facts and circumstances herein, the District Director herewith invokes the discretionary authority granted him under Section 18(a) of the Act, declares that no portion of the award due to the claimant is in default at the time of this Order.

Given under my hand and filed at Jacksonville, Florida, this 16th day of Sept., 2008.

/s/ CHARLES D. LEE
CHARLES D. LEE, District Director
Sixth Compensation District

CERTIFICATE OF FILING AND SERVICE

I certify that on Sept. 16th, 2008 the foregoing Compensation Order was filed in the Office of the District Director, Sixth Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Bernard D Boroski
701 11th Street North
Breckenridge, MN 56520

Insurance Co. Of The State Of Penn.
c/o AIG Worldsource - WC Claim
2 Rincon Ctr, 121 Spear St.
San Francisco, CA 94105-1581

D. Denty Cheatham, Attorney
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Nashville, TN 37203-3244

Joshua T. Gillelan, II, Attorney
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Mark A. Reinhalter, Attorney
Office of the Solicitor of Labor
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Washington, DC 20210

Stephanie Seaman, Attorney
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San Francisco, CA 94111-4912

/s/ CHARLES D. LEE
CHARLES D. LEE, District Director
Sixth Compensation District
U. S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation
400 West Bay Street, Suite 63A, Box 28
Jacksonville, Florida 32202

APPENDIX E

U.S. Department of Labor [Seal Omitted]

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23608
(757) 591-5140
(757) 591-5150 (FAX)

Case No.: 2004-LHC-02359
OWCP No.: 02-131801

B. B., CLAIMANT

v.

DYN CORP, EMPLOYER,

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE, CARRIER,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, PARTY-IN-INTEREST

Issue Date: Feb. 15, 2008

Before: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS AND DENYING RELIEF UNDER SECTION 8(F) OF THE LONGSHORE ACT

This proceeding arises from a claim for benefits filed under the provisions of the Defense Base Act, 42 U.S.C. § 1651, *et seq*. (2000), an extension of the Longshore and Harbor Workers' Compensation Act (the Longshore Act), as amended, 33 U.S.C. §§ 901 *et seq*. (2000).

A formal hearing was held in Raleigh, North Carolina on April 17 through April 19, 2007, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Longshore Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

The Claimant and the Employer have stipulated to the following:

1. That the parties are subject to the jurisdiction of the Defense Base Act provisions of the Longshore Act;
2. An Employer/Employee relationship existed at all relevant times;
3. The last day of employment was April 19, 2002;
4. The Claimant earned the maximum average weekly wage at the time that he last worked;
5. The Claimant has been permanently and totally disabled since April 19, 2002.

ISSUES

1. Whether or not the Claimant's loss of vision was caused by conditions in the workplace;

2. Entitlement to relief under Section 8(f) of the Longshore Act.

EXHIBITS[7]

The following Claimant's exhibits were admitted into the record at the hearing:

CX 1-4

CX D-N

CX R-X

CX AA, BB, GG

Post-hearing, the Claimant has submitted the following proposed exhibits:

CX Z December 2006 deposition of Dr. Meggs

CX HH September 1977 OALJ decision in *Gunter v. Parsons Corporation*

CX KK "Genetics in Ophthalmology" by Dr. Sorsby (1951)

CX LL July 2007 report from Dr. Roberts

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[7] The following abbreviations will be used as citations to the record:

JS - Joint Stipulations;

TR - Transcript of the Hearing

CX - Claimant's Exhibits; and

EX - Employer's Exhibits.

CX MM Bills submitted by Dr. Goldberg

CX NN July 2007 report from Dr. Meggs

CX OO "The Hereditary Dystrophies of the Posterior Pole of the Eye" by Dr. Deutman (1971)

The Employer has not specifically objected to the additional exhibits except for CX HH. The undersigned did not find the 1977 decision to be "on all fours" at the hearing, and therefore the decision does not have precedential value. The decision in *Gunter v. Parsons Corporation* will not be admitted as an exhibit but will be accepted as part of the Claimant's brief. The other post-hearing Claimant's exhibits are entered into the record.

The Employer submitted EX 1-43 at the hearing. EX 10 and EX 12 were withdrawn. The other exhibits were entered into the record. Post-hearing, the Employer has submitted the following proposed exhibits:

EX 44 July 24, 2007 response of Dr. Goldberg to the July 2007 report from Dr. Roberts

EX 45 July 24, 2007 response of Dr. Goldberg to the articles by Dr. Sorsby.

EX 44 and EX 45 are admitted into the record.

CONTENTIONS

Briefly stated at this point, the Claimant contends that his eye problems were insignificant prior to his work for the Employer in Bosnia. Poor ventilation in the workplace and the use of hazardous chemicals led to his blindness.

The Employer argues that

> the medical evidence in this case demonstrates that claimant has been rendered blind by a progressive genetic condition which has caused atrophy, degeneration, and complete destruction of his maculae. This conclusive diagnosis has been rendered by Dr. Goldberg, a widely recognized specialist in diseases of the eye, and corroborated by ample clinical evidence and the opinions of two additional highly qualified experts in medical conditions of the eye, Dr. Gass and Dr. Sonkin. These same experts all agreed that the diagnosed condition was not caused by chemical exposure in this case or any other case. Thus, claimant's loss of anatomical structure in his eyes and his consequent blindness was not, in any way, caused by exposure to chemical substances in the workplace.

EVIDENCE

Testimony of the Claimant

At the hearing, the Claimant testified that he was in the army from 1972 until 1995. Initially he worked in sheet metal and as a mechanic. He became an inspector in 1979.

He began working for the Employer in 1995 as a mechanic and in sheet metal work. (TR 51) He repaired rotor blades with various compounds and adhesives. The company employed him in Korea before he was sent to Bosnia in January 2000.

In 1998, army testing showed vision as 20/100 in one eye (but Dr. Rutledge found better acuity in 2000). (TR 66)

In Bosnia, he worked in a rubber tent that measured about fifty feet by 100 feet by twenty feet. He worked twelve hours almost every day, repairing rotor blades in a poorly ventilated space. In August 2001, he moved to a wooden building with a concrete slab. In early 2002, work began in the "blade shop." An April 2002 army report stated that a ventilation system was in place but the fans had not been installed.

The Claimant's eyes watered frequently due to the exposure to chemical vapors and he would sweat profusely due to the heat.

On April 19, 2002, during a long bus ride and while waiting for flights, he noticed that his vision was limited to seeing light and dark. (TR 107) As soon as he returned to Tennessee, he saw Dr. Rutledge, who referred him to Dr. Sonkin. After a consultation, he was sent to see Dr. Gass. These physicians asked him about his exposure to chemicals. Since early 2002, the Claimant has only been able to distinguish shapes and has lost color vision.

On cross-examination, the Claimant acknowledged that during testing in 1988 an examiner reported "dark spots." Reading glasses were first prescribed in 1997. Except for eye watering and some irritation he was able to function fairly well in Bosnia. However, on the trip home he became blind in the airline terminal. (TR 143)

His work day focused on repairing rotor blades and this involved the use of chemicals, compounds, and sprays. Much of the work was performed indoors to avoid temperature changes in the materials. He would leave the shop several times a day due to the buildup of fumes.

On re-direct, the Claimant stated that he was the sheet metal person and blade person for Apache helicopters and that he generally worked alone. On occasion, he would work in a port where he prepared and inspected aircrafts.

Warren Griggs

Warren Griggs testified that he worked for the Employer from January 1978 until December 2001. Griggs took over the blade shop in Bosnia in mid-2001. Ventilation was much better in facilities in the United States. In Bosnia, a safety inspector had recommended better ventilation and lighting.

Griggs worked with the Claimant in the blade shop in late 2001. The building could only be aired out when they were not "weighing rotor blades." The work required the use of various chemicals and paints.

