BRB No. 11-0395

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| BARBARA DILL<br>(Widow of WADE DILL) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED | ) | DATE ISSUED: 02/28/2012 |
| and | ) | |
| INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Bruce H. Nicholson, Los Angeles, California, for claimant.

Michael W. Thomas and Lara D. Merrigan (Thomas, Quinn & Krieger, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2008-LDA-00259) of Administrative Law Judge Steven B. Berlin 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). We must affirm the findings of fact and conclusions of law of the administrative law judge which are

rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On November 18, 2004, decedent, claimant's husband, commenced employment for employer. After undergoing training and testing in Houston, Texas, decedent was deployed to Iraq, where he was assigned to work "vector control," that is, the trapping and elimination of insects, rodents and animals, work similar to that in which he was engaged prior to his employment with employer. Decedent, who worked twelve-hour days, seven days a week, was soon promoted to a position of supervisor. While in Iraq, decedent monitored his family's bank account via computer, and he made it part of his daily routine to telephone his family every evening during which time he would instruct claimant on administering the family's finances. Decedent returned to the United States for a few weeks in March/April 2005; upon his return to Iraq, decedent continued to call his family daily and, on various occasions, related to claimant his having heard mortar fire, and of having himself come upon mortar fire while driving a pickup truck. After a visit home in mid-2005, decedent returned to Iraq, whereupon he transferred to an environmental technician position which involved the proper storage of hazardous waste. Decedent's interactions with his wife subsequently began to deteriorate, and decedent's daughter experienced family and social difficulties.[1] During a third visit home in late December 2005, decedent's interactions with his family continued to deteriorate. Upon his return to Iraq, decedent reported to claimant that he experienced two troubling work events: he was required to clean up the remains of a soldier who had committed suicide and hazardous waste material spilled on him when a barrel had been overfilled.

The difficulties experienced by claimant and her daughter in the United States, both social and financial, continued to the point that decedent's communications with claimant became strained and contentious.[2] In June 2006, decedent returned to the United States to find that claimant had changed the locks on their home. Two days later, claimant left their home to reside with a friend. Decedent, citing the problems he was experiencing at home, resigned his position with employer on June 23, 2006. In the days that followed, decedent's behavior became erratic. He alternatively attempted to reconcile with his family, argued with his family, vandalized his family's home furnishings, and visited his mother and sister in Puerto Rico. Upon his return from Puerto Rico, decedent wrote several notes setting forth his opinions regarding claimant's

[1]The specific family difficulties and events which were experienced by claimant and her daughter while decedent was employed in Iraq are set forth in detail in the administrative law judge's Decision and Order and will not be repeated in this decision unless they are required to address the specific issues raised on appeal by employer.

[2]In early 2006, claimant apparently consulted a divorce lawyer.

familial activities and, on July 16, 2006, he committed suicide. Claimant subsequently filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909, alleging that decedent's death was related to his employment with employer in Iraq.

In support of her claim for benefits under the Act, claimant and her daughter testified regarding decedent's behavior and interactions with his family before, during, and after his employment in Iraq. Specifically, claimant testified at length regarding decedent's attempts to continue to control his family and its finances from Iraq. Claimant additionally relied upon the opinion of Dr. Seaman, a Board-certified psychiatrist, who opined that the work-related stresses decedent experienced in Iraq, in combination with his deteriorating marital relationship caused by the work-related physical separation from his wife, hastened or accelerated a pre-existing adjustment disorder. Dr. Seaman further opined that decedent's suicide was the result of severe emotional distress and impairment due to his adjustment disorder and was therefore the irresistible result of a mental disorder.

In response to claimant's claim for benefits, employer presented the testimony of Dr. Whyman, who also is a Board-certified psychiatrist. He opined that decedent's suicide was the result of his developmental problems and non work-related stresses. Dr. Whyman opined that decedent's employment in Iraq did not affect his underlying psychological condition. Rather, Dr. Whyman concluded that decedent's suicide was the culmination of all of the things that had gone wrong in decedent's life and had no relationship to his employment in Iraq.[3]

In his Decision and Order, the administrative law judge found that claimant established the existence of working conditions in Iraq that could have aggravated decedent's underlying psychological condition and caused him to commit suicide. The administrative law judge therefore invoked the Section 20(a), 33 U.S.C. §920(a), presumption with regard to a causal relationship between decedent's employment and his death, and further found that employer failed to produce substantial evidence to rebut that presumption. The administrative law judge also found that as decedent's death was caused by an irresistible suicidal impulse, and not by a willful intent to kill himself, claimant's death benefits claim was not barred by Section 3(c) of the Act, 33 U.S.C. §903(c). The administrative law judge thus awarded claimant death benefits and $3,000 for funeral expenses. 33 U.S.C. §909(a), (b).

[3]Neither psychiatrist evaluated decedent during his lifetime, nor was he examined by any mental health professional. Rather, each physician assessed decedent's psychological condition by way of a "psychological autopsy."

On appeal, employer challenges the administrative law judge's findings that decedent's suicide was causally related to his employment with employer in Iraq and that the claim is not barred pursuant to Section 3(c) by decedent's willful intent to kill himself. Specifically, employer contends that the administrative law judge erred in finding that claimant is entitled to invocation of the Section 20(a) presumption. Alternatively, employer asserts that the administrative law judge erred in finding that employer failed to present evidence sufficient to rebut the Section 20(a) presumption and that employer did not establish that decedent's death was due to his willful intent to kill himself. Lastly, employer challenges the amount of funeral expenses awarded to claimant. Claimant has not filed a brief in response to employer's appeal.

## CAUSATION

Employer initially contends that the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §920(a), presumption. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). If these two elements are established, the Section 20(a) presumption applies to link the employee's injury or harm to his employment. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Decedent's death is compensable if it is due at least in part to a work-related injury. *Konno*, 28 BRBS at 61. With regard to the working conditions/accident element, claimant is not required to introduce affirmative medical evidence that the working conditions in fact cause the harm alleged; rather, claimant must show that working conditions existed which could have caused the harm. *See Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010). In his decision, the administrative law judge found that claimant was entitled to the benefit of the Section 20(a) presumption because decedent's suicide constituted an injury and claimant introduced evidence sufficient to establish the existence of working conditions in Iraq which could have contributed to decedent's suicide.

Employer does not dispute that decedent's suicide constitutes an injury sufficient to satisfy the first prong of claimant's *prima facie* case; rather, employer challenges the administrative law judge decision to rely on claimant's testimony regarding the working conditions decedent experienced during his employment in Iraq. In his decision, the administrative law judge set forth at length the testimony of claimant and acknowledged her concession that her memory was at times problematic. Decision and

Order at 5-15, 24. The administrative law judge nonetheless credited claimant's testimony regarding her conversations with decedent regarding his experiences in Iraq; specifically, decedent's experiencing mortar attacks, decedent's cleaning duties following a soldier's suicide, and decedent's exposure to hazardous waste material. Tr. at 90, 110. The administrative law judge's decision to credit claimant's testimony in this regard is neither inherently incredible nor patently unreasonable. *Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge found that decedent's co-worker, Mr. Anstead, confirmed that approximately thirty mortar attacks did in fact occur, ALJX 10 at 17, and that Mr. Olsen, a hazardous materials supervisor, confirmed that he and decedent worked together cleaning and disinfecting a room where a suicide had occurred. CX 73 at 30-31; *see* Decision and Order 25-29. In addition, the administrative law judge found that Dr. Seaman opined that decedent's suicide resulted from a combination of the strain of his familial separation and the incidents he experienced in Iraq. CX 34 at 11-13; *see* Decision and Order at 29 n.24. As substantial evidence supports the finding that claimant established the existence of working conditions which could have caused stress, aggravated decedent's underlying psychological condition and thus contributed to decedent's death, we affirm the administrative law judge's invocation of the Section 20(a) presumption.[4] *See Hawaii Stevedores,* 608 F.3d 642, 44 BRBS 47(CRT).

Once claimant establishes a *prima facie* case, the burden shifts to employer to rebut the presumption with substantial evidence that the employee's injury was not caused, aggravated, or accelerated by the conditions of his employment. *See Hawaii Stevedores,* 608 F.3d 642, 44 BRBS 47(CRT)*; Duhagon v. Metropolitan Stevedore Co.,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Swinton v. J. Frank Kelley, Inc.,* 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see also Del Vecchio v. Bowers,* 296 U.S. 280 (1935). In establishing rebuttal of the Section 20(a) presumption, proof of another agency of causation is not necessary. *See Stevens v. Todd Pacific Shipyards,* 14 BRBS 626 (1982) (Kalaris, J., concurring and dissenting), *aff'd mem.,* 722 F.2d 747 (9th Cir. 1983), *cert, denied,* 467 U.S. 1243 (1984). Rather, the testimony of a physician given to a reasonable degree of medical certainty that no relationship exists between an injury and an employee's employment is sufficient to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Hawaii Stevedores,* 608 F.3d 642, 44 BRBS 47(CRT); *see also*

[4]We note that employer concedes the existence of "war zone stressors" while challenging the administrative law judge's decision to invoke the Section 20(a) presumption. *See* Emp. Br. at 49 n.16.

*Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994); *Del Vecchio*, 296 U.S. 280.

Employer challenges the administrative law judge's finding that Dr. Whyman's opinion is insufficient to constitute substantial evidence sufficient to establish rebuttal of the Section 20(a) presumption. Specifically, employer contends that the administrative law judge erred in applying the Federal Rules of Evidence and the decision of the United States Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), to determine that the opinion of Dr. Whyman is unreliable and consequently inadmissible for the purpose of establishing rebuttal of the Section 20(a) presumption.[5] We agree and, for the reasons that follow, we vacate the administrative law judge's conclusion that Dr. Whyman's opinion cannot rebut the Section 20(a) presumption.

An administrative law judge is afforded wide discretion in admitting evidence into the record. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). Consequently, any decisions made by the administrative law judge regarding the admission or exclusion of evidence are reversible only if the challenging party shows them to be arbitrary, capricious, or an abuse of discretion. *See, e.g., Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). The standards governing the admissibility of evidence in administrative hearings, however, are less stringent than those which govern under the Federal Rules of Evidence. *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969); *Brown v. Washington Metropolitan Area Transit Authority*, 16 BRBS 80 (1984), *aff'd mem.*, 764 F.2d 926 (D.C. Cir. 1985)(table). In this regard, Section 23(a) of the Act specifically provides:

> In making an investigation or inquiry or conducting a hearing the [administrative law judge] *shall not be bound by common law or statutory rules of evidence* or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

[5]In *Daubert*, 509 U.S. 579, the Supreme Court held that under Federal Rule of Evidence 702, which addresses "scientific" evidence, an expert's opinion, in order to be admissible into evidence, must be based on "scientific knowledge" resting on a "scientific methodology."

33 U.S.C. §923(a) (emphasis added); *see also* 20 C.F.R. §§702.338, 702.339. Under the Rules of Practice and Procedure before the Office of Administrative Law Judges, the administrative law judge should admit into the record "relevant evidence." 29 C.F.R. §§18.401, 18.402. "Relevant evidence" is defined as:

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

29 C.F.R. §18.401. Moreover, Section 18.402 states that:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, pursuant to executive order, by these rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority.

29 C.F.R. §18.402. Additionally, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises,[6] has addressed the issue of the application of *Daubert* in a case before an administrative law judge, stating:

> It is clear that the *Daubert* decision rests on an interpretation of Federal Rule of Evidence 702. *See Daubert,* 509 U.S. at 589-92, 113 S.Ct. 2786. The requirements established in Federal Rule of Evidence 702, *Daubert*, and *Kumho [Tire Co. v. Carmichael,* 526 U.S. 137 (1999) extending application of *Daubert* rule beyond scientific testimony to all expert testimony] do not govern the admissibility of evidence before the ALJ in the administrative proceeding in this Social Security case.

