

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 August 2006

Case No.: 2006-LDA-13

OWCP No.: 02-136674

IN THE MATTER OF

R. M.,

Claimant

vs.

**SERVICE EMPLOYERS INTERNATIONAL, INC.,
c/o Brown & Root, Inc.**

Employer

and

**INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
c/o AIG WorldSource**

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.,

On Behalf of the Claimant

JOHN L. SCHOUEST, ESQ.,

BRIAN E. WHITE, ESQ.,

On Behalf of the Employer/Carrier

**Before: PATRICK M. ROSENOW
Administrative Law Judge**

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Defense Base Act (the Act),¹ brought by R.M. (Claimant) against Service Employers International, Inc. (Employer) and Insurance Company of the State of Pennsylvania, c/o AIG Worldsource (Carrier).²

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 30 Jan 06 a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witness, offer exhibits, make arguments, and submit post-hearing briefs. The director appeared by way of post-hearing brief in opposition to Employer's request for Section 8(f) relief.

My decision is based upon the entire record, which consists of the following:³

Witness Testimony of

Claimant

Claimant's Spouse

Exhibits⁴

Claimant's Exhibits (CX) 1-12, 14⁵

Employer's Exhibits (EX) 1-4, 6-16, 18-23, 26-36⁶

Joint Exhibit⁷ (JX) 2⁸

¹ 42 U.S.C. § 1651 *et seq.* (the Defense Base Act is an extension of the Longshore and Harbor Workers' Compensation Act 33 U.S.C. § 901 *et seq.*).

² For simplicity both Employer and Carrier are collectively referred to herein as Employer.

³ I have reviewed and considered all testimony and exhibits admitted in to the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

⁴ Offering records en globo may save the offering counsel time by allowing them to avoid having to actually review every document that they are submitting and removing those which are duplicated elsewhere in the record or have only marginal, if any, bearing on any litigated issue. However, such a practice wastes the time of the Court, which does have to review each document. *See, e.g.,* EX-16, 18; EX-27, 28, 29. Additionally, such a practice fails to identify records which are so cryptic and illegible as to be of little probative value, even if they are relevant. *See, e.g.,* EX-32.

⁵ Claimant's index indicates that he intended to offer CX-13 (Dr. Collard's records) and CX-15 (Dr. Mohammed's records), but those specific exhibits were never provided.

⁶ Employer's index indicates Employer intended to offer EX-5, 17, 24 and 25. Employer later withdrew EX-17 (Mr. Harpoon's records, which were incorrectly cited in the withdrawal letter as EX-18), 24, and 25. EX-5 (Employer's pay records) was never provided. EX-28 and 29 are indexed as different versions of the videotape of Dr. Abang's deposition, but both copies provided appeared to be the edited version. However, the full version was available in the deposition transcript.

⁷ The parties' written stipulation, which was marked as JX-1, is missing, but was reviewed on the record at Tr. 5-6.

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS⁹

1. Jurisdiction exists under the Defense Base Act.
2. There was an employee/employer relationship at the time of the alleged accident.
3. Employer was properly notified of the alleged injury.
4. Notice of controversion was timely and properly filed.
5. Some medical benefits have been paid, but no psychiatric treatment has been provided.
6. Disability benefits in the amount of \$500.00 per week were paid from July 2004 to June 2005.

ISSUES

1. Nature and extent of Claimant's back injury and post traumatic stress disorder.
2. Entitlement of Claimant to care for post traumatic stress disorder.
3. Correct calculation of Claimant's average weekly wage.
4. Special Fund relief.

FACTUAL BACKGROUND

The basic facts of the case are relatively simple. Claimant arrived in Afghanistan in March 2004 to work as a carpenter. On 5 Jul 04, he was assisting in the unloading of a

⁸ Pursuant to the Court's request, the parties submitted JX-2, a chronological table of Claimant's medical treatment. The exhibit reflects Claimant's visits to health care providers, the histories he gave, the diagnoses made, and the assessments made. The exhibit does not constitute a stipulation as to the accuracy of the histories, diagnoses, or assessments. Although the parties indicated they intended to provide an updated table, they did not do so.

⁹ See fn. 7.

generator and injured his back. After some basic medical care and diagnostics, he returned to the United States within a couple of weeks for further tests. He has not returned to any work since.

POSITIONS OF THE PARTIES

Claimant submits that while working for Employer, he suffered a back injury and was exposed to an environment which led to post traumatic stress disorder (PTSD). He argues that he is unable to return to his previous occupation and since Employer has not established any suitable alternative employment, he is totally disabled. He suggests that he has not yet reached maximum medical improvement (MMI) since his post traumatic stress disorder (PTSD) has not been treated. He also seeks medical care for his PTSD. In the alternative, he identifies 1 Apr 05 as a date of MMI after which he could be deemed permanently totally disabled. He also argues that his average weekly wage (AWW) should be calculated under Section 10(b) of the Act, and if that is not possible, his contract wage rate should be used when applying 10(c).

Employer disputes the occurrence and severity of the alleged back injury. It suggests that his back pain is a result of degenerative changes and not related to any single injury suffered in Afghanistan. Employer also argues that Claimant suffered psychological problems before his employment in Afghanistan and that he does not suffer from PTSD related to that work. Employer puts Claimant's MMI date at no later than 16 Mar 05, and submits that Claimant could have returned to his original work as of that date. Employer uses Section 10(c) to calculate the AWW and uses the earnings from the 52 weeks prior to the injury to arrive at an annual income.

In the event Claimant is found disabled, Employer argues that the trauma he suffered in Afghanistan, combined with his preexisting back and psychological conditions, resulted in a level of disability greater than that which would have resulted from the Afghanistan trauma alone. Accordingly, Employer seeks relief under section 8(f). The Director replies that the absence of any vocational evidence makes it impossible for Employer to carry its burden in establishing that Claimant's disability is materially and substantially greater because of his preexisting condition.

