BRB Nos. 12-0426
and 12-0426A

SOLIMAN SOLIMAN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL TERMINAL AND CONTAINER SERVICE, INCORPORATED	)	DATE ISSUED: 03/13/2013
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Order on Motion for Reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Robert J. DeGroot, Newark, New Jersey, for claimant.

Francis M. Womack, III (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits and the Order on Motion for Reconsideration (2011-LHC-00880) of Administrative Law Judge Ralph A. Romano 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.* (the Act). 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 parties stipulated that claimant sustained a work-related injury to his left eye on January 28, 2008, while working as a longshoreman for employer.[1] Claimant sought immediate medical treatment, CX B, and underwent surgical repair of a complex retinal detachment in his left eye on February 6, 2008. CX C. Claimant underwent an additional surgical procedure on his left eye on April 17, 2008. CX F. In January 2009, claimant returned to his regular work for employer. Tr. at 25-26, 47. Employer voluntarily paid claimant temporary total disability compensation from January 30, 2008 to August 21, 2008. *Id.* at 6; 33 U.S.C. §908(b).

In his decision, the administrative law judge first addressed employer's contention that claimant's refusal to undergo YAG laser surgery to treat a capsular opacity in his left eye[2] was unreasonable and unjustified, and that therefore claimant had not reached maximum medical improvement. The administrative law judge rejected employer's contention, finding that claimant's refusal to undergo the YAG surgical procedure recommended by Dr. Spitzer, employer's expert ophthalmologist, was not objectively unreasonable. The administrative law judge determined that claimant's work-related left eye impairment reached maximum medical improvement by September 24, 2009, the date of Dr. Spitzer's last examination of claimant. The administrative law judge further found that claimant is entitled to permanent partial disability benefits for his left eye injury based on an 11 percent visual acuity impairment and an additional 42.5 percent structural damage-related impairment.[3] The administrative law judge summarily denied both claimant's and employer's motions for reconsideration.

On appeal, employer assigns error to the administrative law judge's finding that claimant's refusal to undergo the YAG capsulotomy was not unreasonable and to the consequent conclusion that claimant's eye condition had reached maximum medical improvement. Employer avers that claimant's condition is still temporary because

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[1]Claimant had cataract surgery on his left eye two-and-a-half years before his January 28, 2008, work accident.

[2]The YAG laser surgery is also referred to as a capsulotomy. *See* EX 17 at 11-13.

[3]The administrative law judge also found that claimant did not establish entitlement to an additional period of temporary total disability benefits from August 21, 2008 to January 2009. Claimant does not challenge this finding in his cross-appeal and it is therefore affirmed.

surgery will improve his condition, and that the award of permanent partial disability is premature. Claimant responds, urging affirmance of the administrative law judge's findings regarding this issue. In his cross-appeal, claimant contends that the administrative law judge incorrectly determined the extent of permanent impairment to claimant's left eye. In response, employer contends that in the event that the Board upholds the administrative law judge's finding that claimant has reached maximum medical improvement, the administrative law judge's determination of the extent of claimant's permanent partial disability should be affirmed.

An award of permanent partial disability benefits for a scheduled disability, as set forth in Section 8(c)(1-20) of the Act, 33 U.S.C. §908(c)(1-20), is predicated solely on the existence of a permanent anatomical impairment to a member listed in the schedule, and economic loss is not considered in determining an impairment rating under the schedule. *See Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period, *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), or if he has any residual impairment after reaching maximum medical improvement, the date of which is determined by medical evidence. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004). If surgery is anticipated, maximum medical improvement has not been reached. *Kuhn v. Associated Press*, 16 BRBS 45 (1983). However, if surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be considered permanent. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *see also Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000), *aff'g* 33 BRBS 133 (1999). A claimant's refusal to undergo surgery or other medical treatment does not prevent a finding that maximum medical improvement has been reached where the refusal is reasonable and justified within the meaning of Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4). *Methe*, 396 F.3d at 605, 38 BRBS at 102(CRT); *see also Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Carlisle*, 227 F.3d at 940, 34 BRBS at 82-83(CRT).

In considering employer's argument that claimant's refusal to undergo YAG laser surgery precludes a finding that claimant has reached maximum medical improvement, the administrative law judge applied the analysis for determining whether a claimant's refusal to undergo surgery was unreasonable or unjustified under Section 7(d)(4) of the

Act.[4] *See* Decision and Order at 10-12; *Methe,* 396 F.3d at 604-605, 38 BRBS at 101-102(CRT). Specifically, the administrative law judge recognized that Section 7(d)(4) requires a dual inquiry. Decision and Order at 10; *Pittsburgh & Conneaut Dock Co.*, 473 F.3d at 261, 40 BRBS at 78(CRT); *Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979). Initially, the burden of proof is on the employer to establish that claimant's refusal to undergo medical or surgical treatment is unreasonable; if carried, the burden shifts to claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined as an objective inquiry, while justification has been defined as a subjective inquiry focusing on the individual claimant. *Id.*