Roland Hill

Roland Hill testified that he worked for the Employer from March 1999 to September 2002. Hill went to Bosnia at the same time as the Claimant. The Claimant was fitted for a halfface respirator, but the item was never provided. Smoke bomb tests revealed poor air circulation in the work spaces. Inspectors advised the upgrading of ventilation. (TR 246)

Early Medical Records

Military examinations in December 1971 and in June 1973 reported vision to be 20/20 bilaterally. In August 1988, the Claimant complained of blurriness and headaches after reading for an hour. Examination revealed retinal pigmentary clumping, and vision was correctable

to 20/20. In November 1988, the assessment was hereditary pigment dystrophy. In October 1993, vision was correctable to within normal limits. In May 1998, peripheral pigment was evident. Slit lamp examination was unremarkable. Vision was correctable to 20/20 in one eye and to 20/100 in the other. (EX 13)

In April 2002, Dr. Routledge, an optometrist, reported that the Claimant had lost central visual acuity and the ability to discern the color blue. This was consistent with macular involvement. There were congenital pigment spicules, but tests for retinitis pigmentosa were negative. The impression was acquired colorvision loss due to chemical toxicity and degeneration. (EX 13, pg. 53) The Claimant was referred to Dr. Sonkin.

> Peter Sonkin, an ophthalmologist, examined the Claimant in April 2002. He stated that
>
> On exam visual acuity was 20/400 in each eye. No afferent pupillary defect was seen. His confrontational visual fields were inconsistent. Motility was full in both eyes. Intraocular pressures were 17 and 18 respectively. Slit lamp exam revealed mild nuclear sclerosis and fundus exam revealed atrophic maculas with visible choroidal vessels in both eyes. There is mild mid peripheral reticular pigmentary changes bilaterally. Since that time he has had an ERG with significant decrease in cone function.

Dr. Sonkin concluded that there was "an atrophic maculopathy bilaterally with reduced cone function on ERG. I discussed with him that this was most likely a degenerative condition and possible cone dystrophy but he is concerned that he has a toxic maculopathy and reduced vision due to multiple chemical exposures."

The Claimant was referred to Dr. Gass at Vanderbilt University. In June 2002, the Claimant informed the physician that

> In 1988 on a routine flight examination, he was discovered to have some abnormality in the retina of both eyes. He was asymptomatic at the time. He was seen at the air force base in Augusta, Georgia by a number of different ophthalmologists. Photographs were taken at that time. He continued to be completely asymptomatic until approximately April 16 of this year when he noticed that he was having some difficulty with his vision that seemed a little worse over the next several days. While he was on an airplane flying home on April 20, 2002, he suddenly realized that he was unable to read. He notified the stewardess that he had suddenly lost vision in both eyes. He still had side vision and was able to navigate, but states that when he got off of the plane he could not even see the largest of print on signs. He also was aware of marked photophobia. He noted a dark spot centrally that he describes as a floater that was more marked in his left eye than his right eye. He states that occasionally he notices some small balls around the upper aspect of this central positive scotoma. He had no antecedent flu-like illness. He did have a rather severe intermittent headache on the day of his most severe visual loss. He states that the vision seemed to progress for a few days, but has seemed to stabilize at the present time.

Examination revealed that

> His visual acuity uncorrected in the right eye was 20/400 and left eye 20/200. On manifest refraction,

we could not improve his right eye. With a +0.25, he was 20/80-2 in the left eye. . . . It is my impression that this patient has a very unusual fundus picture that is somewhat suggestive of a reticular dystrophy, but at the same time is associated with some localized areas of thinning of the retinal pigment epithelium that would be atypical for a pigmentary dystrophy. None of the changes explain the sudden onset of loss of central vision and photophobia that he experienced on April 20 of this year. . . . It is my impression that this patient has a diffuse degeneration of the retina that may fall into the general category of a severe pattern dystrophy. In addition, he has a history of a sudden onset of loss of central vision associated with photophobia and loss of color vision that is unexplained. This raises the question of could he have a superimposed AZOOR. If the ERG is completely normal then this would seem to rule out AZOOR or cancer associated retinopathy.

In February 2003, Dr. Gass stated that,

The final impression was he had a combined cone and pattern dystrophy that does not fall under any specific one diagnosis. It was unlikely that he had AZOOR. In summary, the patient has evidence of a diffuse pigmentary degeneration of the retina associated with a cone dystrophy. He still has good peripheral vision. He apparently believes that his loss of vision has something to do with exposure to fumes while doing his job as an aircraft mechanic. I do not know of any type of exposure to fumes that would cause a retinal degeneration of this type. I think it is probable that his environmental exposure to fumes had nothing to do with this retinal dystrophy.

(EX 15)

When deposed in March 2006, Dr. Routledge testified that the Claimant was initially seen in September 2000. At that time, vision was correctable to 20/50 in the right eye and to 20/70 in the left. In May 2001, the Claimant reported decreased vision in dim light and difficulty with contrast. He was provided with "task specific glasses of greater magnification." Some color vision loss was noted.

In April 2002, the Claimant reported that he could not see the color blue and that he had difficulty reading. Visual acuity was 20/70 bilaterally. The Claimant was then referred to Dr. Sonkin.

During the deposition, the parties discussed other medical reports and the possible effects of chemicals on visual acuity. (EX 39) (CX V)

Dr. Sonkin was deposed in February 2005 and testified that he had reviewed records from Drs. Routledge and Gass. After Dr. Sonkin's initial examination in April 2002, the Claimant was sent to Vanderbilt for testing. Dr. Sonkin stated that the Claimant had

> atrophy in his macula it is primarily in that RPE level, it is the supportive layer under the retina. When that supportive layer under the retina is not functioning properly, doesn't work right then everything associated with it doesn't work right also, so my belief based on his exam was that his primary problem was that he had atrophy and RPE problems under the retina resulting in problems with the retina.

(EX 41, pg. 12)

The ERG in May 2002 showed decreased cone function which indicated macular problems. The Claimant had a degenerative retinal condition which primarily affected central vision. Dr. Gass had concluded that the Claimant had a diffused degenerative condition of the retina, at least some sort of atypical pattern dystrophy. (EX 41, pg. 43) Dr. Sonkin testified that

> If somebody gets vapors in the eye I can easily explain that causing irritation and surface abnormalities, anything that gets on the eye, smoke, cigarette smoke, any kind of vapor, anything like that that directly contacts the eye, vapor contacting the eye, that is something any ophthalmologist in my opinion is an expert on. The effects of vapors being inhaled, breathed in or coming in through the skin or whatever and getting into the systemic circulation and possibly having an effect on the retina is not something I think you will find any literature on.

(EX 41, pg. 90)

Thomas Allems, M.D., who is Board Certified in Internal Medicine, reviewed records which included reports from Drs. Goldberg, Roberts and Sonkin, and from Vanderbilt. In the report issued in November 2005, Dr. Allems stated

> I have been asked to review the available medical records and render an opinion as to whether his use of chemical agents in his job with DynCorp caused or contributed to his eye condition. His use of an acid based metal cleaner Pasa-Jell has been the focus of this claim as he had not used it before and it was the primary product used on the job in the months before his acute deterioration in visual acuity.

Dr. Allems diagnosed "degenerative retinal disorder, likely congenital in origin; nonindustrial." He further found that "occupational toxic contribution to [the above finding was] excluded (ruled out) on general principles."

Dr. Allems concluded that

> This is the most interesting and unusual clinical case, but the allegation of an occupational toxic contribution to his retinopathy is wholly without merit on general principles. [The Claimant] has a well documented history of retinal pathology dating back to 1988 with deteriorating visual acuity on a few follow-up visits over the ensuing 13 years. By September 2000 his visual acuity was terrible—20/100 in one eye and 20/200 in the other. . . . In the setting of deteriorating visual acuity and a well documented retinal pathology of nearly 15 years duration, he had a sudden decrease/loss of vision while returning home from Bosnia to the US on 04/19/02. The acute event in April 2002 appears to have represented a continuum of the retinal process that had been ongoing for many years as there was no documentation of an acute pathological process that would explain the events on 04/19/02 (such as an acute retinal detachment, retinal vein thrombosis, etc.). . . . In the blade shop . . . his job involved removing the leading edge strip from rotor blades, sanding off the residual and replacing the strip. He used an acid based metal cleaner called Pasa-Jell and wore appropriate protective equipment including a half face respirator for this task. His other jobs in Bosnia involved the mixture and brush application of a fiberglass resin product (for which he used a half face respirator) and

the mixture and application of a two-part epoxy product in the back shop.

It is expected that in his prior work in more general aircraft and helicopter repair he would have had occasion to use a variety of common industrial solvent based products for cleaning parts. The Pasa-Jell product is the specific focus of his toxic claim because it was the most recent product he was using and he had never used it before his assignment to the blade shop. While using the Pasa-Jell product he wore safety glasses, gloves and a respirator. He did not have any health complaints temporally related to its use but reportedly had concerns about the ventilation in the work area. The absence of respiratory tract irritant symptoms related to its use is indication that the inhalational exposure to it was negligible. As a gel based acid product, there airborne vapour elaboration from the product would be minimized and its health hazards would be predominantly limited to corrosive effects upon direct contact with the skin or eyes. . . . The linkage of any retinal pathology to the specific toxic etiology being proposed in this case is at odds with essentially all fundamental clinical toxicologic principles.

In general, for a chemical to preferentially target the retina of the eye, exposure to the chemical would have to be intense, to the point that it was absorbed into the bloodstream through the skin or via inhalation of concentrated airborne vapours in sufficient quantities to reach levels in the blood that ultimately were capable of affected the function of specific target organs (in this case the retinal structures). . . . Dr. Gass's opinion that [the Claimant's] retinal pa-

thology was not related to occupational exposures reflected an understanding of these concepts, and I think that Dr. Sonkin appreciates them as well. Unfortunately, Dr. Sonkin has confused this case by his opinions that anything is possible. and that one cannot rule out an occupational toxic contribution to [the Claimant's] retinal pathology. In fact it can be ruled out. because the proposed occupational scenario is not possible on general medical principles and there is no precedent for imagining a connection between the use of an acid containing product and retinal pathology.

Pasa-Jell, its individual constituents (chromic acid, nitric acid and hydrofluosilicic acid) and related acid products are simply not causes of retinal pathology so his use of Pasa-Jell cannot be considered a contributing factor to his retinopathy. [The Claimant's] use of Pasa-Jell can be "ruled out" as a contributing factor to his retinopathy on basic medical and toxicologic principles. A factor that cannot be ruled out. as Dr. Sonkin opines, still has to be a scientifically plausible factor that one would logically take into consideration in the differential diagnosis of a condition—a factor that could logically explain the medical condition under certain situations but given the specific circumstances in the case, its contribution is thought to be minor or speculative.

Dr. Allem stated that

I find Dr. Roberts' report illogical and her opinions misinformed. She is not a physician—her wealth of knowledge about retinal toxicokinetics may be extensive, and her writings on the effects of light on the

retina impressive, but she is fundamentally not equipped to even begin to consider holding an opinion on the issues that she has weighed in on. . . . [Dr. Roberts'] theory that the use of Pasa-Jell can cause "direct caustic and oxidative injury leading to ischemic optic neuropathy" is unsupportable on the basis of the general toxicologic principles discussed above-the notion that the acid exposure to the eye somehow bypasses the surface layers of the eye, the cornea, conjunctiva, anterior chamber, iris and the vitreous humour inside the globe without notice yet preferentially damages the retina is a theory that is certainly creative though scientifically implausible. If acid contact with the eye has reached the retina the eye has been dissolved-there would be no optic nerve to become ischemic-and the person has likely not survived the exposure. . . .

In summary, [the Claimant] did not work with a chemical that is known to produce retinal toxicity under any conditions of exposure. He did not work with any chemical product in a way that would lead to systemic toxicity and his history while working of an absence of symptoms excluded systemic toxicity from general consideration. His work with an acid based cleaning product-the focus of this claim-would not be related to retinal pathology on general principles; its only relevant effect would be corrosion and tissue destruction upon direct contact. Industrial acid products are not systemic toxicants and do not affect the retina. Any theorized toxic effect from his occupation on his chronic degenerative retinopathy can be firmly excluded on general medical and toxicologic principles.

(EX 16)

Joan Roberts, who has a Ph.D. in organic chemistry, reviewed records in December 2004. Dr. Roberts stated,

> Medical tests and diagnosis of [the Claimant] have revealed evidence of a cone dysfunction but normal rod function. There is further evidence of diffuse pigmentary degeneration of the retina associated with this cone dysfunction. Cone dysfunction of this type is associated with organic solvent exposure. In addition to [the Claimant's] loss of color vision, his sudden blindness may also be related to chemical-induced mitochondrial dysfunction leading to **ischemic optic neuropathy**. Visual disturbances generally develop between 18 and 48 hours after exposure and range from misty or blurred vision and to complete blindness due to retinal and optic nerve damage. . . . There is no precise medical evidence that proves that [the Claimant] had an underlying retinal dystrophy. It was reported by Dr. Gass that "AZOOR was unlikely." Also there was no evidence of bone spicule pigmentation or unusual narrowing of his retinal vessels. (Dr. Gass); these symptoms are usually associated with an underlying retinal dystrophy, Stragardt disease and retinitis pigmentosa. . . . There is evidence presented by [the Claimant], Mr. Hill and Mr. Griggs that confirm that DynCorp ***did not*** provide [the Claimant] with goggle or protective eyewear, respiratory protective equipment, protective clothing, face protection, or maintain proper exhaust ventilation in the area used to clean and treat helicopter blades in Bosnia 2002.

My knowledge of induction of ocular damage, organic chemistry and ocular toxicology leads me to conclude, within a reasonable degree of scientific certainty, that the repeated unprotected human exposure to chemical compounds, including hydrocarbon fuels and solvents listed below, can directly induce ocular neurotoxicity, genotoxicity, intra-ocular inflammatory responses leading to optic neuropathies and loss of vision, particularly color vision. Unprotected human exposure to Pasa-Gel (5 % Chromic acid, 15% nitric acids and hydrofluosilicic acid 5%) causing **direct caustic and oxidative injury** leading to **ischemic optic neuropathy**. This opinion, through peer reviewed research of myself and others in this area, is widely accepted within the scientific community. . . .

Each chemical on the list of chemicals to which [the Claimant] was exposed is a chemical irritant and would induce an inflammatory reaction in the human eye.

There may also be a synergistic (exaggerated enhanced) effect of more than one chemical irritant. It is well established that inflammation plays a role in optic nerve and retinal degeneration (including macular degeneration) leading to blindness. The eye is immune privileged, which means there is little or no immune response in the eye because of the collateral damage that can occur in response to immune activation. In the presence of an eye irritant, the immune cells will pass through blood ocular barriers and the resultant immune response releases a cascade of reactive oxygen species (ROS) molecules which oxidize and damage ocular tissue including retinal pigment

> epithelial cells, retinal ganglion cells and the optic nerve. . . .
>
> All of the components of PASA gel are corrosive liquids capable of causing direct caustic damage to biological tissues, including the eye. It is for this reason that the product is labeled as extremely hazardous and not to be used without full face ocular protection and forced air respirator. . . .
>
> **Conclusion**: It is my expert opinion that [the Claimant] developed his present blindness after he was exposed to toxic chemical compounds while working as a helicopter blade mechanic for defense contractor DynCorp in Bosnia. These chemicals included hydrocarbon fuels, aromatic organic solvents and caustic acids. He was not provided with appropriate respiratory protective equipment, protective clothing, eye and face protection with a full face shield or goggles. His exposure to these toxic chemicals was not appropriately monitored and nor was health evaluated in a timely fashion in order to find early warnings of biological damage. He was not informed nor properly trained in the use of hazardous materials to prevent injury. It is my final opinion that the unprotected exposure of [the Claimant] to these toxic chemicals lead to the induction of, or the acceleration of, the damage to his eyes that has resulted in his present blindness.

(CX R)

William Meggs, M.D., who is Board Certified in Internal Medicine and in medical toxicology, reviewed records in December 1995. Reportedly,

> On April 22, 2002, [the Claimant] developed acute onset of blindness. In hindsight, he describes a blurriness or haziness to his vision in the period leading up to April 22, from April l6 to April 19. At that time, he was working at the Blade Shop at Camp Eagle, in a poorly ventilated building, and exposed to a complex mixture of volatile organic chemicals, acids, and corrosives.

Dr. Meggs found that, "to a reasonable degree of medical certainty, the diagnosis is organic solvent induced macula atrophy with cone dysfunction." Dr. Meggs then explained the scientific basis for his diagnosis. The physician stated that the Claimant

> was exposed to a complex mixture of organic solvents without adequate protection. There is a strong scientific literature documenting color vision loss among solvent-exposed workers. Specifically, color vision is mediated by structures in the retina known as cones, and it is these cones that are dysfunctional in [the Claimant's] retina, as documented by the electroretinogram performed at Vanderbilt University. In particular, the complex mixture of solvents he was exposed to contained three organic solvents that are known to be toxic to the retina: toluene . . . methanol, and n-hexane. . . . Further, he was exposed to a mixture of organic solvents, and a number of studies have documented a color vision loss [i.e., cone dysfunction] in workers exposed to mixtures of solvents. . . .
>
> Dr. Meggs cited numerous differential diagnoses and reasons for ruling these out. (CX S)

In February 2006, Morton Goldberg, M.D., who is Board Certified in ophthalmology, reviewed the report from Dr. Meggs. Dr. Goldberg stated that

> At your request, I have reviewed the material you sent me, including a report from Dr. William Joel Meggs. I am enclosing my personal annotations for Dr. Meggs' bibliographic citations. In brief, virtually none of the references supports the contention that exposure to toxic chemicals caused [the Claimant's] symptoms. [The Claimant] may possibly have a color deficiency (this needs documentation), but none of the toxic chemicals cited by Dr. Meggs resulted in loss of visual acuity (which is [the Claimant's] major problem), loss of peripheral fields, or substantive retinal electrophysiological changes. Thus, I do not believe Dr. Meggs' evaluation is accurate, nor is it relevant to [the Claimant's] clinical situation. The allegedly toxic substances are not known to cause defects in visual acuity, despite the color vision changes (that are, themselves, essentially free of symptoms).

(EX 19)

> In July 2006, Dr. Goldberg reviewed records from Dr. Roberts. Dr. Goldberg stated
>
> I note that Dr. Roberts is not a physician, not an ophthalmologist, and not a clinical retinal specialist, and therefore cannot legally have diagnosed or treated retinal diseases throughout her career. Presumably, therefore, she has not had meaningful personal experience in diagnosing clinical cases like that of [the Claimant]. Now that I have had a chance to review her bibliographic citations (recently sent to me by you; see separate set of my annotations), I will

try to evaluate the points she has made in her December 21, 2004 letter, and I will use her numbering sequence. I. a. Positive evidence of blindness induced by chemical exposure. - Dr. Roberts states that cone dysfunction affecting [the Claimant] is associated with organic solvent exposure. (references 1-4). Her conclusion is erroneous, because such solvents do not degrade visual acuity, do not cause central blind spots (scotomas), do not cause pathological/anatomical changes in the retinas/maculas, and do not cause electroretinographic (ERG) abnormalities, all of which are deficits affecting [the Claimant].

Dr. Roberts also suggests that [the Claimant's] "sudden blindness may also be related to chemical mitochondrial dysfunction, leading to ischemic optic neuropathy. Visual disturbances generally develop between 18 and 48 hours after exposure." There is no evidence that [the Claimant] underwent such exposure of his mitochondria, and the possible chemicals that could conceivably have induced such a disease are not identified. Furthermore, the appearance and function of his optic nerves have never been in question by any of his previous clinical examiners. . . . If he doesn't have a detectable genetic trait, it doesn't prove the role of a toxin, because: 1) such roles have not been established in the scientific literature; and 2) he may still have a hereditary trait that is not detectable by current scientific methods. . . . Color vision defects, which are known to be results of exposure to several inhaled toxins, such as toluene, are NOT associated with reduced visual acuity, central scotomas in the visual field, pathologic/anatomic changes in the appearance of the maculas

> and retinas, or electroretinographic (ERG) abnormalities—all of which [the Claimant] does have. Color vision defects are functional abnormalities and do not have abnormal anatomic appearances in the macula and retina as has [the Claimant]. Dr. Roberts also cites exposure to Pasa-gel (chromic acid, nitric acid, and hydrofluosilicic acids) as causing direct caustic and oxidative injury leading to ischemic optic neuropathy. There is no evidence for this conclusion. These toxic acids can cause external bums to the skin and to the surface of the eye, but they do not cause internal injuries to the retina or macula or even the optic nerve.

(EX 20)

In mid-September 2006, Dr. Goldberg examined the Claimant. Numerous tests were conducted. Vision was correctable to 20/400 bilaterally. Dr. Goldberg stated that

> The multi-focal ERG testing . . . is an objective measurement of the electrical functioning of [the Claimant's] retina. It is clearly subnormal in the macular regions of both retinas, and the other testing performed here confirms that the major problems with [the Claimant's] retinas are secondary to destruction (atrophy, disappearance, shrinkage, wasting, death, etc.) of the cones in his retinas. These dystrophic events are not caused by, nor exacerbated by, fume inhalation, nor by exposure to any known toxins. Moreover, his disease is located in his retinas, not, as speculated by one of his consultants, in his optic nerves or brain. . . . Fume exposures of different types, can occasionally cause functional de-

> fects leading to color vision abnormalities, but there is no evidence that they cause anatomic abnormalities such as those demonstrated by [the Claimant], nor do they cause severe central scotomas (blind spots) nor loss of sharpness of vision (reduction of visual acuity), as demonstrated by [the Claimant].

Dr. Goldberg stated that the Claimant's

> current situation is that of an individual with extremely low levels of visual acuity due to structurally damaged ocular fundi, especially the macular regions of his retinas, where sharp vision normally originates. It is highly unlikely that this condition will improve. It could slowly worsen over time. There is no doubt in my mind that this condition is not related to any external influence, but is, in all probability, a dystrophic condition with a likely hereditary causation, despite the absence of any other known affected family members. Such circumstances are not uncommon in genetic diseases of the eye or of other tissues in the body.

(EX 18)

In late September 2006, Charles Becker, M.D., who is Board Certified in Internal Medicine and in medical toxicology, reviewed records. Clinical data indicated that

> On April 20, 2002, while on a flight back to the USA, [the Claimant] noted a dramatic onset of decreased visual acuity and was eventually seen by an ophthalmologist Dr. Sonkin, on April 23, 2002. [The Claimant] apparently had severe difficulty with visual acuity and was eventually given a full disability because

of eye difficulty. [The Claimant] felt that the agent that he was working with most recently known as Pasa-Jell 107 was a gel form of metal cleaner and conditioner. The ingredients in this product are nitric acid 10%, chromic acid 1%, and hydrofluosilicic acid, less than 5%. This material is a severe irritant and a corrosive.

Dr. Goldberg had indicated that the Claimant

has a genetic disorder leading to a progressive loss of cones in both of his retinae, especially in the maculae. The correct clinical diagnosis for [the Claimant's] disease is choroidal sclerosis, or vascular atrophy of the choroid. The precise mechanism for this abnormality is not known but it is likely to be genetic. My review of the literature and review of the articles supplied by Drs. Meggs and Roberts provide no evidence that toxic or environmental influences are known to be responsible for causing or exacerbating vascular atrophy of the choroids. . . . Dr. Meggs and Dr. Roberts have suggested that solvent exposures may cause changes to the eye. These abnormalities are functional changes in the color vision. I have been unable to find a single peer review or scientific article supporting the allegation that any of the agents to which [the Claimant] may have been exposed could cause the anatomical abnormalities and electrophysiological abnormalities demonstrated by [the Claimant].

None of the articles supplied by Dr. Roberts or Dr. Meggs or that I was able to find suggests that anatomic abnormalities with severe central scotomas and loss of vision are a result of any exposure at any

> dose. [The Claimant's] changes in his eyes are a result of the genetic disease of the cones in his retina, known as choroidal sclerosis. . . . While using Pasa-Jell, he did wear safety glasses, gloves, and a respirator on occasion. What is important is that he did not report of symptoms at the time of possible exposure. One would anticipate reports of acute respiratory symptoms related to inhalation exposure from agents that are caustic. A gel-based caustic agent may release materials into the environment that would be expected to have early warning properties of irritation when they had direct contact with skin or eyes. It is not clear from basic toxicology how a caustic acid gel could damage the retina without causing damage to the outer layers of the eye.

Dr. Becker stated that

> The thorough review by Dr. Goldberg shows unequivocally that [the Claimant] has a genetic disorder called choroidal sclerosis that causes a slowly progressive loss of cones in both the retinae, especially in the maculae. No peer reviewed scientific literature has been provided nor does any exist to support a relationship between any possible exposures that [the Claimant] may have encountered between January 2000 and April 2002. The agents that he may have worked with are not known to cause damage to the retina such as described in this case. During the time that he allegedly worked with these agents, with the possibility of insufficient respiratory protection, he did not have symptoms that would be anticipated if the agents gained access to the body.

(EX 17)

When deposed in November 2006, Dr. Becker testified that he reviewed records that included reports from Drs. Goldberg, Allem, Roberts, Meggs, Routledge, Sonkin and Gass.