*Bayliss v. Barnhart,* 427 F.3d 1211, 1218 n.4 (9th Cir. 2005); *see also Richardson v. Perales,* 402 U.S. 309 (1971) (hearsay evidence admissible in administrative proceedings if it is reliable).

[6]As the district director in the San Francisco, California, OWCP office filed and served the administrative law judge's decision, Ninth Circuit law applies in this case. 42 U.S.C. §1651(b); *Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979).

In this case, the administrative law judge analyzed Dr. Whyman's opinion in light of the standards expounded in *Daubert*, 509 U.S. 579, and Federal Rule of Evidence (FRE) 702, concluded that this opinion does not rise to the level of substantial evidence and thus found that employer did not rebut the Section 20(a) presumption. *See* Decision and Order at 29-36. We cannot affirm this finding. Section 23(a) provides that the administrative law judge is not bound by formal rules of evidence. In light of this statutory provision and the Ninth Circuit's decision in *Bayliss*, the admissibility of evidence under the Longshore Act is not governed by FRE 702 or the decision in *Daubert* concerning the admission of scientifically-based evidence. *See Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); *see also Olsen*, 25 BRBS 40; *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). Dr. Whyman is a board-certified specialist whose opinion may be credited by an administrative law judge. *See Jones v. Aluminum Co. of North America*, 35 BRBS 37, 40 n.4 (2001); *see also S.K. [Kamal] v. ITT Industries, Inc.*, 43 BRBS 78 (2009), *aff'd in part and rev'd in part*, No. 4:09-MC-348, 2011 WL 790464 (S.D. Tex. March 1, 2011). Accordingly, based on the facts of this case, we hold that the administrative law judge erred in using an impermissible standard to hold that Dr. Whyman's opinion is not admissible evidence. The opinion of Dr. Whyman as to the cause of decedent's suicide is evidence which the administrative law judge should admit into the record, inasmuch as the administrative law judge has a duty under the Act to fully inquire into matters at issue and to receive into evidence all material testimony and documents.[7] *See Olsen*, 25 BRBS 40; 20 C.F.R. §702.338. Accordingly, we reverse the administrative law judge's finding that the opinion of Dr. Whyman is not admissible. We vacate the award of death benefits and we remand the case for the administrative law judge to determine whether employer produced

[7]We additionally agree with employer that the administrative law judge erred in his characterization of Dr. Whyman's diagnoses. In his report, Dr. Whyman prefaced three of his four diagnoses of decedent's mental condition with the term "probable." *See* EX 44 at 30. The administrative law judge interpreted the term "probable" as meaning "provisional," a term indicating uncertainty in the medical literature. *See* Decision and Order at 34-35. However, the plain meaning of "probable" is: "Apt . . . to be true" or "Relatively likely but not certain." *Webster's II New Riverside Dictionary*, Houghton Mifflin Co., (1984) at 937. In evaluating medical testimony, the administrative law judge may assess the bases for a physician's opinion, but may not substitute his own opinion for that of the physician. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2$^{d}$ Cir. 1997). In this case, it appears to be uncontested that decedent suffered from some type of psychological condition. Dr. Whyman's report sets forth his opinion regarding the presence and cause of such conditions subject to the difficulty of a posthumous diagnosis.

substantial evidence to rebut the Section 20(a) presumption.[8] *See Duhagon,* 169 F.3d 615, 33 BRBS 1(CRT); *O'Kelley,* 34 BRBS 39. The administrative law judge's "task is to decide, as a legal matter, whether the employer submitted evidence that could satisfy a reasonable factfinder that the claimant's injury was not work-related." *Hawaii Stevedores,* 608 F.3d at 651, 44 BRBS at 50(CRT).