In discussing the "reasonableness" prong, the administrative law judge took into consideration the Board's decision in *Hrycyk,* 11 BRBS at 241-242, regarding the requisite showing that the recommended medical procedure be of aid in restoring a degree of the claimant's lost earning capacity.[5] Decision and Order at 11-12. The administrative law judge found in this regard only that employer did not meet its burden of establishing that the YAG capsulotomy was likely, as a matter of reasonable medical

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[4]Section 7(d)(4) of the Act provides:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. §907(d)(4). Employer is not seeking to suspend claimant's compensation in this case, but Section 7(d)(4) has been applied to the issue of permanency. *See Methe,* 396 F.3d at 605, 38 BRBS at 102(CRT).

[5]In *Hrycyk,* the Board provided the following description of the reasonableness determination:

> The first inquiry is into reasonableness. Of course, the recommended procedure or examination must be proven likely, as a matter of reasonable medical probability, to be of aid to a course of treatment designed to relieve the claimant's symptoms and restore a degree of his or her lost earning capacity without undue risk to his or her health or well-being. . . . Broadly stated, the inquiry is: what course would an ordinary person in the claimant's condition pursue after weighing the risks and rewards of the procedure with the alternatives of continued pain and restriction?

11 BRBS at 241-242; *see also Malone,* 29 BRBS at 110.

probability, to be of aid in restoring some measure of claimant's lost earning capacity. *Id.* at 12. We agree with employer, however, that the requirement set forth in *Hrycyk* that the recommended medical procedure be shown to aid the restoration of lost earning capacity is not applicable to scheduled injury cases, in which loss of wage-earning capacity is not considered in calculating an employee's award under the Act.[6] *See generally Gilchrist*, 135 F.3d 915, 32 BRBS 15(CRT). Rather, in a case involving a scheduled injury, the relevant reasonableness inquiry is whether the recommended procedure is likely, as a matter of reasonable medical probability, to lessen the extent of the claimant's medical impairment, or to relieve his symptoms and the physical effects of his injury, without undue risk to his health or well-being. *See generally Hrycyk*, 11 BRBS at 241-242. As the administrative law judge's reasonableness analysis in this case focused only on whether the YAG procedure was likely to restore a measure of claimant's lost earning capacity, we must vacate the administrative law judge's conclusion that claimant's decision to forgo that procedure is not objectively unreasonable. We therefore remand the case for the administrative law judge to reconsider, in accordance with the standard applicable to scheduled injury cases, whether employer made the requisite showing that claimant's refusal to undergo the YAG capsulotomy is objectively unreasonable. On remand, the administrative law judge should fully discuss and weigh the relevant medical opinions regarding the probable benefits and the risks associated with the YAG surgical procedure.[7] The administrative law judge then must determine what course an ordinary reasonable person in claimant's condition would pursue after weighing the risks and rewards of the procedure with the alternative of continued restriction. *See Hrycyk*, 11 BRBS at 241-242.

In view of his determination that employer failed to make the initial showing that claimant's refusal to undergo the YAG surgical procedure was objectively unreasonable, the administrative law judge found it unnecessary to consider the question of whether claimant's refusal was justified from a subjective standpoint. Decision and Order at 12; *see Malone*, 29 BRBS at 110-112; *Hrycyk*, 11 BRBS at 241-243. On remand, should the

[6]Neither *Hrycyk*, 11 BRBS 238, nor *Malone*, 29 BRBS 109, which quoted with approval the Section 7(d)(4) reasonableness test set forth in *Hrycyk*, was a scheduled injury case. Thus, in both of those cases, in which compensation was based on loss of wage-earning capacity, the question of whether the recommended medical procedure would aid in restoring a degree of the claimant's lost earning capacity was a relevant consideration in determining whether the claimant's refusal to undergo the procedure was reasonable.

[7]The administrative law judge's Decision and Order contains only a brief summary of the opinions of the three physicians who commented on YAG laser surgery as a treatment option, Decision and Order at 11, and the statement that only Dr. Spitzer unequivocally recommended that claimant undergo the procedure. *Id.* at 12.

administrative law judge find that claimant's refusal to undergo the YAG capsulotomy is objectively unreasonable, he must address whether claimant established that his particular circumstances justify his refusal. As the Board stated in *Hrycyk*, 11 BRBS at 242, and reaffirmed in *Malone*, 29 BRBS at 111-112, this inquiry focuses narrowly on the individual claimant and on his particular circumstances and subjective reasons for refusing the procedure.

We next consider the contention raised by claimant in his cross-appeal regarding the administrative law judge's determination of the extent of claimant's visual impairment. As will be discussed below, claimant's allegation of error has merit; therefore, if the administrative law judge finds on remand that claimant's condition is permanent, he must award claimant scheduled permanent partial disability benefits in accordance with the provisions of Section 8(c)(5) and 8(c)(16) of the Act, 33 U.S.C. §908(c)(5), (16).

In determining the extent of claimant's disability, the administrative law judge considered the opinions of Drs. Scannapiego and Spitzer regarding the extent of claimant's uncorrected vision.[8] As noted by the administrative law judge, both physicians calculated claimant's impairment in accordance with the American Medical Association *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). Decision and Order at 14; CXs J, L. Dr. Scannapiego opined that claimant has an 85 percent visual disability of the left eye based on his uncorrected visual acuity in that eye and an additional 42.5 percent disability associated with structural changes in the left eye. CX J; CX M at 13-14, 26. Dr. Spitzer reported that claimant has an 11 percent acuity-related impairment rating. CX L. In deposition testimony, Dr. Spitzer explained that his 11 percent impairment rating refers to claimant's uncorrected binocular vision, or put another way, to claimant's overall vision when the measurements of both his left eye and his right eye, which has normal vision, are combined. EX 17 at 22, 33-34. He further testified that the uncorrected vision in claimant's left eye is 20/100, which represents a 95 percent acuity-related impairment in that eye. *Id.* at 21-22, 31, 33-34.

The administrative law judge found binocular vision to be the appropriate measure of claimant's visual acuity. Decision and Order at 14. Thus, with respect to the extent of claimant's visual acuity-related impairment, the administrative law judge relied on Dr. Spitzer's assessment that claimant has an 11 percent impairment of his binocular vision. *Id.* The administrative law judge also considered the structural damage to claimant's left

[8]An award for loss of vision under the schedule is based on uncorrected vision. *National Steel & Shipbuilding Co., Inc. v. Director, OWCP [McGregor]*, 703 F.2d 417, 15 BRBS 146(CRT) (9th Cir. 1983), *aff'g* 8 BRBS 48 (1978); *Gulf Stevedore Corp. v. Hollis*, 298 F.Supp. 426 (S.D. Tex. 1969), *aff'd*, 427 F.2d 160 (5th Cir.), *cert. denied*, 400 U.S. 831 (1970).

eye, and credited Dr. Scannapiego's assignment of a 42.5 percent impairment rating based on those structural changes. *Id.* The administrative law judge accordingly awarded claimant scheduled permanent partial disability benefits based on an 11 percent visual acuity impairment rating and an additional 42.5 percent structural damage rating. *Id.* at 14, 16.

We agree with claimant that the administrative law judge committed legal error by relying on the extent of impairment to claimant's binocular vision rather than on the loss of vision in claimant's injured left eye. In a case, such as this one, in which the claimant's work-related injury resulted in damage to one eye, the scheduled award is properly based on the extent of impairment to the injured eye.[9] *See National Steel & Shipbuilding Co. v. Director, OWCP [McGregor]*, 703 F.2d 417, 15 BRBS 146(CRT) (9th Cir. 1983), *aff'g* 8 BRBS 48 (1978). Furthermore, under Section 8(c)(16), compensation for loss of 80 percent or more of the vision of an eye is the same as for the total loss of an eye. *Id.*, 703 F.2d at 417, 15 BRBS at 147(CRT). Thus, a claimant with a loss of 80 percent or more of the vision in one eye is entitled to the 160 weeks of compensation awarded for the loss of an eye under Section 8(c)(5) of the Act, 33 U.S.C. §908(c)(5).[10] *Id.*

In this case, both Drs. Scannapiego and Spitzer have assessed the loss of visual acuity in claimant's injured left eye as greater than 80 percent. *See* Decision and Order at 14; CX J; EX 17 at 22, 33-34. Thus, in accordance with Section 8(c)(16), the measured loss of visual acuity in claimant's left eye represents the legal equivalent of the total loss of that eye. *See McGregor*, 763 F.2d at 417, 15 BRBS at 147(CRT). Therefore, if, on remand, the administrative law judge again finds that claimant's condition has reached permanency, claimant is entitled to the 160 weeks of compensation provided under the schedule for the total loss of an eye. 33 U.S.C. §908(c)(5), (16); *McGregor*, 703 F.2d at 417, 15 BRBS at 147(CRT).

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[9]Section 8(c)(16) states that:

> Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

33 U.S.C. §908(c)(16).

[10]Section 8(c)(5) states that permanent partial disability compensation, based on two-thirds of the claimant's average weekly wage, is eye lost, one hundred and sixty weeks' compensation. 33 U.S.C. §908(c)(5).

Accordingly, the Decision and Order Awarding Benefits and the Order on Motion for Reconsideration of the administrative law judge are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge