

U.S. Department of Labor

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Issue Date: 24 July 2006

Case No.: 2006-LDA-26

OWCP No.: 02-139360

IN THE MATTER OF

**SAMUEL WALKER,
Claimant**

vs.

**SERVICE EMPLOYERS INTERNATIONAL, INC.,
Employer**

and

**INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA.,
Carrier**

APPEARANCES:

**GARY B. PITTS, ESQ.,
On Behalf of the Claimant**

**RICHARD L. GARELICK, ESQ.,
On Behalf of the Employer**

**BEFORE: RICHARD D. MILLS
Administrative Law Judge**

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, (the "Act" or "LHWCA") as extended by the Defense Base Act, 42 U.S.C. § 1651, *et seq.* The claim is brought by Samuel Walker, (Claimant) against Service Employers International Inc.

(Employer) and Insurance Company of the State of Pennsylvania (Carrier). Claimant sustained injuries on December 21, 2004 during a suicide bombing attack while stationed in Iraq as an employee for Employer. The parties dispute causation, among other issues. A hearing was held on February 7, 2006 in Houston, Texas, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

- 1) Joint Exhibit No. 1; and
- 2) Respondent's Exhibits Nos. 1-4; and
- 3) Claimant's Exhibits Nos. 1-15.

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received by both parties. This decision is being rendered after giving full consideration to the entire record.¹

STIPULATIONS²

The Court finds sufficient evidence to support the following stipulations:

- 1) Jurisdiction is not a contested issue.
- 2) The date of Claimant's injury/accident was December 21, 2004.
- 3) Claimant's injury was in the course and scope of employment.
- 4) An employer/employee relationship existed at the time of the accident.
- 5) Employer was advised of the injury on December 21, 2004.
- 6) Employer filed a Notice of Controversion on February 16, 2005.
- 7) An Informal Conference was held on July 27, 2005.
- 8) Claimant's average weekly wage at the time of injury was \$1,992.77.
- 9) No compensation benefits have been paid.

¹ The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX – Claimant's Exhibit, RX – Employer's Exhibit, and TR – Transcript of the Proceedings.

² JX-1.

- 1) No medical benefits have been paid.
- 2) Permanent disability is not currently an issue.
- 3) Date of maximum medical improvement is not currently an issue.

ISSUES

The unresolved issues in these proceedings are:

- (1) Nature and Extent of Disability; particularly, whether or not any disability of Claimant's is casually related to the December 21, 2004 injury.
- (2) Claimant's entitlement to temporary total/partial disability compensation.
- (3) Medical Benefits
- (4) Attorney's fees and expenses

SUMMARY OF THE EVIDENCE

I. TESTIMONY and REPORTS

Samuel Walker

Claimant, Samuel Walker, testified at the hearing. TR 16. Claimant was born on December 24, 1961 in Selma, Alabama. TR 17. He completed high school and had spent some time pursuing a degree in criminal justice but was not able to finish due to his military commitment. TR 17. After graduating from high school in 1980, Claimant joined the Army. TR 18. He was in the Army for 24 years and retired as a sergeant first class. TR 18, 19. Claimant held numerous jobs while in the Army, including, platoon sergeant, drill sergeant, drill sergeant trainer, an equal opportunity NCO, and an Advanced Individual Training instructor. TR 18. After leaving the Military, Claimant went to work overseas, in Iraq, for Kellogg Brown & Root (KBR) as a morale, welfare and recreation (MWR) coordinator. TR 19. Claimant arrived in Iraq in November 2003, roughly seven months following the beginning of the liberation of the country. TR 23. After about seven or eight months as MWR coordinator, Claimant was promoted to supervisor of the MWR program.³ TR 19, 20. Claimant worked in the forward operating base (FOB) Marez in Mosul, Iraq (about 200 miles north of Baghdad) as MWR supervisor and ran two multi-million dollar facilities with 33 employees. TR 20.

³ Normally there are three steps to promotions in the MWR program, coordinator, technician, and supervisor. Claimant skipped the technician position and was promoted directly to the top position of supervisor.

During Claimant's military career he never went into combat, and had never been in a foreign country during wartime. TR 22. Nor had Claimant had exposure to explosives before his time in Iraq. TR 24. He had received training while in the military, but since he worked mostly in communications, his exposure to combat training was limited. TR 24. Prior to the December 21, 2004 incident, Claimant had never seen a psychiatrist or received any kind of psychiatric treatment. TR 23. Claimant had not had a problem with stress, sleeplessness, nightmares, disruptive dreams, or hyper-vigilance prior to his employment with Employer. TR 24.

In Iraq Claimant was exposed to bombings on a daily basis. TR 25. Mortar rounds were fired at the base every day and the base personnel would have to run for cover in bunkers. TR 25. They would hear a whistling sound of the mortar and then someone would come on the radio and yell "we've got incoming" and tell everyone to get to a bunker. TR 25. Prior to the December 21, 2004 bombing, Claimant had been back twice to the states to visit family for about 10 days each time. TR 26.

On December 21, 2004 Claimant was picked up by three female colleagues to go to the dining facility for lunch. TR 27. As Claimant entered the dining facility he saw two colleagues, Les and Carpenter One (a nickname). TR 28. Claimant approached Carpenter One and was showing him some paperwork that they needed to discuss after they finished lunch. TR 28. Claimant then took a seat next to two of the females that had picked him up for lunch. TR 28. One of the females, Nicky Navares, got up to go to the salad bar and as she was coming back to sit down, Claimant picked up some fries to begin eating and in his peripheral vision noticed a flash. TR 28, 29. Claimant was picked up and thrown from the table by the force of the explosion. TR 29.

When Claimant woke up all he could hear was screaming and yelling of people around him. TR 29. Two soldiers came and asked Claimant if he was ok and then carried him out of the dining area. TR 29. As he was carried out, Claimant saw body parts all over the floor in the dining facility. TR 29, 30. Claimant saw body parts all over his clothes and on his ear. TR 30. Those tending to his wounds thought he was injured and began taking his clothes off, but it was really the body parts of other people. TR 30. Claimant also had metal parts on him that were determined to be part of copper wires from a bomb detonator. TR 32, 33. KBR security then came in and took some of the wire from Claimant's clothes. TR 33. This is how they determined that the explosion was the result of a suicide bomber. TR 33.

Claimant was taken to triage and saw other people being worked on. TR 30. He could hear the medics saying "Okay, he's gone" in reference to some of the other people injured by the bomb. TR 31. One man, about four people down from Claimant, was being worked on when Claimant heard the medics say "Well, he's gone;" the medics then picked the body up to carry him out and Claimant saw the blood running down the man's

wedding band. TR 31. Claimant stated that Carpenter One was “blown to pieces.” Carpenter One had gone up to get some ice cream and that was where the suicide bomber was waiting. TR 31. Claimant explained that normally he would sit near the ice cream, but on that particular day, the people he was having lunch with did not want to. GR 31. Prior to the attack, Claimant, Carpenter One and Les had been discussing their birthday, all of which were coming up soon. TR 31, 32. Both Carpenter One and Les died in the explosion. TR 32. Claimant testified that two other men who had helped Claimant with an event two days before were sitting behind him in the dining area and were killed. TR 32.

Once Claimant and the other injured individuals were inside the hospital, the insurgents began dropping more mortar rounds on top of the hospital. TR 32. While in the hospital Claimant kept complaining that the side of his face was burning and he had a headache, but the medics told him there was nothing wrong with his face. TR 33. Later Claimant’s ear blistered as a result of the heat from the blast, the skin on his hand began to peel off and he suffered from cuts and scrapes to his head and knee. TR 34-37; CX-2. Claimant kept returning to the hospital seeking treatment for his physical injuries, but he was told that the medical complaints had to be life, limb or eyesight in order to get treatment because the hospital was short on medical resources. TR 37, 38.

Claimant told Employer that he could not work because the burns on his ear and hand were bothering him every time he went outside and he was having headaches. TR 38. Employer did not want Claimant, or four other individuals that were injured but not receiving medical care, to leave because it needed the workers. TR 38. However, a reporter that came down to cover the explosion heard about Claimant’s lack of medical care and threatened to take the story to CNN. TR 38, 39. As a result, around December 24, 2004, Employer decided to send the men home to receive medical care. TR 39. However, once the men got back to the states they were not given any instructions on how to receive medical care through Employer. TR 39. Prior to leaving Iraq, Claimant requested a medical evaluation, as he was told to by one of Employer’s managers, so that he would have proof that he had been injured while abroad. TR 39. Employer did not want to give Claimant a medical evaluation because it was worried that Claimant would use it to sue them once he was back in the states. TR 40. Claimant was finally able to get a medical report prior to leaving Iraq. TR 40.

After he had been home about three or four days, Claimant called the KRB office to find out where he needed to go to continue his medical treatment. TR 40. He was referred to Tom Anderson at AIG, who was handling the claims for the individuals injured in the Mosul attack. TR 40. Mr. Anderson gave Claimant a claim number, which Claimant passed on to the other individuals who had been sent home with him. TR 40. However, when Claimant attempted to use this number to receive treatment at various hospitals, he was turned down. TR 41. Claimant then went to the military hospital but was told he had to go to the VA hospital. TR 41. The VA hospital was so backed up that

it would take three or four weeks to get an appointment. TR 41. Claimant eventually, in January 2005, paid \$460.00 to be enrolled in TriCare Prime in order to get medical treatment. TR 41. However, it took 30 days to process the enrollment, thus Claimant was not seen until March 2005.⁴ TR 41.

Since Claimant returned from Iraq, he has had problems sleeping. TR 43. Claimant could not sleep at night, so during the day he would drink a few beers and sleep a little bit. TR 44. His sleeplessness became so problematic that he contacted Dr. Moore to see about getting some sleep therapy. TR 44. Dr. Moore told Claimant that he would have to go through the military to have such tests done. TR 44. Claimant did see a military doctor who prescribed Ambien. TR 44. Prior to Iraq, Claimant drank very little, if at all and was lean and trim. TR 44. Now, he was drinking every day and was putting on weight. TR 44. His daughter and sister noticed the changes in Claimant; his sister kept telling him that he was not the same as he was before he left to go work for Employer. TR 43, 44.

When Claimant first returned to the states after being in Iraq, he was interviewed by the FBI regarding the explosion. TR 45. After the interview, one of the interrogators gave Claimant a pamphlet on psychological information and told Claimant that they thought Claimant needed to see someone regarding the incident. TR 45. At that point, Claimant thought he was fine and threw the pamphlet away. TR 45. However, four or five weeks later, when he starting experiencing more difficulty sleeping he went to see a military doctor, Dr. McNear. TR 45. Dr. McNear wanted Claimant to see a psychologist, but could not get a timely appointment through the military hospital, so he used a list of TriCare psychologists and Dr. Moore had an appointment available. TR 46.

Claimant explained that upon his return from Iraq he began seeing images of dead soldiers and body parts, hearing voices and screams, smelling gunpowder or C-4, and having trouble sleeping. TR 47. Certain things trigger these images for Claimant. TR 47. The McDonald's sign brings back these images because Claimant was eating french fries right before the explosion. TR 47, 48. Raw chicken reminds Claimant of human body parts, and if he sees a gold wedding band it takes him back to the day of the incident. TR 48. These images are often triggered three or four times a day. TR 48. Claimant went to see Dr. Moore to help him deal with these recurring images. TR 46, 47. Claimant also is much less social than he was prior to his experience in Iraq. TR 52. He worked in his position as Morale, Welfare and Recreation coordinator/supervisor because he enjoyed putting on events and interacting with people. TR 58. Now, he doesn't like crowded places because he is constantly looking around and trying to be aware of his surroundings. TR 53.

⁴ While Claimant was waiting for his TriCare insurance to process he attempted to see three or four doctors using the claim number given to him by Employer. TR 42. However, none of the doctor's dealt with out of state worker's compensation and when they tried to contract Tom Anderson regarding coverage, he never got back to the doctors with an answer. TR 42.

When Claimant returned home, he took a job working for *John Deere* sometime between May and July of 2005⁵. TR 49, 85. However, every time a tractor part would drop and make noise, Claimant would crouch down as if he was in a combat zone. TR 49. The other workers made fun of him and Claimant quit after two and a half weeks. TR 49. On November 15, 2005, Claimant went to work for the Georgia Youth Academy part-time at night. TR 50. Claimant goes to the camp once the kids are in bed and keeps watch until the morning at which time he makes sure they are up and getting dressed. TR 50. He wakes them up at about five o'clock and leaves the camp around 6:45 or 7:00 a.m. TR 50. Claimant works between 20 to 29 hours a week and makes eight dollars an hour, but sometimes does not get any work if there is a holiday. TR 50.

Claimant sees Dr. Moore about once a week; however, sometimes he can not afford the twenty-five dollar co-pay required at every visit, and he does not go. TR 50, 85. Claimant does not tell Dr. Moore that lack of money is the reason he is not making the appointments. TR 51. Worker's compensation has not paid for any of Claimant's medical or psychological care since his return to the states. TR 51. Claimant's TriCare insurance pays Dr. Moore. TR 51. Claimant has tinnitus which causes a ringing in his ears. TR 56. He also has constant headaches, and has been told by others that his hands tremble. TR 56, 67. He was in physical therapy for a while and had problems with his right knee. TR 56. He also had an elbow injury from shrapnel which has cleared up. TR 61.

Claimant explained that he felt he was making some progress while working with Dr. Moore; however, around December 2005, when the anniversary of the bombing was approaching, Claimant again became depressed and stressed. TR 60. Claimant prefers not to talk about the events of December 21, 2004. TR 60. Claimant has stopped drinking as much as he was immediately after his return to the states. TR 61. He now takes over the counter sleeping aids. TR 61. Claimant has requested more Ambien from the doctor, but since the doctor considered it too addictive, he suggested that Claimant instead see a sleep specialist. TR 61, 62. Claimant has not been able to see a doctor in regard to his sleep problems. TR 62.

Claimant explained that he is willing to do anything he can to deal with his illness and get better. TR 64. He wants to be able to take care of his family the way he did prior to going to Iraq. TR 64.

⁵ Claimant worked about 30 hours a week and made between \$7.50 to \$8.00 an hour. TR 88. If the factory met its production goals each day they gave the employees a 10 percent bonus for the day. TR 88. Claimant later stated that he worked for *John Deere* in June 2005. TR 88.

On cross-examination, Claimant stated that he had planned on working in Iraq for three years. TR 68. He wanted to use his salary from the first year to pay off his debts and then use the money from the last two years to buy a house and a car. TR 68. After putting in three years, Claimant intended to enjoy his retirement and pursue a career as an NCAA basketball official. TR 68. Claimant has worked about ten or eleven high school basketball games since his return from Iraq. TR 70. Working the games is relaxing for Claimant and takes his mind off of other things. TR 71, 72. Claimant explained that usually the crowd at these games is not that large and there is security. TR 72. Claimant also runs about twice a week which relieves stress. TR 74.

Claimant lives with his best friend, Robert Burnett. TR 75. Mr. Burnett tells Claimant that Claimant has changed and complains because Claimant never wants to go out and do anything but just stays in his room. TR 76.

Claimant acknowledged that he was very close with his sister who passed away in October 2005. TR 77. Her death has affected him, but he can deal with the pain because he knows she is in a better place. TR 79. Claimant stated that people continue to ask about Iraq and want to know about his time overseas, but he does not like to talk about it. TR 81, 82. Since suicide bombings are talked about in the news so much, people often ask Claimant if he saw any suicide bombings. TR 82, 83.

Prior to the hearing, Claimant last saw Dr. Moore on January 31, 2006. TR 83. Dr. Moore has been working with Claimant regarding his mental state and trying to help Claimant deal with the images in his mind. TR 83, 84.

II. MEDICAL EVIDENCE: Reports and Depositions

Aubrey Moore, Ph.D.

Dr. Moore testified by deposition on June 15, 2006.⁶ He was initially questioned by Employer's counsel. Dr. Moore saw Claimant on the following dates: January 13, 25, and 31, 2006; February 21 and 28, 2006; March 14 and 28, 2006; April 11 and 18, 2006, May 2, 16, and 23, 2006; and June 13, 2006. Depo, p. 4. As of January 25, 2006 Dr. Moore diagnosed Claimant with posttraumatic stress disorder (PTSD) and recurrent major depression mild. Depo, p. 4. Claimant did exhibit and continues to exhibit signs of PTSD such as flashbacks, intrusive memories, thoughts that something bad might occur, as well as signs of avoidance of topics that might trigger re-experiencing these symptoms. Depo, p. 4. Claimant also showed consistent signs of increased autonomic arousal, such as difficulty sleeping, irritability and hypervigilance to threats. Depo, p. 4.

⁶ Dr. Moore's deposition was taken post-trial at the request of Claimant's counsel. This deposition was not designated in either party's exhibit lists, therefore it will be cited as Depo, p. ____.

Dr. Moore also observed signs of depression, which over time increased to major depression. Depo, p. 5. Claimant would report feelings of sadness, exhaustion, difficulty concentrating and several occasions of suicidal ideation. Depo, p. 5.

Dr. Moore testified that Claimant moved out of his friend's house in April 2006. Depo, p. 7. Claimant did this in order to isolate himself because of the difficulty he was having interacting with other people and in order to avoid people questioning him about his behavior and about Iraq. Depo, p. 7. Claimant is very concerned about others perceiving him as crazy and thus tries not to talk about Iraq or discuss the symptoms he is having. Depo, p. 8-11. He also does not want others to know that he sees a psychologist. Depo, p. 11.

Claimant has not attended group therapy nor has Dr. Moore recommended that for Claimant. Depo, p. 11. Dr. Moore explained that group therapy revolves around the idea of having a patient discuss the experience that causes distress so that if it is talked about enough, eventually the distress associated with the experience will decrease. Depo, p. 12-13. Dr. Moore, however, was trying a relatively new approach (metacognitive therapy) with Claimant that encourages him to disassociate himself from the affect of the symptoms of PTSD. Depo, p. 15. However, Dr. Moore did concede that group therapy might be beneficial to Claimant. Depo, p. 15. The major group therapies dealing with wartime-related PTSD, that Dr. Moore was aware of, were connected to the VA; he was not aware of any similar service available for a civilian contractor. Depo, p. 12, 15.

Dr. Moore also conceded that the application of metacognitive therapy has been somewhat difficult with Claimant because he has not seen Claimant as regularly as he would like to. Depo, p. 18. Claimant did not make all of his scheduled visits due partially to insurance problems.⁷ Depo, p. 19. Also, Claimant has had various traumas, including his sister's death, the anniversary of the bombing and a burglary, all of which disrupt the type of treatment that Dr. Moore is attempting to do. Depo, p. 19. Thus, Dr. Moore has discussed possibly using a different treatment option with Claimant. Depo, p. 20. Claimant has missed more appointments with Dr. Moore than any of Dr. Moore's other patients. Depo, p. 21. In order for this particular therapy to work a patient has to make their appointments and has to do their therapy homework. Depo, p. 21. Dr. Moore later acknowledged that after discussing the absences with Claimant, Claimant's attendance greatly improved. Depo, p. 53.

Dr. Moore testified that on the Tuesday prior to the deposition, he had received results from an independent evaluation of Claimant, conducted by psychiatrist Dr. Antin. Depo, p. 24, 27. Dr. Antin obtained an MMPI-2 profile of Claimant that Dr. Moore found shocking because it revealed that Claimant was doing much worse than what Dr.

⁷ Dr. Moore stated that Claimant had never told him that Claimant was missing an appointment because he could not make the co-payment. Depo, p. 47.

Moore had observed. Depo, p. 24, 27. Dr. Antin's report was similar to Dr. Moore's report on Claimant from about 10 months prior. Depo, p. 6. After reviewing these test results, Dr. Moore would suggest that Claimant see a psychiatrist. Depo, p. 26, 27. Dr. Moore would also do some follow-up investigation with Claimant to explore some of the troubling areas (particularly the spike on the schizophrenia scale) on these tests and would recommend medication.

Dr. Moore explained that his diagnosis of Claimant at the present had not changed since the beginning of Claimant's therapy. Depo, p. 38. While Dr. Moore was not as optimistic about Claimant's recovery as he had been when he first began seeing Claimant, he did not believe Claimant had reached maximum psychological improvement. Depo, p. 42, 52. He still believed Claimant could be treated and could improve. Depo, p. 52. He also believed that Claimant wanted to improve and get better. Depo, p. 53.

Dr. Moore stated that Claimant might benefit more from inpatient therapy where he could get more intensive therapy; however, Dr. Moore did not think this was realistic because Claimant was already having trouble getting his medical bills paid. Depo, p. 43.

Dr. Moore did not necessarily think Claimant's current job was the best position for him because Claimant was still having stress associated with the job. Depo, p. 54. However, based on his and Dr. Antin's findings regarding Claimant's condition, Dr. Moore thought it was remarkable that Claimant was able to maintain this job. Depo, p. 54. Based on Claimant's current condition, Dr. Moore would recommend a low-stress job that did not require a lot of personal interaction. Depo, p. 55.

Dr. Todd Antin

Dr. Antin, a psychiatrist, testified by deposition on June 16, 2006.⁸ Dr. Antin works with patients with PTSD although it does not make up the majority of his practice. Depo, p. 8. He was not familiar with any facility around the country that specializes in offering services to non-military personnel returning from Iraq. Depo, p. 10. Carrier, AIG World Source, referred Claimant to Dr. Antin for an independent evaluation. Depo, p. 10. Dr. Antin was surprised that Claimant had not seen a psychiatrist for his condition. Depo, p. 13

Dr. Antin reviewed a number of treatments options used in dealing with PTSD. Depo, p. 12-16. Dr. Antin recommended more aggressive treatment for Claimant than he was currently receiving. Depo, p. 17. He would probably put Claimant in a five day a week treatment program that would include group therapy and individual therapy. Depo, p. 18, 19. Dr. Antin recognized that Claimant did not want to talk about the traumatic events,

⁸ Dr. Antin's deposition was submitted post-hearing and will be cited as Depo, p. __.

but he explained that most patients, once immersed in intense therapy, begin to feel comfortable and open up. Depo, p. 19. Group therapy would be available for Claimant at Dr. Antin's facility, although everyone in the group would not necessarily have an affiliation with the military or have been in combat. Depo, p. 21. The group would contain individuals with a variety of illnesses, not just PTSD. Depo, p. 21.

Dr. Antin opined that aggressive psychiatric treatment including psychotropic medication should provide a more accelerated recovery for Claimant, allowing him to return to full-time employment in the near future. Depo, p. 23. After examining Claimant, Dr. Antin felt that Claimant showed significant improvement from his initial injury but was having trouble making the last step needed for a full recovery. Depo, p. 24. Dr. Antin explained, that although Dr. Moore had given Claimant a somewhat poor prognosis of full recovery, Dr. Antin believed there were still a number of treatments available that would need to be done before Dr. Antin could make a similar such assessment. Depo, p. 25.

Dr. Antin stated that he did not believe Claimant would be able to return to a combat situation for a long time, if it at all. Depo, p. 27. Dr. Antin next discussed the MMPI-2 test that he conducted on Claimant. Depo, p. 28. This test is used to validate the clinical findings obtained during a personal interview. Depo, p. 28. It can determine malingering or exaggeration or other issues that would be hard to pick up in a one time interview. Depo, p. 28. Claimant's test results showed a slight tendency to exaggerate, but overall the test was deemed valid. Depo, p. 30. Dr. Antin did not believe that Claimant was malingering and thought Claimant had real, significant psychiatric issues. Depo, p. 35. The MMPI-2 of Claimant portrayed an individual in great distress with chronic psychological maladjustment, physical body complaints, and a long standing personality disorder related to pessimism, which Dr. Antin opined was part of the reason Claimant was having a long recovery. Depo, p. 31. The test confirmed Dr. Antin's finding of PTSD. Depo, p. 32.

Dr. Antin did not think Claimant was at maximum medical improvement and would recommend that Claimant undergo more intensive, aggressive treatment, see a psychiatrist and possibly be prescribed medication. Depo, p. 36. Dr. Antin believes that Claimant sincerely wants to get better.

In Dr. Antin's Independent Medical Examination report, he opined that Claimant met the criteria for PTSD and that this illness seemed to be casually related to the physical injuries that Claimant suffered on December 21, 2004 while stationed in Iraq. Depo, Exhibit 2.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to the Longshore Harbor Workers' Compensation Act, as extended by the Defense Base Act. 42 U.S.C. § 1651. The LHWCA applies "in respect to the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States or any executive department, independent establishment, or agency thereof . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work." 42 U.S.C. § 1651.

In this case, the parties stipulate and the Court finds that jurisdiction is proper under the Defense Base Act.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495 (1982). Once the claimant establishes these two elements of his *prima facie* case, § 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). When an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside of work, the employer is liable

for the entire disability and for medical expenses during both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. See Atlantic Marine v. Bruce, 661 F.2d 898, 901, 14 BRBS 63, 65 (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 456-57 (9th Cir. 1954); Mijangos v. Avondale Shipyards, 19 BRBS 15, 17 (1986). In addition, if a claimant's employment aggravates a non-work-related, underlying disease or condition so as to produce incapacitating symptoms, the resulting disability is compensable. See Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (1st cir. 1981).

After the § 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

In this case, the parties have stipulated that Claimant was injured on December 21, 2004 while in the course and scope of employment. JX-1. Claimant testified that he received various injuries when he was thrown across the dining hall in Mosul, Iraq as the result of a suicide bomber attack. Claimant was initially treated in Iraq, but returned to the states a few days after the bombing in order to seek more adequate medical attention. Based on the parties stipulations and the evidence, Claimant has made a *prima facie* case of compensability and is entitled to the § 20(a) presumption. Employer has offered no evidence to rebut this presumption nor is sufficient evidence found in the record. Claimant's treating psychologist, Dr. Moore, testified that Claimant suffered from various symptoms of PTSD related to his injuries in Iraq. Similarly, Dr. Antin, the psychiatrist who was hired by Employer to provide an independent evaluation of Claimant, diagnosed Claimant with PTSD and casually linked it to Claimant's experience in Iraq. Accordingly, the Court finds that Claimant's injuries (physical and psychological) were caused by his employment-related accident in Iraq.

NATURE AND EXTENT OF SCHEDULED DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological

impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one 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. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97

(1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

The parties stipulated, JX-1, that maximum medical improvement (“MMI”) is not currently an issue in this case. JX-1. Neither Dr. Moore nor Dr. Antin believed that Claimant had reached MMI, and both felt that further treatment could be beneficial for Claimant. Therefore, the Court finds that Claimant has not reached MMI.

Although Employer asserts in its post-trial brief that Claimant is not disabled and thus not entitled to compensation, there is no evidence to support this contention. Claimant returned from Iraq about five days after the bombing incident on December 21, 2004. He was unemployed until he took a part time job working at the *John Deere* tractor factor on or about June, 2005. However, Claimant was only able to work for about two and a half weeks before the stress of the job caused him to quit. Claimant explained that large tractor parts would often fall in the factory making a loud noise and Claimant would drop to the floor as he was accustomed to doing in Iraq. The other employees made fun of Claimant due to his reaction to the noises. After this experience, on November 15, 2005, Claimant found a job working at a youth camp. Claimant works only at night and has limited interaction with the kids in the camp. Although this job is better suited to Claimant than the position at *John Deere*, Dr. Moore still opined that working at the youth camp was causing Claimant stress and may not be the best position for Claimant at this time. Dr. Moore thought it was remarkable that Claimant was able to maintain this particular employment. Employer’s hired psychiatrist, Dr. Antin, provided further support, in his deposition, that Claimant was not able to return to his usual employment. He stated that he did not believe Claimant would be able to return to a combat environment for a long time, if at all. However, Dr. Antin also testified that with more aggressive treatment, he believed Claimant would be able to regain full-time employment in the near future. Claimant also testified that he occasionally works as a referee for high school basketball games and that he finds this job to be a relaxing diversion from the other stresses in his life.⁹

Claimant has established a *prima facie* case of total disability, because he cannot return to his usual employment. Employer has not presented any evidence of suitable alternative employment. Therefore, the Court finds Claimant is entitled to temporary

⁹ Claimant stated that he has worked about 10 or 11 games since his return from Iraq and that he makes \$20 per game.

total disabled from December 21, 2004, the date of his injury in Iraq, until November 15, 2005, the date Claimant began working for the Georgia Youth Academy.¹⁰ Although Claimant worked for a brief period for *John Deere*, he was unable to maintain that job due to the symptoms of PTSD¹¹. Claimant is entitled to temporary partial disability from November 15, 2005 and continuing. Claimant has established that he is capable of alternative employment as he has maintained his job with the Georgia Youth Academy and occasionally referees high school basketball games.¹²

AVERAGE WEEKLY WAGE

Section 10 of the Act, 33 U.S.C. § 10, sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) in order to arrive at an average weekly wage. See Johnson v. Newport News Shipbuilding and Dry Dock Co., 25 BRBS 340 (1992). The determination of an employee's annual earnings must be based on substantial evidence. See Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991).

Section 10(a) applies when an employee has worked in similar employment for substantially the whole of the year. See 33 U.S.C. § 910(a). The inquiry focuses on whether the employment was intermittent or permanent. See Gilliam v. Addison Crane Co., 21 BRBS 91 (1987); Eleazer v. General Dynamics Corp., 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady, then §10(a) will apply. See Duncan v. Washington Metro. Area Transit and Auth., 24 BRBS 133, 136 (1990). The §10(a) formula requires the finding of an average daily wage and can only be utilized if the record contains evidence from which an average daily wage can be determined. See Taylor v. Smith & Kelly Co., 14 BRBS 489, 494-95 (1981); Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 1179, 5 BRBS 23, 26 (9th Cir. 1976).

¹⁰ The record is unclear as to when Employer stopped paying Claimant; however, Claimant is requesting compensation beginning on January 1, 2005. Therefore, Employer would be entitled to a credit for the days in December 2004, following the accident, for which Claimant was paid.

¹¹ Employer would be entitled to an offset, based on Claimant's earnings from this job, in the amount of disability compensation owed. However, Claimant's earnings do not reduce his average weekly wage to below the applicable maximum compensation rate of \$1,047.16, as allowed by § 906(b)(1). Claimant stated that he worked at *John Deere* for about 30 hours a week and made between \$7.50 and \$8.00 an hour, with a potential to earn an additional 10% each day the factory met its production goals. Assuming Claimant worked a full 40 hours a week and made an additional 10% each day, Claimant would have earned \$352.00 a week. Claimant's average weekly wage is \$1,992.77. \$1,992.77 minus Claimant's earnings of \$352.00 equals \$1,640.77. Two thirds of \$1,640.77 equals \$1,093.85, which is above the applicable maximum compensation rate of \$1,047.16. Therefore, Claimant's earnings do not affect the amount of disability compensation owed by Employer.

¹² Taking Claimant's earnings from these jobs into consideration still does not reduce Claimant's average weekly wage to below the maximum compensation rate and therefore does not affect the amount of disability compensation owed by Employer. Claimant works between 20-29 hours a week for the Georgia Youth Academy and makes \$8.00 an hour, which equals a possible average weekly wage of \$232.00. Assuming Claimant referees one basketball game per week at \$20.00 a game, Claimant's average weekly wage would be \$252.00 a week. (Claimant testified that he has only refereed about 10-11 games since his return from Iraq.) \$1,992.77 minus \$252.00 equals \$1,740.77. Two thirds of \$1,740.77 equals \$1,160.51 which is greater than the maximum compensation rate of \$1,047.16.

When Section 10(a) is not applicable, the Court will look to §10(b). Section 10(b) calculates the average weekly wage based on similarly situated employees and applies when the injured employee did not work for substantially the whole of the year under §10(a). See 33 U.S.C. § 910(b).

When both Sections 10(a) and (b) are inapplicable, the calculation of average weekly wage defaults to §10(c), which allows the Court to calculate a claimant's average weekly wage in a manner that reflects a fair and reasonable approximation of the claimant's annual wage earning capacity at the time of his work injury. See 33 U.S.C. § 910(c).

The parties stipulate, JX-1, and I find that Claimant's average weekly wage at the time of his injury was \$1,992.77. However, pursuant to §906(b)(1), Claimant's compensation may not exceed the maximum compensation rate, which is 200 percent of the applicable national average weekly wage at the time of injury. On December 21, 2004, the maximum compensation rate was \$1,047.16. *United States Dept. of Labor, Employment Standards Administration* (July 20, 2006). As Claimant's compensation based on an average weekly wage of \$1,992.17 would be greater than this maximum compensation rate, Claimant is entitled to compensation at the rate of \$1,047.16.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

- (a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. 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. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980). In the instance of multiple injuries, the employer at the

time of the aggravating injury assumes liability for all subsequent related medical expenses and compensation. Colburn v. General Dynamics Corp., 21 BRBS 219 (1988).

Employer asserts that Claimant should not be entitled to medical benefits because Claimant's treating psychiatrist, Dr. Moore, is disappointed in Claimant's progress and because Claimant skips appointments. While Dr. Moore did express concern that Claimant was missing too many appointments, he also explained that once he discussed the problem with Claimant, Claimant's attendance significantly improved. Claimant himself testified that he sometimes missed appointments because he could not afford the \$25.00 co-pay; he would not, however, tell Dr. Moore that he was missing the appointments due to financial problems. Dr. Moore also explained that although the treatment he had been using with Claimant was not providing the expected results, other treatment options were available. Dr. Moore believed that Claimant suffered from PTSD and sincerely wanted to get better. Employer's hired psychiatrist, Dr. Antin, also diagnosed Claimant with PTSD. Dr. Antin opined that Claimant needed much more aggressive treatment than he had received thus far and that many options were available to help Claimant recover. Employer/Carrier has presented no evidence to support its contention that medical expenses should be denied or to explain why it did not pay, at the least, physical medical expenses related to the December 21, 2004 bombing, upon the return of Claimant to the United States.

Claimant has established that his current disability is the result of his December 21, 2004 work-related injury. Therefore, the Court finds that Employer is liable for all past and future compensable medical benefits arising from Claimant's December 21, 2004 injuries, including but not limited to, reimbursement for Claimant's paid insurance premiums and payments made by Claimant to Dr. Moore, as well as Section 7 future medical expenses, specifically expenses related to psychological/psychiatric care as recommended by Claimant's treating psychologist, Dr. Moore.

§ 14(E) ASSESSMENT

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days after it has knowledge of the injury. 33 U.S.C. §914; *Jaros v. Nat'l Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988). In this instance, Employer has not paid any compensation to Claimant and did not file a notice of controversion until February 16, 2005. JX-1. Employer's counsel stipulated that Employer was advised of Claimant's injury on December 21, 2004. JX-1. Therefore, Employer did not file a notice of

controversion within 14 days of learning of Claimant's injury and is liable for Section 14(e) penalties.¹³

ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this Decision to submit an application for attorney's fees. 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. The Act prohibits the charging of a fee in the absence of an approved application.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

- 1) Employer shall pay to Claimant compensation for temporary total disability from December 21, 2004 through November 15, 2005, based on an average weekly wage of \$1,992.77.
- 2) Employer shall pay to Claimant compensation for temporary partial disability, based on an average weekly wage of \$1,992.77, commencing on November 15, 2005 and continuing.
- 3) Employer shall be entitled to a credit for all payments of compensation that it previously made to Claimant.
- 4) Employer shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

¹³ Employer asserts in its supplemental post-hearing brief that penalties should be barred because it did not receive notice or an opportunity to be heard on the issue of penalties. Employer cites Prolerized New England Co. v. Benefits Review Board, 637 F.2d 30 (1st Cir. 1980) in support of this proposition. Prolerized however, does not support Employer's position. Rather Prolerized explained that the additional assessment of § 14(e) penalties was mandatory and could be raised sua sponte by the Court when Employer failed to either timely pay compensation or file a notice of controversion according to the Act. See Id. at 39,40. However, the Court noted that § 14(e) "provides its own escape hatch when the employer has failed to make payments 'owing to conditions over which he had no control ...'" Id. at 40. In this case, Employer has failed to assert that "conditions beyond its control" prevented it from paying compensation to Claimant. Therefore, penalties are properly assessed against Employer.

- 5) Pursuant to Section 14(e) of the Act, Employer shall be assessed penalties on all compensation not timely paid, the exact amount to be calculated by the District Director as heretofore set out;
- 6) Employer shall reimburse/pay Claimant for all reasonable and necessary medical expenses related to Claimant's December 21, 2004 injury.
- 7) Claimant's counsel shall have thirty (30) days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (20) days from receipt of the fee petition in which to file a response.
- 8) All calculations necessary for the payment of this award are subject to verification and adjustment by the OWCP District Director.

So ORDERED.

A

RICHARD D. MILLS
Administrative Law Judge