Dr. Becker stated that he was not aware of a toxicological causal connection for choroidal atrophy. (EX 42, pg. 127) Ophthalmological abnormalities were seen on an examination in 1988. Dr. Becker acknowledged that toxic chemical exposure could lead to color blindness. (EX 42, pg. 157) While the Claimant had cone and choroid damage, Dr. Becker could not relate such abnormality to exposure to solvents.

The Claimant's counsel asked during the deposition,

> There are three possibilities here as far as causation is concerned are there not: one that he has this disease and the chemicals had nothing to do with it; two, the chemicals caused it; three, he had this condition and it was aggravated by the chemical exposure so it manifested itself at an earlier time or got worse, caused blindness, where it might not have caused complete blindness? Aren't those three possible diagnoses?

(EX 42, pg. 135) The physician responded, "Possible. There's no literature to support the latter two." (EX 42, pg. 135) The Claimant's counsel then asked,

> In general, do you have an opinion as to whether an eye condition or any other condition, be it hereditary, or something, something that predisposed a person to developing an eye condition, could be aggravated or made worse or made to manifest itself on another

> date because of exposures to chemicals similar to the chemicals we know—

Dr. Becker stated, "I don't have evidence for that." The Claimant's counsel then pondered, "If you had evidence, though, would you say it's possible?" Dr. Becker responded, "It's possible. But I'd have to look at it in terms of this case in which I focused on choroidal atrophy. And I don't find any literature to support that. . . . [to support that] choroidal atrophy is caused or worsened by exposure to any chemical." (EX 42, pgs. 180-181)

Dr. Roberts was deposed in early December 2006 and testified that she had a Ph.D. in organic chemistry and that her "emphasis is on the choroid and ocular melanoma and uveitis, the retina and macular degeneration and any other agent that could cause or induce macular degeneration and the lens cataractogenesis, agents that can cause cataracts."

Dr. Roberts stated that

> there are three ways that organic solvents, they are usually referred to in the literature as VOC, volatile organic compounds, enter the body, enter the bloodstream, and cross the blood-retinal barrier. The first two, one is what we call transdermally, in other words, through the skin if they should get on the skin; second is through inhalation, so breathing it can pass from the lungs to cross blood-brain and blood-retinal barriers. And the third, of course, is direct contact with the eye.

Dr. Roberts also indicated that the material could be ingested. (EX 43, pgs. 52-53)

Dr. Roberts testified that she disagreed with Dr. Goldberg as human studies on ocular toxicity of organic solvents clearly demonstrate damage to the cones. (EX 43, pg. 64) Loss of cones leads to loss of visual acuity. (EX 43, pg. 68)

Dr. Roberts noted that Dr. Goldberg indicated that the impairment could be due to some genetic disorder of unknown etiology. Presumably, this would lead to a slowly progressive loss of cones in both of his retinas, especially in his maculas. (EX 43, pg. 77)

Dr. Roberts stated,

> When you have an organic solvent or something lipid-soluble, it can pass through the membranes and through the cell membranes reach the blood, and then the blood can feed that substance directly to the retina and/or to the brain. When it is a substance that is not fat-soluble, then there usually has to be receptors, they're called uptake receptors, they physically suck in the material, shall we say, to the brain or to the retina. So the answer to your question is, it's very easy to get something that is fat-soluble, like an organic solvent, to the retina, specifically, and to the brain, and it's very hard but not impossible to get other more watersoluble substances both to the brain and to the retina.

(EX 43, pgs. 92-93) The physician was then asked, "So it is your opinion, Doctor, that [the Claimant's] eye problem is the result of damage to the cones in the retina and that that was the result of these toxins which have broken the retinal barrier?" Dr. Roberts replied, "That is correct." (EX 43, pg. 93)

When deposed in mid-December 2006, Dr. Meggs testified that he had reviewed records that included reports from Drs. Goldberg, Sonkin, Gass, Becker, Roberts and Routledge. Dr. Meggs testified,

> What we do know, what we do have, is the description of the facility, and the ventilation fan didn't work, and there wasn't electricity, etcetera, etcetera, and we have a list of the chemicals that he was exposed to, and we know that his retina was damaged in a functional way that's identical to what the literature says could happen to a person exposed to these chemicals. And so we know he had a significant exposure. I think anybody would agree, you know, reading the different reports and the testimony of the coworkers and him and seeing what the substances were and the reports of the ventilation and the hood. He had a significant exposure to a category of chemicals that can cause dysfunction of the cones of his eyes, that part of the retina. And we know from the ERGs that this is moderate to severe damage to these structures, and we don't have any other reason to explain why his cones aren't working. Nobody has found another reason. Nobody has been able to demonstrate anything.

(CX Z, pg. 43)

Dr. Meggs agreed with the statement in his report which mentioned, "To a reasonable degree of medical certainty the diagnosis is organic solvent-induced macular atrophy with cone dysfunction." (CX Z, pgs. 48-49)

Dr. Meggs was asked to comment on Dr. Goldberg's statement that

> there is no doubt in my mind that this condition is not related to any external influence, but is in all probability a dystrophic condition with a likely hereditary causation despite the absence of any other known affected family members. . . . There is no doubt in my mind that this condition is not related to any external influence. . . .

Dr. Meggs testified that he disagreed with Dr. Goldberg. Dr. Meggs stated,

> I disagree with him that there's just no doubt that there could be no external influence. I mean, he worked with the solvents. How could he say that there's no doubt that the solvents had nothing to do with it? He has the ERG showing cone dysfunction, and the solvents are known to cause cone dysfunction. Yeah, I disagree with that.

(CX Z, pg. 68)

Dr. Goldberg was deposed in early April, 2007 and testified that examinations in 1988 and in 1993 suggested paracentral scotomas. Dr. Goldberg stated that he disagreed with Drs. Meggs and Roberts. Dr. Goldberg reported, "I don't believe anyone has ever in the history of the world, to my knowledge, lost his vision in this type of disease from exposure to a chemical."

(CX X)

At the hearing, Dr. Roberts testified that

> My expertise for the last 30 years—and I have 80 or more peer-reviewed publications—is in the field of the chemistry of the eye, both the natural processes in the eye, natural substances in the eye that are

> chemicals, and external, physical or chemical agents that may disrupt the function of the eye. We call that endogenous and exogenous. Endogenous is the internal natural substances, and exogenous is external.

(TR 267)

Dr. Roberts stated that there were five layers in the eye. The outer layer is the choroid, then the retina, and then the photoreceptive layer, which contains the rods and cones. Next is the neural retina, and finally, the optic nerve. The witness testified that government testing had shown that color vision could be affected by exposure to solvents. (TR 303) She reported that

> the biggest problem of chronic exposure is that eventually there is damage to the repair either enzymes or repair genes, and then the repair doesn't occur. So that's why you don't necessarily get immediate blindness. You get slow, slow, slow damage, and then the damage is permanent. It goes from transient to permanent.

(TR 311) Dr. Roberts testified that the Claimant

> was not informed or properly trained in the use of hazardous material to prevent injury, and it is my final opinion that unprotected exposure of [the Claimant] to these toxic chemicals led to the induction or at least the acceleration of the damage to his eyes that has resulted in his present damage, his present blindness.

(TR 328)

Dr. Roberts was asked about a report (EX 20) from Dr. Goldberg who stated that Dr. Roberts' "conclusion is erroneous because solvents do not degrade visual acuity, do not cause central blind spots, do not cause pathological anatomical changes in the macula, do not cause electro-retinographic ERG abnormalities." (TR 333) Dr. Roberts responded and stated that testing by an associate of Dr. Goldberg showed

> a thinning of the retinal pigment epithelial layer, in addition to the damage to the cones, and their tests and Dr. Adams' analysis says that there is a thinning of the neural retina. And, as I described before, that's the layer with the ganglion cells. So what that says is, in addition to cone damage, there's damage to the retina pigment epithelial cells, which are cells that feed photoreceptor cells, and that there's damage to the neural layer, which is what is sending a signal from the eye to the brain. Rather than contradict what I was saying, it more strongly confirms that the organic solvents destroyed the cones and resulted in color vision loss and visual acuity loss, and that there is some neurotoxicity that is evidenced by their analysis of the thinning of the neural retina. So I used their data to say—it confirms what I said in the first place in 2004, before I had this data.

(TR 334-335)

Dr. Roberts testified that exposure to solvents can cause dyschromatopsia, color blindness, in the blue and yellow cones. The Claimant had lost these color perceptions. He worked with Pasa-Gel, which is highly corro-

sive and one article indicated that exposure could lead to retinal and optic nerve damage.

Dr. Meggs testified that he was a physician who specialized in toxicology. After a review of the Claimant's statements, army inspection reports, and information from Drs. Roberts, Sonkin and Allems, Dr. Meggs concluded that the Claimant "suffered from organic solvent-induced macular atrophy with cone dysfunction." (TR 444)

Dr. Meggs relied on the results from the ERG, the electroretinogram, and supporting literature. The rods were fine but the cones were bad, which is an unusual result. Studies of workers exposed to solvents showed defects in color vision.

When informed that Dr. Goldberg had stated that the diagnosis was hereditary choroidal atrophy, Dr. Meggs reported that the ERG studies had shown a different type of retinal problem. (TR 462)

Dr. Meggs stated that the Claimant

> doesn't have a family history, and he has the exposure to solvents. So, in my opinion, it's more reasonable than not that the solvents is the problem with his cones, and, if someone were to show that he did have an inherited defect, which no one has been able to show, I still don't—in my opinion that wouldn't let the solvents off the hook. I would have to concede it would very difficult to say what percent.

(TR 476) The physician testified that solvent exposure must have been severe based

> on the two industrial hygiene reports where basically the workplace got an F. I mean, they don't give grades, but the two places he worked were literally condemned. I mean, they said, look, look at what he's working with and look at the ventilation here, bad stuff. Pick up any one of those cans, and I guarantee you that it will say on it—or, material safety data sheets, use in a well-ventilated area, harmful if breathed. And then they conclude there was no good ventilation for what he was working with.

(TR 490)

At the hearing, Charles Becker, M.D., testified that he was Board Certified in Internal Medicine, in medical toxicology, and in occupational and environmental medicine. The physician had performed studies of United Airlines and General Motors workers and he conceded that solvent exposure could produce color vision changes. (TR 529)

Dr. Becker had reviewed medical reports, statements from the Claimant, and descriptions of materials used in Bosnia. The physician noted that Dr. Goldberg had stated that the Claimant had "choroidal sclerosis, a genetic disease that accounts for the visual acuity problems." Dr. Becker reported he did not "believe that solvents cause visual acuity problems. The solvents cause dyschromatopsia." (TR 543)

There was a discussion of dose estimate based upon industrial hygiene simulation. It was noted that the Claimant worked in three different types of buildings in a temporary setting. Dr. Becker acknowledged that exposure to carbon monoxide, ethylene, glycol and methanol can produce eye changes. (TR 610)

The physician stated that there were no signs of optic nerve damage. He noted, "there is retinal dysfunction, but the retinal dysfunction occurs because the choroid doesn't have the right vessels. And that's a genetic disease." (TR 615)

Dr. Becker understood that the Claimant's optic nerve was normal although Dr. Roberts stated that it was damaged. (TR 620) Dr. Becker stated that "I'm here rendering a toxicological opinion about what's known about what solvents do to the eye, and my opinion is that it is not generally accepted that they cause visual acuity problems, which are the problems that [the Claimant] has." (TR 648)

Dr. Goldberg testified that he was Board Certified in ophthalmology and that he primarily dealt with the retina and the macula. He also focused on ocular trauma and inherited eye diseases.

The Claimant underwent testing and an examination. Dr. Goldberg reviewed records which suggested that the Claimant

> had a natural progression of a disease that started in his maculas and retinas a long time ago, at least as far back as age 35. And then it progressed, waxing and waning over the next 15 to 18 years. And the first notation I could find in the record was from 1988, when the Claimant was 35, his visual acuity was normal at that time, but he had what was called, quote, pigment clumping, end quote, in both retinas.

(TR 669)

In 1988, the Claimant was noted to have a paracentral scotoma, which is a blind spot around the periphery

of the macula. In 1993, a physician found pigmentary change near the center of the macula, near the fovea, which is the center of sharp vision. In early 1994, central scotomas were noted.

In 1998, visual acuity dropped to 20/100 in the left eye, but later returned to 20/20. Later that year, pigment mottling was seen in the center of the macula. In 2000, Dr. Routledge noted changes in the choroid. Dr. Routledge had prescribed magnifiers. The Claimant had experienced a progressive intermittent loss of vision.

Dr. Goldberg reported that the Claimant

> had had loss of vision a couple of years before he really appreciated it. He got to a point where the vision had worsened to a tipping point when it became severely symptomatic for him, and he could not read, probably because—hard to know, probably because he didn't recognize he had poor vision in one eye when he still had one good eye. And eventually, when the good eye progressed, he was unable to read with both eyes, and that made it impossible for him to read at that time. But, even at that time, he had 20/70 vision, according to Dr. Rutledge and Dr. Sonkin's examination.

(TR 680-681)

In June 2002, "Dr Gass found the central scotoma, central blind spot on the right eye, and a paracentral scotoma in the left eye." (TR 681)

Testing ordered by Dr. Goldberg revealed that he

> had a dramatic Draconian destruction of his macula. It was missing a great deal of tissue, and I could see through the internal layers of the retina and macula, much of those tissues had shrunken and gone away, disappeared. So I could see the more externally located tissue that is ordinarily hidden from sight, camouflaged by healthy tissues on the internal aspect of the retina.

(TR 686)

The optical coherence tomography test (OCT) showed that the retina was thin due to missing cones.

Dr. Goldberg testified that the Claimant had "a disease called choroidal sclerosis, which is sometimes called vascular atrophy of the choroid or central areolar macular degeneration. It's a variant of macular degeneration." (TR 704)

Dr. Sorsby described this condition in a book that was written in 1951.

"Dr. Sorsby goes on to show different stages of the disease in patients of different ages. This is a progressive disease, as it has been in" the Claimant. (TR 704)

Dr. Goldberg stated that the Claimant's

> maculas are destroyed. They are structurally absent. They're gone as a result of his disease, his type of macular degeneration, so-called choroidal sclerosis. And you do not see that, you do not see that in any form of environmental or exogenous impact that you can imagine, I have heard about or read about. So this is a hallmark of his situation. He has structural damage to the macula, a form of macular de-

> generation, as a young man that is not caused ever, to the best of my knowledge, not caused ever, as far as I can tell from reviewing the world's literature, by exogenous stimuli.

(TR 706)

Dr. Goldberg reported that Dr. Gass had found Dr. Sorsby's macular dystrophy, or choroidal sclerosis, during his examination of the Claimant. (TR 711)

Dr. Goldberg testified that

> There is a marked difference between color vision abnormalities that are either inherited or acquired and this type of severely destructive dystrophy or degeneration of the entire macula. . . . Choroidal sclerosis in the context that we are discussing, this loss of blood vessels or choroidal vascular atrophy, is a disease characterized by progressive loss of the capillaries in the center of the macula of the choroid, secondary to which the overlying macula in the retina shrinks away, atrophies, disappears, leaving this scar tissue.

(TR 708)

Dr. Goldberg disagreed with Dr. Roberts' statement to the effect that "it is widely accepted within the scientific community that the acids and other solvents he had been exposed to cause loss of vision. She actually hasn't done research or published in that area, despite her saying she did, and there is nothing in the literature to substantiate her point of view." (TR 715)

Dr. Goldberg also indicated that Dr. Meggs had made some misleading statements based on articles that

Dr. Meggs had reviewed. Finally, on direct examination, Dr. Goldberg testified that "I would go beyond medical certainty or medical probability, which I take to understand, more likely than not, I feel 99.999 percent certain that he has, unfortunately, a chronic degenerative disease which is causing him a great deal of difficulty, but has nothing to do with solvent exposure, either initiation or accentuation." (TR 716)

On cross-examination, Dr. Goldberg acknowledged that neither he nor Dr. Gass had mentioned Dr. Sorsby in their reports. Dr. Goldberg stated that scotomas were noted on examinations in 1988, 1993 and in 1994. Central visual acuity remained good "for a long period of time, but simultaneously he was progressively losing his paracentral visual field and getting more pigment in the retina and macula." (TR 749)

Dr. Goldberg was asked about the rarity of the Claimant's impairment. The physician stated that "it's a rare disease. There are probably three dozen or so cases in the world's literature, thereabouts." (TR 763)

Dr. Goldberg stated that "Dr. Meggs and Dr. Sonkin both point out in their depositions, a sporadic occurrence of a disease does not rule out a genetic cause, and it is frequently the case that the first patient one sees with a genetic disease has no other affected family members." (TR 758)

Dr. Goldberg was asked, "So, it would be difficult to prove that it was not triggered by environmental factors?" (TR 765) He responded,

> Well I think not. Of all of the cases that have been reported-there haven't been a large number, but

> those that have been reported, not a single one has had exposure to toxins. And, in addition, most of the cases reported have been within families. They have been inherited in the absence of exposure to exogenous toxins.

(TR 765)

Post-Hearing

> In July 2007, Dr. Meggs stated
>
> Dr. Morton Goldberg has testified that solvents did not damage the eyes and cause vision lost in [the Claimant] because he has looked into his eyes and found an alternative diagnosis, atrophy of the choroid. Atrophy means a wasting away, a diminution of a cell, tissue, organ or part. The choroid is the middle layer, the layer between the retina and sclera, in the back of the eye. There are two flaws in Dr. Morton Goldberg's arguments. The most damaging is that [the Claimant] had electroretinogram performed twice. The electroretinogram is an objective test that does not depend on the subjective opinion of an observer. The electroretinograms both agreed that [the Claimant] has selective damage to the cones but not the rods of his retina. This finding is different from what has been seen in electroretinograms performed on patients with atrophy of the choroid. Further, this finding is exactly what one expects in solvent damaged workers, with damage to the cones and not the rods. The second flaw is that Dr. Morton Goldberg's diagnosis depends on his subjective judgment from looking into [the Claimant's] retina. Choroidal atrophy is a pathological diagnosis requiring a biopsy, not a gross diagnosis from looking.

> Even if a biopsy were performed and [the Claimant] was found to have choroidal atrophy, the fact remains that he has damage to the cones of his eyes as verified by electroretinogram studies which is different from choroidal atrophy.

(CX NN)

> In July 2007, Dr. Roberts stated
>
> I would appreciate your acceptance of this rebuttal of Dr. Gol[d]berg's testimony for this case for the following scientific reasons. In Dr. Goldberg's opinion, [the Claimant's] loss of vision had nothing to do with chronic exposure to organic solvent but to a genetic disorder know as Sorsby's fundus dystrophy. (1) There is no clinical evidence for Sorsby's dystrophy in any of the tests performed to define [the Claimant's] ocular damage. Quite to the contrary, Sorby's dystrophy begins with atrophy to the central retina and then slowly progresses toward the periphery. Changes were first noticed in the periphery of his retina and much later after exposure to a variety of industrial organic solvents lead to central vision damage. Reference: Sorsby's fundus dystrophy was originally defined by its clinical features, namely thick deposits of both proteins and lipids present within Bruchs membrane. Atrophy of the retina, pigment epithelium, and choroid then slowly progresses toward the periphery. Sorsby first described these clinical symptoms in Genetics in Ophthalmology in 1951, A. Sorsby, M.E.J. Masson and N. Gardener, A fundus dystrophy with unusual features, Br J Ophthalmol 33 (1949), pp. 67-97.

(2) There is no history of Sorsby'[s] dystrophy in [the Claimant's] family which is a disease that has a "dominant inheritance pattern" to distinguish it from other retinal degenerations. Reference: Since then it has been found that Sorsby Fundus Dystrophy (Sorsby FD) is a dominant inheritance pattern distinguish the dystrophy in the present pedigree from other dystrophies and age-related macular degeneration (Am J Ophthalmol. 1988 Aug. 15; 106(2):154-61. Pseudoinflammatory macular dystrophy. Dreyer RF, Hidayat AA)

(3) There is no scientific (genetic) evidence of [the Claimant] having Sor[s]by's FD. Goldberg ordered genetic tests in order to attempt to associate [the Claimant's] ocular damage to a genetic disorder. None of these tests proved a positive association with any genetic disorder. Dr. Goldberg did not order a test for a mutant form of TIMP-3. If Dr. Goldberg thought that [the Claimant] has Sor[s]by's Fundus Dystrophy why did he not test for this disorder? Chromosome 22 and the protein mutant TIMP-3 have since been linked to Sor[s]by's FD and this has been known since 1994. Reference: Weber BH, Vogt G, Wolz W, Ives EJ, Ewing CC. Sor[s]by's fundus dystrophy is genetically linked to chromosome 22q13-qter. Nat. Genet. 1994;7:158-161.

(4) [The Claimant's] loss of color vision is loss of blue/yellow, which is linked to damage by organic solvents. Sor[s]by's FD is linked with a genetically linked loss of red/green color vision. Reference: Acta Ophthalmol (Copenh). 1989 Dec; 67(6):617-24. Colour vision in a family with Sor[s]by's dystrophy.

Atchison DA. Department of Optometry, Queensland University of Technology, Brisbane, Australia.

(CX LL)

In late July 2007, Dr. Goldberg responded to the post-hearing statement by Dr. Roberts. Dr. Goldberg stated, in part,

> (1) She states, "There is no clinical evidence for Sorsby's dystrophy in any of the tests performed to define [the Claimant's] ocular damage." Actually, the clinical, electrophysiological, and psychophysical tests that I and my colleagues performed were all compatible with and diagnostic of the diagnosis of Sorsby's dystrophy (central areolar choroidal dystrophy; aka choroidal sclerosis and many others). Joan Roberts claims that Sorsby's dystrophy begins with atrophy in the central retina and then progresses toward the periphery. She states, however, with respect to [the Claimant] that "changes were first noticed in the periphery of his retina." In fact, there have been at least two instances showing that fundus pigmentation can occur in the periphery of patients with this disease. (Reference: Archer, D, et al, Fluorescein Studies of Chorodial Sclerosis. American Journal of Ophthalmology 1971: Vol. 7; 266-85.) [The Claimant's] clinical course, over the years, is quite compatible with the diagnosis of choroidal sclerosis.
>
> (2) Joan Roberts states that "There is no history of Sorsby's dystrophy in [the Claimant's] family." This is clearly irrelevant. I pointed out in my trial testimony that numerous genetic diseases may occur in only one generation of a given kinship or family. Of-

ten, only one individual is affected. Dr. Roberts cites a diagnosis of Sorsby's fundus dystrophy in the reference she offers, but she fails to realize that the diagnosis of the cases published in this reference is that of pseudoinflammatory macular dystrophy. (see this exact title as referenced by Dr. Roberts in her letter). This type of macular dystrophy ("pseudoinflammatory macular dystrophy.) is not the disease that [the Claimant] has. [The Claimant] has a disease known as central areolar choroidal dystrophy (aka choroidal sclerosis" and many others). Interestingly, both of these disorders (pseudoinflammatory macular dystrophy and central areolar choroidal dystrophy) have been cited in the literature as "Sorsby's macular dystrophy," but they are totally different diseases with different genetic mutations and totally different clinical appearances.

. . . (4) Regarding Dr. Roberts' assertion that [the Claimant's] color vision defect (allegedly a blue/yellow defect rather than a red/green defect) is more typical of damage by organic solvents than of a genetic retinal disease, she should be made aware that both blue/yellow and red/green defects occur in central areolar choroidal dystrophy ("both acquired blue-yellow dyscromatopiasia and acquired red-green dyscromatopiasia have been described in the patients" with this syndrome (page 415 of August F. Deutman, "*The Hereditary Dystrophies of the Posterior Pole of the Eye*". Charles C. Thomas publisher, 1971, pg. 415).

(EX 44)

In July 2007, Dr. Goldberg evaluated materials submitted by Claimant's counsel. (See CX KK) The physician stated, in part, that

> the Claimant has the essential elements in the macular portion of his retinas that do allow me to make a definitive diagnosis of choroidal sclerosis. Because the capillaries of the macula are missing, I had an excellent view-with photographic documentation previously submitted to the court-of the more externally located large ropey whitish-yellow vessels (white streaks-easily seen in his retinal photos) in the outer layers of the choroid. Contrary to Mr. Cheatham's conclusion that the photographs showed something different from the artist's depictions in Dr. Sorsby's book, the photographs actually are characteristic and diagnostic of choroidal sclerosis and entirely compatible with the artist's interpretations.

(EX 45)

DISCUSSION

Section 2(2) of the Longshore Act defines injury as

> The term "injury" means accidental 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.

33. U.S.C. § 902(2) (2000). This statute clearly states that the injury to the employee must arise out of employment and in the course of employment. A work-

related aggravation of a preexisting condition is an injury. under Section 2(2) of the Longshore Act. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom.*, *Gardner v. Director*, OWCP, 640 F.2d 1385 (1st Cir. 1981); *Preziosi v. Controlled Industries*, 22 BRBS 160 (1989). In addition, the Benefits Review Board has also held that the term "injury" includes the aggravation of a pre-existing nonwork-related condition or the combination of work and non-work-related conditions.

Section 20(a) of the Longshore Act creates a presumption that the Claimant's disabling condition is causally related to his employment. 33 U.S.C. § 920(a) (2000). In order to invoke the 20(a) presumption, the Claimant must prove that he suffered a harm and that conditions existed at work or that an accident occurred at work which would have caused, aggravated or accelerated his condition.

In this case, the Claimant was found to have severe eye impairment shortly after his return from Bosnia. The Claimant, as well as Messrs. Griggs and Hall have testified as to solvent exposure and poor ventilation in the workplace.

In addition, Drs. Roberts and Meggs have attributed the Claimant's loss of vision to working conditions in Bosnia. Therefore, the Section 20(a) presumption is invoked.

Section 20(a) places the burden on the employer to produce sustained countervailing evidence to rebut the presumption that the injury was caused by the claimant's employment. *Cairns v. Matson Terminals*, 21 BRBS 252 (1998). Employer must produce facts, not speculation, to overcome the presumption of compensa-

bility, and reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created in Section 20(a). *Smith v. Sealand Terminal*, 14 BRBS 844 (1982); *Dixon v. John J. McMullen & Assocs.*, 13 BRBS 707

Dr. Goldberg, the ophthalmologist in this case, has examined the Claimant. After reviewing records and researching reference works, this physician concluded that the Claimant has a genetic disorder that would progress without extraneous factors. Dr. Becker has concurred in this assessment.

These opinions are sufficient for rebuttal of the Section 20(a) presumption. Therefore, this administrative law judge must weigh all of the evidence and resolve the case on the record as a whole.

Under the substantial evidence rule, the administrative law judge's findings must be based on such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See DelVecchio v. Bowers*, 296 U.S. 280 (1935).

The experts in this case rely on the treatise by Sorsby. However, there are different interpretations regarding application to the Claimant's case.

One must defer to Dr. Goldberg as he is Board Certified in ophthalmology and has studied the effects of hazardous substances on the eyes. This physician has clearly stated that exposure to solvents cannot produce the abnormalities that have been demonstrated in this case.

However, Drs. Roberts and Meggs disagree with the determination of a true genetic disorder that cannot be affected by outside elements.

Dr. Goldberg testified that there were only some three dozen documented cases that were similar to the Claimant's.

The Claimant was a very credible witness and he testified that he had minimal vision problems prior to his work in Bosnia and that he had a sudden loss of vision in both eyes as he was leaving that country.

Dr. Goldberg has stated that serious eye changes were present prior to Bosnia, but that the Claimant only became aware of these changes when these affected his remaining central visual acuity.

It is reasonable to state that the Claimant has a genetic eye disorder. It is also reasonable to conclude that the unsatisfactory working conditions and exposure to solvents aggravated the underlying eye impairment. The undersigned administrative law judge is persuaded by the opinions of Drs. Roberts and Meggs that the disability was aggravated by working conditions.

Entitlement to Relief under Section 8(f) of the Longshore Act

Section 8(f) of the Longshore Act states, in part,

> In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling

within the provisions of section 8(c)(1)-(20) [subsec. (c)(1)-(20) of this section], the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of section 8(c)(13) [subsec. (c)(13) of this section], the employer shall provide compensation for the lesser of such periods. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of 8(c)(1)-(20) [subsec. (c)(1)-(20) of this section], the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of section 8(c)(13) [subsec. (c)(13) of this section], the employer shall provide compensation for the lesser of such periods.

33 U.S.C. § 908(f) (2000).

The Employer raised the issue of Section 8(f) relief when a form LS-18 was submitted to the District Director in June 2004. This issue was not mentioned in the closing brief that was filed in 2007. It is apparent that the Employer clearly contends that the totally disabling eye impairment was not caused by working conditions or aggravated while the Claimant was employed with the Employer.

As the Solicitor has filed a brief on the issue of Section 8(f) relief, this issue will be considered.

The Solicitor has pointed out that

> it is the employer/carrier's position as expressed through the opinions of Dr. Goldberg that all of the claimant's visual problems are the result of the natural progression of an eye condition that pre-existed his employment for DynCorp, and that the claimant's employment as a helicopter repairman and its concomitant chemical exposure had nothing to do with his loss of vision.

Therefore, the Solicitor states that "pursuant to the applicable authorities, therefore, should the administrative law judge find that employer/carrier's position is persuasive, there can be no Section 8(f) relief."

The undersigned administrative law judge will accept the argument that if a preexisting impairment runs its normal course and is not aggravated in the workplace, then there is no basis for a grant of relief under the applicable statute.

Many cases have stated the requirements for Special Fund relief in some variation of the following language:

> To qualify for § 8(f) relief, an employer must make a three-part showing (i) that the employee had a pre-existing partial disability, (ii) that this partial disability was manifest to the employer, and (iii) that it rendered the second injury more serious than it otherwise would have been.

In this case the medical records do show that there were positive signs of a severe eye disorder as early as 1988. Such signs were more apparent by 2000. Therefore, part (I) has been met in this case.

The requirement that a claimant's pre-existing disability must be manifest to the employer is not a statutory requirement of Section 8(f) but has been added by the courts. *American Mut. Ins. Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). It is "a 'judicial' gloss which Congress has not acted to erase". *American Shipbuilding Co. v. Director, OWCP*, 865 F.2d 727, 730, 22 BRBS 15 (CRT)(6th Cir. 1989). The regulations have contained the requirement since 1985. 20 C.F.R. § 702.321(a), 50 Fed. Reg. 401 (1985), *amended* 51 Fed. Reg. 4285 (1986).

The manifest requirement is regularly imposed "by all federal circuit courts which have addressed the issue." *Stone v. Newport News Shipbuilding & Dry Dock* Co., 20 BRBS 1, 5 n.2 (1987); *C.G. Willis, Inc. v. Director*, OWCP, 31 F.3d 1112 (11th Cir. 1994); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 323 (2d Cir. 1993); *Director, OWCP v. Luccitelli*, 964 F.2d 1303 (2d Cir. 1992), *rev'g Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991); *E.P. Paup Co. v. Director*, OWCP, 999 F.2d 1341 (9th Cir. 1993); *Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74 (1st Cir. 1992); *Bunge Corp. v. Director, OWCP [Miller]*, 951

F.2d 1109 (9th Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990); *Two R Drilling Co. v. Director, OWCP*, 894 F.2d 748 (5th Cir. 1990); *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656 (3d Cir. 2000). The Supreme Court has not spoken on the validity of the requirement.

A useful function of the requirement is that it insures that a disability actually pre-existed the second injury. Although this function would be served if medical records sufficed to establish a condition that would deter a cautious employer from hiring or encourage a cautious employer to terminate the worker because of increased risk of compensation liability, the Board had held that "a *post hoc* diagnosis of a pre-existing condition, even a diagnosis based only on medical records in existence prior to the date of injury, is insufficient to meet the manifest requirement." *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 99 (1991).

While there were signs of impending impairment prior to the Claimant's employment in Bosnia, significant visual loss was not apparent to the worker or to the employer before April 2002.

Therefore, the record does not reflect that impairment of vision could be considered manifest to the employer. prior to the Claimant's service in Bosnia.

As the manifest. requirement has not been met, the request for relief under Section 8(f) of the Longshore Act must be denied.

The documents in this case are voluminous and would fill four shipping boxes. Therefore, the formal file in this case will remain in the Newport News office of the

Office of Administrative Law Judges until April 1, 2008 in anticipation of possible post-hearing motions.

ORDER

1. The Employer is to pay permanent total disability compensation to the Claimant from April 20, 2002 and continuing at the maximum compensation rate.

2. The Employer is to provide all necessary treatment for the Claimant's bilateral eye impairment.

3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).

4. All monetary computations made pursuant to this Decision and Order are subject to verification by the District Director.

5. The Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

6. Section 8(f) relief is denied.

7. The formal file will remain with the Office of Administrative Law Judges until April 1, 2008.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/kbe
Newport News, Virginia