LAW

Disability Compensation

While that the Act is normally construed liberally in favor of the Claimant,¹⁰ the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is

¹⁰ *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

evenly balanced, violates Section 7(c) of the Administrative Procedure Act,¹¹ which specifies that the proponent of a rule or position has the burden of proof and thus the burden of persuasion.¹²

In arriving at a decision, the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences there from, and is not bound to accept the opinion or theory of any particular medical examiner.¹³

Section 2(2) of the Act defines “injury” as “accidental injury or death arising out of or in the course of employment.”¹⁴ In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.¹⁵ The presumption takes effect once the claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident that could have caused the harm occurred.¹⁶

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain.¹⁷ These two elements establish a *prima facie* case of a compensable “injury” supporting a claim for compensation.¹⁸

A claimant’s credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption.¹⁹

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that a claimant’s condition was neither caused by his working conditions nor aggravated, accelerated, or rendered

¹¹ 5 U.S.C. § 556(d).

¹² *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff’d* 900 F.2d 730 (3rd Cir. 1993).

¹³ *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh’g denied*, 391 U.S. 929 (1968).

¹⁴ 33 U.S.C. § 902(2).

¹⁵ 33 U.S.C. § 920(a).

¹⁶ *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998).

¹⁷ *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff’d sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990).

¹⁸ *Id.*

¹⁹ *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff’d sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982).

symptomatic by such conditions.²⁰ “Substantial evidence” means evidence that reasonable minds might accept as adequate to support a conclusion.²¹ Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).²²

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and no longer controls the outcome of the case.²³ If an administrative law judge (ALJ) finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.²⁴ The presumption does not apply, however, to the issue of whether a physical harm or injury occurred²⁵ and does not aid the claimant in establishing the nature and extent of disability.²⁶ Section 20(a) does not provide a presumption of compensability or injury.²⁷ A claimant still must establish the existence of an injury.²⁸

When aggravation of or contribution to a preexisting condition is alleged, the presumption still applies, and in order to rebut it, an employer must establish that the claimant’s work events neither directly caused the injury nor aggravated the preexisting condition resulting in injury or pain.²⁹ A statutory employer is liable for consequences of a work-related injury which aggravates a preexisting condition.³⁰ Although a preexisting condition does not constitute an injury, aggravation of a preexisting condition does.³¹ Generally speaking, employers accept their employees with the frailties which may predispose them to bodily injury.³²

²⁰ See *Gooden*, 135 F.3d 1066; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976); *Conoco, Inc. v. Director [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); *Louisiana Ins. Guar. Ass’n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

²¹ *Avondale Industries v. Pulliam*, 137 F.3d 326,328 (5th Cir. 1988); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is “less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence”).

²² See *Smith v. Sealand Terminal*, 14 BRBS 844 (1982).

²³ *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).

²⁴ *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994).

²⁵ *Devine v. Atlantic Container Lines, G.I.F.*, 25 BRBS 15 (1990).

²⁶ *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

²⁷ *Devine*, 25 BRBS at 19-20.

²⁸ *Id.*

²⁹ *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

³⁰ See *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1012 (5th Cir. 1981).

⁴⁰ *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982).

³² *Britton*, 377 F.2d at 147-148.

Generally, the opinion of a treating physician is entitled to greater weight than the opinion of a non-treating physician.³³ However, an ALJ is not bound by the opinion of one doctor and can rely on the independent medical evaluator's opinion and evidence from the medical records over the opinions of the treating doctor.³⁴ A claimant's history of lying may be relevant to claimant's trustworthiness as a witness³⁵ or if in diagnosing the claimant's condition, doctors relied on what the claimant told them.³⁶

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,³⁷ which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury.³⁸

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage.³⁹ Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year.⁴⁰ But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then Section 10(c) is appropriate.⁴¹

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

³³ *Downs v. Director, OWCP*, 152 F.3d 924, (9th Cir. 1998); *see also Loza v. Apfel*, 219 F.3d 378 (5th Cir. 2000) (Social Security administrative law decision).

³⁴ *Duhagan v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997).

³⁵ *Cf.* F.R.E. 608(b).

³⁶ *Houghton v. Marcom, Inc.*, BRB Nos. 99-0809 and 99-1315 (April 25, 2000) (unpublished) .

³⁷ 33 U.S.C. § 910(a)-(c).

³⁸ *SGS Control Services*, 86 F.3d at 441; *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sum nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

³⁹ 33 U.S.C. § 910(a).

⁴⁰ 33 U.S.C. § 910(b).

⁴¹ *Empire United Stevedore v. Gatlin*, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

A worker's average wage should be based on his earnings for the weeks that he actually worked for the employer rather than on the entire prior year's earnings if a calculation based on the wages at the employment where he was injured would best adequately reflect a claimant's earning capacity at the time of the injury.⁴²

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.⁴³

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c).⁴⁴ The objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury.⁴⁵ Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent, or discontinuous.⁴⁶ In calculating annual earning capacity under subsection 10(c), the Administrative Law Judge may consider: the actual earnings of the claimant at the time of injury,⁴⁷ the earnings of other employees of the same or similar class of employment,⁴⁸ claimant's earning capacity over a period of years prior to the injury,⁴⁹ multiply claimant's wage rate by a time variable,⁵⁰ all other sources of income,⁵¹

⁴² *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981) (the court remanded the case for the ALJ to calculate AWW based on the 7-8 weeks claimant actually worked for employer because it best adequately reflected claimant's earning capacity).

⁴³ 33 U.S.C. § 910(c).

⁴⁴ *Hayes v. P & M Crane Co.*, 930 F.2d 424 (5th Cir. 1991); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981).

⁴⁵ *See Barber*, 3 BRBS 244.

⁴⁶ *Gatlin*, 935 F.2d at 822.

⁴⁷ 33 U.S.C. § 910(c); *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-45 (1988).

⁴⁸ 33 U.S.C. § 910(c); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Hayes*, 23 BRBS at 393.

⁴⁹ *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58 (1976) (all the earnings of all the years within that period must be taken into account).

⁵⁰ *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 465 (1981); *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283, 287 (1980). (if this method is used, must be one which reasonably represents the amount of work which normally would have been available to the claimant. *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509, 513 (1979)).

overtime,⁵² vacation and holiday pay,⁵³ probable future earnings of claimant,⁵⁴ or any fair and reasonable representation of the claimant's wage-earning capacity.⁵⁵

Under subsection 10(c), the Administrative Law Judge must arrive at a figure which approximates an entire year of work (the average annual earnings).⁵⁶

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.⁵⁷ Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or permanent). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."⁵⁸ Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.⁵⁹ Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.⁶⁰ A claimant's disability is permanent

⁵¹ *Harper v. Office Movers/E.I. Kane*, 19 BRBS 128, 130 (1986); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052, 1057 (1978).

⁵² *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981); *Ward v. General Dynamics Corp.*, 9 BRBS 569 (1978).

⁵³ *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100 (1991).

⁵⁴ *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987).

⁵⁵ See generally, *Flanagan Stevedores, Inc. v. Gallagher and Director, OWCP*, 219 F.3d 426 (5th Cir. 2000).

⁵⁶ *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

⁵⁷ *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

⁵⁸ 33 U.S.C. § 902(10).

⁵⁹ *Sproull*, 25 BRBS at 110.

⁶⁰ *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (*per curiam*), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996).

in nature if he has any residual disability after reaching maximum medical improvement.⁶¹ Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature.⁶²

The question of extent of disability is an economic as well as a medical concept.⁶³ To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.⁶⁴

A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability.⁶⁵ Once a claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

To establish a *prima facie* case of total disability, the employee need only show he cannot return to his regular or usual employment due to his work-related injury.⁶⁶ If the claimant makes this *prima facie* showing, the burden shifts to employer to show suitable alternative employment.⁶⁷ The presumption of disability ends on the earliest date that the employer establishes suitable alternate employment.⁶⁸

Medical Care

Section 7(a) of the Act requires employers to provide reasonable and necessary medical care.⁶⁹ A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.⁷⁰

⁶¹ *Trask*, 17 BRBS at 60.

⁶² *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.

⁶³ *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

⁶⁴ *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).

⁶⁵ *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

⁶⁶ *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984).

⁶⁷ *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).

⁶⁸ *Palombo v. Director, OWCP*, 937 F.2d 70, 25 (2d Cir. 1991).

⁶⁹ 33 U.S.C. §907(a).

⁷⁰ *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-8 (1984).

Section 8(f) Relief

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim.⁷¹

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a preexisting permanent partial disability; (2) the preexisting disability was manifest to the employer, and (3) the current disability is not due solely to the employment injury.⁷²

EVIDENCE

*Claimant testified at trial in pertinent part that:*⁷³

He was born in 1971 and graduated from the 12th grade in 1990. He was a wrestler in school. He did not like office work and wanted to be active. He worked in a lumberyard from 1991 to 1992, as a union carpenter from 1992 to 1995, as a fabricator from 1995 to 1996, and from 1996 to 1998 as a security guard. He was a building specialist doing construction work during 1998, a field rep from 1998 to 1999, and a union carpenter between 1999 and 2003. He was unemployed from October 1, 2003 through January 15, 2004, and a forklift operator from January 16, 2004 to July 5, 2004. He then went to work for Employer in Afghanistan as a carpenter. He did everything from building gun racks to building any types of buildings, coffins, and changing doors on the incinerator. He did concrete work and all aspects of construction.

Before he went to Afghanistan he was in good shape and there was almost nothing he could not do. In 2001, he was in a car accident and got sideswiped. He did not realize he was hurt because he was more concerned about his mother, who was also in the car. He had neck surgery and is now two inches shorter. He had a foam neck brace after the surgery, but it felt like it was choking him all the time, so he took it off. He lay on the couch, built up his neck muscle, and got full mobility. He missed about four to six weeks of work, but then went back, even moving drywall. Some of the

⁷¹ *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 619 (9th Cir. 1983).

⁷² 33 U.S.C. § 908(f); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977), *rev'g* 4 BRBS 23 (1976); *Lockhart v. General Dynamics Corp.*, 20 BRBS 219, 222 (1988).

⁷³ Tr. 21-76.

drywall weighs 128 pounds a piece and he had to lift it by himself. He also was active with snowmobiling and skiing. Since the accident in Afghanistan, he has not even tried it.

In the year prior to 4 Jul 04, he worked for Foss Drywall framing and was doing union carpentry. He also was a carpenter for Brake Alert. He worked on countertops, welded, built stainless steel and worked underneath doing the muffler.

EX-1 is the contract with Employer that he signed. He went to Afghanistan in about March of 2004. He was able to do all his work without any physical limitations. He had had a pre-employment physical with Employer and passed it. He recalls filling out a medical questionnaire for Employer, but cannot recall whether he checked the box for back pain.

In terms of craft and skill, his work in Afghanistan was essentially the same type as in the United States. However, instead of just wearing a tool belt he wore an armored vest and helmet. He always needed to be on his toes for a shot, bomb, or the siren.

On 4 Jul 04, he was asked to unload a generator from a flatbed truck. The generator weighed about 1500 pounds. He had some local workers helping him. When they slid it off the end of the truck, the workers could not handle the weight and the generator fell, taking Claimant with it all the way to the ground. He felt pain, but thought it was something that would just go away. The pain did not go away. The rest of that day he did not try to work. Instead, he talked to a new supervisor about different types of construction.

He had 5 Jul 04 off and was hoping he would improve. On the morning of the 6 Jul 04, he could not move. He asked a coworker to get the medic and tell the boss that Claimant would not be able to work. The medic came and gave him strong pain medication that made him "flaky." The medic told the boss that Claimant was injured. Claimant went to see the boss as soon as he could move around and told him what happened. Claimant saw the medic and the Army doctor at the Combat Support Hospital at Baghram Air Force Base in Afghanistan quite a few times. He was "loaded up" on something like Valium, Percocet, or Morphine.

The Employer's medic and the Army doctor decided Claimant should return to the United States for some testing. Claimant returned to the United States within a couple of days for medical treatment. He can not recall a lot of what went on once he was back in the States because he was

so “loaded up” on the pain medicine. One night his wife came home from getting supper at a Chinese Restaurant, and Claimant said “[w]ell, thanks for supper Jesus.” Claimant’s spouse told him it was time to go to the hospital. He remembers going into the emergency room with the whole left side of his face paralyzed. That was his first medical treatment after returning to the United States. The emergency room visit was for his paralyzed face and possible medication side effects, not for his back. They looked at Claimant’s brain and discovered a tumor.

He had an MRI of his back on 16 Jul 04 and would be surprised if it showed no disc bulges or protrusions at the lumbar level.

He was ultimately referred to Dr. Park, who was puzzled as to why Claimant was having ongoing problems. Dr. Park reviewed the MRI and had Claimant go see another doctor. Dr. Park initially said that Claimant had chronic lower lumbar pain and prescribed steroid injections. Toward the end of October 2004, Dr. Park told Claimant he did not have much more to offer in the form of treatment and Claimant’s working diagnosis was mild bulging discs, facet arthritis, and chronic lumbar strain. He sent Claimant to Dr. Bernard for a final opinion. Dr. Park told Claimant he was going to reach maximum improvement months from the injury. That happened about six months after his injury.

In November 2004 Claimant had an MRI of the lumbar spine. Claimant was told it showed a problem at the thoracic level. Dr. Bernard reviewed the MRI and told Claimant the problem in the thoracic spine is not a herniated disc, but a degenerative disc or an abnormality. He said it was not yet bad enough for surgery and referred Claimant to a pain specialist, Dr. Abang.

Claimant has received continuous medical treatment for his back and has not returned to work.

He estimates his monthly pay with Employer in Afghanistan was about \$6,000.00, take home. He talked to another carpenter who had been in Afghanistan almost a year and he earned the same amount as Claimant.

Employer’s insurance company paid for his medical treatment related to his back, up until May 2005, but nothing since.

Claimant’s spouse got him a state-funded insurance company, which has paid for a psychologist and a psychiatrist to treat Claimant for post traumatic stress syndrome.

Claimant was exposed to unusual things in Afghanistan. The base had a perimeter going all the way around. Some of it was sand bags and some of it was fencing. There were little triangle signs that said "Mines" all over the place. Claimant saw little kids begging for water and saw one girl – the same age as his stepdaughter - run over a land mine. After he changed the incinerator doors he opened up the shed door to wash his hands off and there were garbage bags laying all around and blood pouring out of them. He could see a head and a knee. It really messed with Claimant's head. There were quite a few rocket attacks too. It seemed like at least once a week they got attacked.

One night, Claimant had to go out and fix a door. Just going outside at night scared Claimant even though he does not normally scare easily. There was something about being over there in the darkness with mountains surrounding him. They had to travel together at night because so much can happen and one person can disappear. He got out of the truck and saw an M-16 pointing at him. There were also guys getting shot in the head. Someone who had gotten some home brew started walking towards the guard shack and got shot right in the head.

Since his return, Claimant is short-tempered and on edge. He gets scared easily by noises from behind. It is mostly his wife and fortunately he does not hit her. He has problems sleeping and takes medication prescribed by a psychiatrist, Dr. Miller. Dr. Berry, Claimant's psychologist, told him that he has post traumatic stress syndrome. He has been seeing Dr. Miller and Dr. Berry since September 2005. He was having problems with nightmares or reliving things that he saw in Afghanistan. He sees his stepdaughter running through the fields and going over landmines. The psychologist and psychiatrist are helping a little, but Claimant just tries to put on a big front.

When they were checking Claimant after he came back from Afghanistan and he was paralyzed in his face, they discovered a brain tumor. It is about a quarter-inch big, but is stable. They cannot do a biopsy, but the doctor is not worried about it because if it was malignant it would have grown. Dr. Garcia told Claimant the tumor puts pressure on his memory and fear. No one has related the tumor to anything in Afghanistan.

He continues to have sleep problems, in spite of the medication. His back pain level fluctuates and he has good and bad days. On average, over the last couple of weeks his pain has been 8 of 10. He tries not to do anything

to inflame it. He has a real hard time with stairs and walking. He hardly has any muscle tone and can hardly even hold himself up. He has fallen on a number of occasions when his legs gave out. He thought he had a seizure, but the doctor thinks that it was an anxiety attack.

He has had what he thinks are anxiety attacks. He feels like he cannot control his breathing, his chest gets really heavy, and he blacks out. He can not recall if he is taking medication for anxiety. His spouse tracks that.

He gets up in the morning, brushes his teeth, drinks a can of pop, and puts in a chew. If he feels good he will sit down in the recliner and watch some TV. He tries to cook supper sometimes, but at times he cannot finish it.

He cannot take walking around Wal-Mart. It is too much of a strain. He has to get the electric cart because there is just too much walking in the Superstore. Since he has come back from Afghanistan, he has not engaged in any athletic pursuits. He is a lot more prejudiced now.

He met with the Department of Labor vocational rehabilitation person. Claimant took an IQ test. He pre-enrolled at ITT Tech. He went through orientation and then got a paper saying that the insurance company would not pay for his retraining. He would like to get back into the labor market and does not want to sit down all the time. He was going to go for computer drafting.

He wants to go back to work. He is thirty-four years old and still has a lot to offer. If he had the money to go to school, he would pay for it himself. He is confident that with some assistance he can get back to the workforce. Computer Aided Drafting is a two-year program where he can get an associate degree. He contacted people that hire ITT Tech graduates and was told that after he was at ITT Tech for six months they would put him to work. He learned how to read blueprints and is confident in his ability to do that now. He is certain he could succeed in the ITT program.

He had seen a psychiatrist or psychologist in 2000, four years before going to Afghanistan. That was because he got a divorce and left his little daughter. He was having a hard time coping. He only saw the psychologist one time. She gave him a little sample pack of Paxil and he was done. During the two or three years before going over to Afghanistan, he had not seen a psychiatrist or a psychologist and was not having nightmares or sleep problems.

Claimant testified at deposition in pertinent part that:⁷⁴

He completed a questionnaire for Employer's pre-employment physical, but could not recall if he indicated a history of back pain.

The work he did for Employer in Afghanistan was generally the same type of carpentry work he had done before. Between March 2003 and March 2004, he worked mostly as a carpenter and earned about \$40,000. He also tried to start his own business.

He was injured while helping to move a generator on 4 or 5 Jul 04. He felt the pain right away at level of 8 of 10. The pain stayed consistent throughout the day. He did not do any physical work the rest of the day because he was talking with a supervisor about work. The next morning he could hardly move. He asked someone to get a doctor and tell his supervisor he was hurt. Employer's medic came and gave him an injection and pills. Later that day, he went to the JAG's office to discuss child support issues. Then Claimant saw his supervisor and told him about the injury. The supervisor told Claimant he would get the paperwork going.

Claimant never returned to work and returned to the United States 10 to 12 days later.

He cannot do anything that involves bending or lifting. He cannot stand for a long time - two hours is about the longest he can take. His back can lock up and make it hard for him to get out of a chair. Over time, his back has been getting worse.

He does not recall his pain medication causing him to have nightmares. He is still on Paxil, Dilantin, Norvsac, Lexapro, and Skelaxin. He had either a seizure or anxiety attack about 45 days before the deposition. He uses a TENS unit.

Dr. H. John Park's records reveal in pertinent part that:⁷⁵

He is an orthopedist who saw Claimant for the first time on 22 Jul 04. Claimant described sustaining a back injury while lifting a generator in Afghanistan on 5 Jul 04. He complained of back pain and left leg numbness. Dr. Park reviewed his previous MRI and conducted a physical

⁷⁴ EX-26.

⁷⁵ EX-30; CX-1.

examination. His impression was that Claimant suffered from a severe lumbar spasm. He prescribed Claimant pain medication and anti-inflammatories.

Claimant returned on 5 Aug 04. Dr. Park conducted another physical examination and could not determine the cause of Claimant's problems. He continued to treat Claimant for lumbar strain and possible facet arthritis.

On 16 Sep 04, Claimant returned again reporting no significant change. Dr. Park conducted another physical examination, but did not see any new causes for Claimant's pain and recommended he try epidural injections.

On 28 Oct 04, Claimant returned and reported that the epidural injection did not provide any relief. Dr. Park conducted another physical examination, but told Claimant he had no other options than to refer him to a neurosurgeon. Dr. Park's working diagnosis was mild bulging disc, facet arthritis, and chronic lumbar strain. He believed Claimant would reach MMI in January 2005 and should remain off work until then. He referred Claimant to Dr. Bernard.

Dr. Clark Bernard's records reveal in pertinent part that:⁷⁶

He is a neurologist who saw Claimant three times after a referral from Dr. Park.

On 10 Nov 04, he took Claimant's history. Claimant described the initial back trauma in Afghanistan and his back and leg pain. He denied bowel or urinary incontinence. Dr. Bernard conducted a physical examination and reviewed the 16 Jul 04 MRI, deciding to obtain more tests before arriving at a diagnosis and treatment plan.

On 15 Dec 04, Claimant returned and reported continued low back and left leg pain. His straight leg raise was unremarkable. Dr. Bernard reviewed the 24 Nov 04 MRI and assessed Claimant as suffering from sciatica. He recommended Claimant stay off work.

On 17 Jan 05, Dr. Bernard reviewed the 12 Jan 05 MRI, with Claimant and advised him that there was no "frank cord compromise." He told Claimant he could offer no surgical treatment and recommended rehabilitation.

⁷⁶ EX-14; CX-1.

*Dr. Anthony Abang testified at deposition and his records reveal in pertinent part that:*⁷⁷

He is board certified in physical medicine and rehabilitation. Claimant was referred to him by Dr. Bernard. He had 5 visits with Claimant on 14 Feb, 3 Mar, 16 Mar, 11 Apr, and 5 Dec 05.

On his initial visit on 14 Feb 05, Claimant described his original injury on 4 Jul 04, when he was in Afghanistan helping unload a generator and began to suffer low back pain and left leg numbness. Claimant reported reduced sensation in his left leg. Dr. Abang conducted a physical examination and reviewed a number of previous studies. A lumbar spine MRI done on 24 Nov 04 showed a disc protrusion at T11-12 with possible stenosis and slight cord compression, but no abnormalities in the lumbar area. Lumbar and pelvic x-rays from 24 Nov 04 was normal. A lumbar spine MRI from 16 Jul 04 was also normal. A thoracic MRI of 12 Jan 05, showed a degenerated disc at T11-12 with mild posterior bulge and no stenosis. At that time, Dr. Abang was uncertain of the left leg symptoms, but believed Claimant had a component of right SI joint dysfunction. He started Claimant on Neurontin and physical therapy. He also ordered an EMG.

Claimant returned on 3 Mar 05 for the EMG. He complained that his pain had worsened and he now had headaches. Dr. Abang conducted a physical examination. The EMG was normal and showed no signs of abnormalities. Dr. Abang's diagnosed Claimant with right SI joint dysfunction with lumbosacral myofascial pain and secondary sleep disturbance, all related to his original injury. Dr. Abang prescribed a TENS unit.

Claimant returned on 16 Mar 05 and reported unchanged pain. Dr. Abang conducted a physical examination. Lumbosacral myofascial pain is essentially a muscle or ligament strain and should normally resolve in two to three months. He cannot explain why Claimant's pain lasted longer. There are some patients who have simple strains and continue to have pain after a few months. He does not attach much significance to the T11-12 protrusion since Claimant's was complaining of lumbar and leg symptoms. Dr. Abang recommended a functional capacity evaluation (FCE) and sent Claimant back to physical therapy, but believed he had reached MMI at that time. The FCE reported Claimant demonstrated consistent effort through the testing and concluded he could work an eight-hour medium demand job with infrequent heavy lifting.

⁷⁷ EX-9; EX-27; CX-1.

On 11 Apr 05, Claimant returned and they discussed the FCE results. Dr. Abang also conducted a physical examination. Claimant complained of continued back and leg pain. Dr. Abang diagnosed Claimant with lumbosacral radiculopathy as a result of his July 2004 injury and reiterated his opinion that Claimant was unable to return to his original level of work, but able to do medium level work. Even though the EMG was normal, it can return false negatives and cannot conclusively rule out lumbosacral radiculopathy. Dr. Abang's diagnosis is based on Claimant's subjective complaints.

Claimant returned again in December 2005 when he ran out of pain medication. Dr. Abang conducted a physical examination. He also reviewed new MRIs from 5 Jul 05. A lumbar MRI showed minimal diffuse disc bulge at L4-5 without impingement. A thoracic MRI showed mild anterior wedge deformity of T3 and possible central compression fracture of T5 and T6, with normal thoracic cord. A cervical MRI showed narrowing of C3-4 with bilateral hard disc or spur encroachment, moderate diffused disc bulge at C4-5, and fusion at C5-6-7.

The July 2005 MRIs were the first objective tests indicating a potential lumbar disc problem. Dr. Abang is not aware of any intervening trauma between the July 2004 generator injury and the July 2005 MRIs. As of the Claimant's final visit with him in December 2005, Dr. Abang no longer believed Claimant had suffered from a SI joint dysfunction component, but thought instead that Claimant's symptoms were from a chronic strain. That did not change his opinion as to Claimant's appropriate work restrictions and he told Claimant to take his pain medications as required.

Dr. Abang suspects that there is no relation between the T11 or T12 disc problem and Claimant's lower lumbar pain. Claimant's complaints would be expected to arise from L3 to L5. There are 4 to 5 inches between T11-12 and L3.

There is some variation between MRIs and their interpretation. It would not be surprising if one MRI reported a minimal bulge and another did not. If Claimant had some degenerative changes it could make him more fragile.

Claimant's Spouse testified at trial in pertinent part that:⁷⁸

She has been with Claimant for 5 years and married to him for four. Before he left for Afghanistan he was in very good condition. He could do anything. They worked together finishing their garages. They hung the sheetrock. She had never known Claimant to go to a doctor or a hospital for back problems. He had no physical limitation or complaints of pain while doing any physical activities.

Before going to Afghanistan, Claimant was very outgoing, ornery, and headstrong. He had no problems with anxiety. During the time she knew Claimant before he went to Afghanistan, he was not under the treatment of a psychiatrist or taking any psychiatric medication. He had no sleeping problems and was not hypervigilant. He did not have nightmares.

On about 14 Jul 04, she picked Claimant up at the airport. He was on a lot of pain medication and pretty loopy. He complained of lower back pain. They went home and on about 16 Jul 04 she took him to the ER because he lost control of his bowels in bed and did not realize it. She has been taking him to the doctor ever since due to his continuous back pain. Some days the pain is worse than others and Claimant will toss and turn at night. He cannot sit, stand or walk for very long. She got him a cane last week when she noticed how wobbly his legs had become.

Since coming back from Afghanistan, he has had problems sleeping. He is jumpy, and if she gets up and hits the bed or the headboard it startles him. He usually comes up with a fist, but has never struck her. He also talks in his sleep and yells. The psychiatrist and psychologists have not been able to help with the nightmares and things like that. He started seeing them in September and goes twice a month. It is paid for by state insurance.

He wants to return to the labor market when he can.

Employer's medical records for Claimant reveal in pertinent part that:⁷⁹

On 6 Jul 04, Claimant complained of midline lower back pain secondary to lifting a generator the day before. He was seen in bed and given Flexeril and Naprosyn.

⁷⁸ Tr. 76-85.

⁷⁹ EX-4, pp. 7-12.

On 7 Jul 04, Claimant was sent for an examination with an Army medical personnel. He reported lower back pain radiating down his left leg and occasionally into his neck. He was diagnosed with acute sciatica and taken off work for 72 hours. He was told to stop taking the Flexeril and Naprosyn and start taking Celebrex. He was started on Percocet, Valium, Prednisone, and Celebrex.

On 10 Jul 04, Claimant returned to the Army clinic complaining of pain. He had a normal lumbar x-ray and was placed on Toradol. He was advised to return to the United States for an MRI.

On 12 Jul 04, Claimant was seen by Employer's medical staff and reported continued pain. He was given an injection of Toradol and told to return if the pain worsened before he left for the United States.

Claimant's health questionnaire for Employer shows in pertinent part that:⁸⁰

Claimant reported: (1) prior alcohol abuse in 1999, (2) frequent head injury or unconsciousness in 1991, (3) back pain, (4) neck pain and whiplash in 2001, and (5) a cervical fusion in 2001.

Dr. Terry Troutt's independent medical evaluation report states in pertinent part that:⁸¹

He conducted an evaluation of Claimant on 21 Jun 05. He took Claimant's history and conducted a physical examination. He found Claimant had exaggerated responses to pain in the lower back with light brushing on the skin. He also reviewed medical records from Dr. Park, the neurological group, and Dr. Abang, along with the FCE report and July 04, November 2004, and January 2005 MRI reports.

Dr. Troutt's assessed that Claimant should remain on medium duty, but after 4-6 weeks of work conditioning, would be able to return to his original job. He based that opinion on his physical examination of Claimant, during which Claimant had a high degree of range of motion variation, along with non-dermatomal loss of sensation and other positive Waddell's maneuvers. He also based it upon the absence of any remarkable objective findings, except for the T11-T12 degeneration, which does not correspond with lower back pain.

⁸⁰ CX-2.

⁸¹ EX-8.

Claimant's contract with Employer states in pertinent part.⁸²

The term of employment was approximately 12 months and allowed for termination at any time by Claimant or Employer. The base monthly pay was \$2,583.00 with a total of 55% in bonuses for Foreign Service, area differential and danger.

Hardin Hospital records reveal in pertinent part that.⁸³

On 16 Jul 04, Claimant presented to the emergency department in the early morning hours complaining of back pain radiating to the left leg and bowel dysfunction. He gave a history of ruptured or bulging disc with instructions to have emergency surgery if he lost bowel control. The clinical impression was acute low back pain, myofascial strain, and herniated disc. Claimant was given pain medications and underwent a lumbar MRI, which was normal.

On 25 Jul 04, Claimant was brought by his wife to the emergency department in the early evening. He complained of a headache, was incoherent, and his speech was slurred. The clinical impression was a drug overdose and a brain CT scan was taken. It disclosed a small mass and he was referred to a neurologist.

On 10 Aug 06, a brain MRI showed a .7cm nodule along the lateral aspect of the left ventricular body. The doctor recommended a follow up MRI in three months to monitor any changes.

On 1, 8, and 20 Oct 06, Claimant had epidural steroid injections at L-3-4.

On 24 Nov 04, Claimant had x-rays of the pelvis and lumbar spine, which were normal.

On 2 Jul 05, Claimant returned to the emergency department in the early morning complaining of lower back pain and an inability to void or evacuate his bowels. He related a history of post traumatic distress disorder. The clinical impression was acute prostatitis or possible neurogenic bladder. He was catheterized and admitted.

⁸² EX-1.

⁸³ EX-12; CX-1.

Thoracic, cervical, and lumbar MRIs were performed on 5 Jul 05. They showed: minimal diffuse disc bulge at L4-5 without impingement; mild anterior wedge deformity of T3 and possible central compression fracture of T5 and T6, with normal thoracic cord; and narrowing of C3-4 with bilateral hard disc or spur encroachment, moderate diffused disc bulge at C4-5, and fusion at C5-6-7.

On 24 Aug 05, a brain CT scan showed the mass to be stable.

On 7 Dec 05, Claimant presented to the emergency room complaining of a seizure, chest pain, and labored breathing. He gave a history of PTSD and short term memory loss. A CT scan of the brain showed no change.

On 10 Dec 05, he presented with complaints of chest pain and shortness of breath.

On 12 Dec 05, he was brought to the emergency room by paramedics and reported being struck in the face during an assault. Back x-rays showed a healed fusion, degenerative disc disease at C3-4 and C4-5, and no changes in the thoracic spine. Claimant was diagnosed with a contusion and released.

Dr. Lovegildo Garcia's records reveal in pertinent part that:⁸⁴

Claimant was referred to him by the emergency room after a CT scan disclosed a brain mass. On 3 Aug 04, he examined Claimant and took a history, which indicated the onset was on 25 Jul 04, when Claimant's wife found him at home incoherent. Dr. Garcia reviewed the CT scan and assessed Claimant as having seizure disorder and a brain mass. He scheduled Claimant for an EEG and brain MRI.

On 9 Sep 04, Claimant returned. He reported no seizures, but headaches. The MRI disclosed a .7cm mass in the left lateral ventricle. He started Claimant on Depakote.

Communicare clinical records reveal in pertinent part that:⁸⁵

On 10 Aug 05, Claimant provided an admission history that included a history of child sexual abuse, exposure to violence in Afghanistan, being in a car accident in which his girlfriend was killed, and PTSD. He related a

⁸⁴ EX-15.

⁸⁵ CX-14.

previous outpatient visit for suicidal ideations in about 1998 and a 10 day inpatient hospital stay for the same reason. He related occasionally needing help with dressing and cooking and that he could not ski or snowmobile because of his back. He enjoys watching TV, playing cards, and shooting a gun. His diagnosis was major depressive disorder, alcohol dependence, and PTSD.

Claimant returned on 14 Nov 05. He reported decreased energy and appetite, restless sleep, violent nightmares, and being physically and mental drained.

On 19 Dec 05, Claimant reported that while his sleep was still poor and he had anxiety and was hypervigilant, his mood was much better. He felt more level headed.

On 9 Jan 06,⁸⁶ Claimant reported getting along better with his spouse and having no nightmares.

On 16 Jan 06, he reported increased symptoms from memories of Afghanistan and conflicts with his spouse.

On 6 Feb 06, Claimant reported snapping and smashing plates against the wall. He complained of increased anxiety and sitting and shaking uncontrollably.

***Claimant answered interrogatories in pertinent part that:*⁸⁷**

The only medical or psychological treatment he had received in the ten years before his accident in Afghanistan was neck surgery in 2001.

***Claimant answered supplemental interrogatories in pertinent part that:*⁸⁸**

He was treated as a psychiatric outpatient for one visit when he was 27 years old. He has not received any other in or outpatient psychiatric care or psychotherapy at any other facility.

⁸⁶ The form indicates 2005, but is assumed to be an error.

⁸⁷ EX-22.

⁸⁸ EX-36.

*Mercy Hospital records reveal in pertinent part that.*⁸⁹

On 28 Nov 03, Claimant was treated for a crushing injury to his finger.

On 6 Dec 02, Claimant was brought to the hospital by police and admitted on a 72 hour hold. He had called his spouse at work reporting suicidal ideations. He remained inpatient for 5 days and was diagnosed with recurrent major depressive disorder and alcohol dependency. Claimant's spouse visited him. Claimant gave a history of depression and a probable diagnosis of PTSD was considered.

On 29 Mar 01, Claimant had a cervical fusion at C6-6 and C6-7.

ANALYSIS

Nature and Extent of Disability

Claimant's Back Injury

While Employer argues that Claimant's inconsistent descriptions of the weight of the generator and the timing of his visit to the JAG to discuss child support create a question about whether or not he was injured at all, the weight of the evidence is that he sustained some sort of injury while lifting a generator. That, along with the expert medical evidence, is sufficient to invoke the Section 20(a) presumption. That presumption was not rebutted by substantial evidence and the record shows a nexus between Claimant's employment and his initial back condition.

However, that presumption does not apply to the degree of Claimant's injury. The medical experts have largely based their findings and opinions on Claimant's subjective reports of pain. Dr. Park had trouble corroborating Claimant's complaints with any objective findings and Dr. Bernard likewise found a largely unremarkable physical exam and no frank cord compromise. Dr. Abang, Claimant's treating physician, based his diagnoses on Claimant's subjective complaints. In addition, Dr. Troutt found Claimant had exaggerated responses and a high range of motion, with non-dermatomal loss of sensation and positive Waddell responses.

Where the accuracy of a claimant's subjective complaints and reports are critical, his credibility is key. In December 2002, Claimant called his wife with suicidal ideations. He was taken to a hospital by police for an involuntary admission and remained there in psychiatric treatment for five days. Yet Claimant told Employer in a

⁸⁹ EX-35.

discovery response that his only medical or psychological treatment in the ten years before his work accident was a single neck surgery. When Employer asked him once again in a supplemental interrogatory, Claimant admitted to a single outpatient psychiatric visit, but again failed to disclose his inpatient treatment. At trial, he mentioned the single visit, but denied otherwise having seen a psychiatrist. His spouse similarly denied that she was aware of Claimant having any psychological issues before he went to Afghanistan, even though it was his suicidal call to her that led to the police taking him to the hospital for five days of inpatient psychiatric treatment, during which she visited him.

It strains common sense to imagine that both Claimant and his spouse simply forgot that incident, particularly since Claimant disclosed it in the history he provided to CommuniCare in 2005. It is equally difficult to imagine they were confused about the parameters of the questions being asked, particularly when there was a supplemental interrogatory to which Claimant disclosed the single outpatient visit from 2000.

Since I do not find Claimant to be credible, I also afford the medical opinions which rely on his subjective reports much less weight. Instead, I find Dr. Troutt's report to be more probative. Accordingly, I find the weight of credible evidence establishes that: (1) as per Dr. Abang, Claimant was capable of at least medium duty as of April 2005, and (2) as per Dr. Troutt, Claimant should have been able to return to his original job on 2 Aug 05, following 6 weeks of conditioning.

However, in the absence of any evidence of medium level duty suitable alternative employment, the record establishes that Claimant was temporarily totally disabled from the date of injury until 2 Aug 05.

Claimant's PTSD

The record contains no comprehensive narrative notes or testimony from the mental health care providers treating Claimant. The forms provided show (1) Claimant reported his Afghanistan stressors (along with his preexisting PTSD) to his providers and (2) there was a diagnosis of recurrent major depressive disorder and chronic PTSD. Even Claimant's self-serving statements that one of his doctors told him that "of course" he suffers from PTSD was not in the context of whether the PTSD was aggravated by his time in Afghanistan. One CommuniCare staff note entry indicates an increase in symptoms due to experiences in Afghanistan; however, it is not clear whether that is a staff assessment or a subjective patient report. In any event, there is no direct medical or expert evidence that the preexisting PTSD was or even could have been aggravated by his employment in Afghanistan. Nonetheless, as marginal as the medical evidence is on this issue, when combined with the basic facts of the case, it is sufficient to raise the Section 20(a) presumption that Claimant's preexisting PTSD was aggravated by his employment in Afghanistan.

Similarly, the absence of any direct medical opinion evidence makes it difficult for Employer to effectively argue that it rebutted the presumption. It is clear that Claimant, in spite of what appears to be efforts to hide it from this Court, suffered from a significant level of PTSD before his employment in Afghanistan. Nonetheless, the record does not contain substantial evidence that would lead to a conclusion that Claimant's time in Afghanistan had no aggravating impact whatsoever on his PTSD. Consequently, I find the presumption applies and Claimant's current PTSD is attributable, to at least some degree, to his time in Afghanistan.

However, the presumption does not apply to the degree of injury or disability. There is an absence of any direct medical opinion evidence discussing the extent to which Claimant's PTSD impacts his capacity to work. Instead, the evidence concerning this issue consists primarily of his subjective reports to his mental health care providers and testimony at his deposition and the hearing. Consequently, his credibility becomes even more significant. His failure to accurately disclose the existence of his preexisting PTSD makes his testimony in this area unreliable. Moreover, he conceded that he was able and wanted to participate in a rehabilitation and education plan, which indicates that his PTSD was not debilitating. Consequently, I find that his PTSD did not impact his capacity to return to work.

Average Weekly Wage

Claimant and Employer correctly agree that Section 10(a) does not apply, as Claimant did not work in the same employment for substantially the whole of the year immediately preceding his injury.

Claimant argues for the application of Section 10(b). He accurately observes that Employer's counsel gave every indication that Employer possessed and would provide data relevant to a 10(b) calculation. Claimant testified that he had talked to another carpenter in Afghanistan who had been there for about one year doing the same work for Employer. That coworker confirmed that his pay was the same as Claimant's. Claimant's counsel suggests that given Employer's failure to honor its promise at trial, the Court should rely on Claimant's testimony as the basis for a Section 10(b) calculation.

Even though Claimant's credibility has been significantly impeached, he provided the name of the employee. Moreover, Employer not only had the opportunity, but had promised to provide more complete information on this issue. It elected not to do so.⁹⁰

⁹⁰ Claimant filed no motion to compel Employer to provide the information.

Accordingly, I find that the weight of the evidence in the record shows that Mr. Marsh was an employee in the same class who has worked substantially the whole of the year. Mr. Marsh's rate of pay was the same as Claimant's. Consequently, Section 10(b) applies and Claimant's average weekly wage is the same as the rate at which he was paid at the time of his injury, or \$1,520.58.⁹¹

Section 8(f) Relief

In the absence of a finding of any permanent disability, the Section 8(f) issue is moot.

DECISION

1. Claimant suffered a compensable back injury on 5 Jul 04 and an aggravation of his preexisting post traumatic stress disorder while he was employed in Afghanistan.
2. Claimant was temporarily totally disabled from 5 Jul 04 until 2 Aug 05.
3. Claimant's post injury earning capacity average weekly wage at the time of his work-related injury was \$1,520.58.

ORDER

1. Employer shall pay Claimant compensation for temporary total disability from 5 Jul 04 through 2 Aug 05 based on Claimant's average weekly wage of \$1,520.58.
2. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's 5 Jul 04 back injury, pursuant to the provisions of Section 7 of the Act.
3. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's Post Traumatic Stress Disorder and incurred after his return from Afghanistan, pursuant to the provisions of Section 7 of the Act.
4. Employer shall receive credit for all compensation heretofore paid, as and when paid.

⁹¹ Mr. Marsh's pay was the same as Claimant's and Employer paid Claimant \$25,636.99 for Claimant's time in Afghanistan.

5. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982)⁹²

6. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

7. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.⁹³ A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

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PATRICK M. ROSENOW
Administrative Law Judge

⁹² Effective 27 February 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring co., et al*, 16 BRBS 267 (1984).

⁹³ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **20 Oct 05**, the date this matter was referred from the District Director.