Moreover, we agree with employer's contention that the administrative law judge erred in failing to address its argument that the familial dysfunction experienced by decedent upon his return to the United States in June 2006 constituted an intervening cause of decedent's death sufficient to relieve it of liability for claimant's claim. Employer can rebut the Section 20(a) presumption by producing substantial evidence that decedent's death was due to a subsequent non work-related event which is not the natural or unavoidable result of the original work injury. *See Cyr v. Crescent Wharf & Warehouse Co.,* 211 F.2d 454 (9th Cir. 1954); *see also Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983). Cases involving death due to suicide require a chain of causation; where there is some connection between the death and the employment, the casual effect attributable to the employment injury must not have been "overpowered and nullified" by an intervening cause originating entirely outside the employment. *See Voris v. Texas Employers Ins. Ass'n,* 190 F.2d 929, 934 (5th Cir. 1951), *cert. denied,* 342 U.S. 932 (1952); *Konno,* 28 BRBS 57; *see also Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992). Employer is relieved of liability if the death is attributable to the intervening cause. *See generally Wright v. Connolly-Pacific Co.,* 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Madrid v. Coast Marine Constr. Co.,* 22 BRBS 148 (1989). In this case, it is undisputed that decedent, upon his return to the United States in June 2006, encountered marital discord and familial stressors involving his wife and daughter. Specifically, the testimony of claimant and decedent's daughter, as well as the written notes authored by decedent before his demise, establish a broad overview of the events that decedent experienced between his return in June and his decision to take his life in July 2006. As the administrative law judge did not address whether the events occurring between decedent and his wife and daughter upon his return in June 2006 constituted an intervening cause of decedent's suicide sufficient to relieve employer of liability for decedent's death, the administrative law judge must fully address the totality of the evidence regarding this issue on remand.

[8]If, on remand, the administrative law judge finds that employer has presented evidence sufficient to rebut the presumption, he must resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Hawaii Stevedore,* 608 F.3d 642, 44 BRBS 47(CRT).

## SECTION 3(c)

Employer argues that the administrative law judge erred in finding that claimant's death benefits claim is not barred pursuant to Section 3(c) of the Act, on the basis that decedent's suicide was occasioned by an irresistible suicidal impulse. Section 3(c) bars compensation under the Act "if the injury was occasioned . . .by the willful intention of the employee to injure or kill himself or another." 33 U.S.C. §903(c). *See O'Connor v. Triple A Machine Shop*, 13 BRBS 473 (1981); *Kielczweski v. The Washington Post Co.*, 8 BRBS 428 (1978); *Rogers v. Dalton Steamship Corp.*, 7 BRBS 207 (1977). Section 3(c) must be applied in conjunction with Section 20(d), 33 U.S.C. §920(d), of the Act, which affords claimant the benefit of the presumption that, in the absence of substantial evidence to the contrary, the injury was not occasioned by the willful intention of the employee to injure or kill himself or another. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Once employer produces substantial evidence sufficient to rebut the presumption, it falls from the case. *Del Vecchio,* 296 U.S. 280. Because Section 3(c) is an affirmative defense, the burden of proof then rests on employer to establish, based on the record as a whole, the applicability of Section 3(c) to the claim. *See Schwirse v. Marine Terminals Corp.*, 45 BRBS 53 (2011). Cases involving an employee's suicide focus on whether the employee's death stems from a "willful intent" to commit suicide or from an irresistible suicidal impulse resulting from an employment-related condition. Where an employee's suicide is not due to a "willful intent" but results from an irresistible suicidal impulse resulting from a work-related condition, Section 3(c) does not bar the compensation claim. *See Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), *aff'd in pert. part sub nom. Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979); *see Voris*, 190 F.2d 929; *Konno,* 28 BRBS 57; *Maddon*, 23 BRBS 55.

In his decision, the administrative law judge stated that employer rebutted the Section 20(d) presumption, and he found that decedent committed suicide due to an irresistible suicidal impulse such that Section 3(c) does not bar the claim. In so concluding, the administrative law judge credited the opinion of Dr. Seaman, that decedent's suicide was the result of the severe emotional distress and mental/emotional impairment of his adjustment disorder and was, therefore, the irresistible result of a mental disorder. The administrative law judge rejected the contrary opinion of Dr. Whyman, who opined that decedent willfully decide to take his own life, based in part on his finding that Dr. Whyman's analysis is problematic due to his inability to

formulate a diagnosis with sufficient certainty.[9] While the administrative law judge is entitled to weigh the medical evidence of record and is not required to accept the opinion of any particular examiner, *see Walker v. Rothschild Int'l Stevedoring Co.*, 526 F.2d 1137, 3 BRBS 6 (9th Cir. 1975), we cannot affirm the administrative law judge's conclusion that employer did not establish that decedent's suicide was the result of his willful intent to kill himself. We have previously noted that the administrative law judge improperly substituted the term "provisional" for that of "probable" in Dr. Whyman's report and he thus mischaracterized Dr. Whyman's diagnosis as lacking in certainty. *See* n. 7, *supra*. Therefore, we must vacate the administrative law judge's finding that Section 3(c) does not bar claimant's claim. On remand, the administrative law judge must address the totality of the evidence on this issue, including the written statements authored by decedent prior to his demise.[10]

**FUNERAL EXPENSES**

Lastly, employer asserts that as the parties stipulated that claimant incurred $1,115 in funeral expenses, the administrative law judge erred in awarding claimant $3,000 for funeral expenses. We agree with employer.

[9]We reject employer's contention that the administrative law judge committed reversible error in ordering the parties to submit into evidence the supplemental report of Dr. Seaman dated February 11, 2009. Following the close of the record, the administrative law judge determined that Dr. Whyman had referenced Dr. Seaman's supplemental report, but that this report was not contained in the record. Consequently, the administrative law judge ordered the parties to submit Dr. Seaman's supplemental report into the record, with the parties being allowed the opportunity to file briefs addressing the report. Employer has not shown that it was prejudiced by the administrative law judge's request; to the contrary, employer was in possession of Dr. Seaman's supplemental report, it had presented that report to its expert for consideration, and its expert subsequently addressed the report. *See* 20 C.F.R. §702.338; *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

[10]Employer asserts that the administrative law judge erred in failing to take into consideration the statements written by decedent prior to his death. As these statements pertain to decedent's state of mind immediately prior to his taking his life, and were reviewed and discussed both Drs. Whyman and Seaman in their respective reports, the administrative law judge should address these statements when addressing the issue of whether decedent was capable of forming the willful intent to commit suicide.

Section 9(a), 33 U.S.C. §909(a), of the Act provides for the payment of reasonable funeral expenses not to exceed $3,000. The parties stipulated before the administrative law judge to funeral expenses of $1,115. *See* ALJX 10. However, the administrative law judge, without explanation, awarded claimant the maximum amount allowable under the Act, $3,000. *See* Decision and Order at 43. An administrative law judge may not reject a stipulation without giving the parties notice that he will not automatically accept the stipulation. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989). Moreover, as claimant submitted documentation establishing funeral expenses totaling $1,115, *see* CX 24, Cl. Post-hearing Br. at 62, substantial evidence supports the parties' stipulation regarding the funeral expenses incurred by claimant. Accordingly, we vacate the award of funeral expenses of $3,000, and modify the administrative law judge's decision to reflect claimant's entitlement to $1,115 for funeral expenses, contingent on there being a causal relationship between decedent's death and his employment with employer.

Accordingly, the administrative law judge's award of death benefits is vacated, and the case is remanded for the administrative law judge for further findings in accordance with this opinion. The administrative law judge's award of funeral expenses is modified to reflect claimant's entitlement to $1,115 for funeral expenses, contingent upon claimant's success on remand.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge