

U.S. Department of Labor

Office of Administrative Law Judges  
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**Issue Date: 28 August 2008**

CASE NO.: 2007-LDA-318

OWCP NO.: 02-159261

IN THE MATTER OF:

M. G.<sup>1</sup>

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL

Employer

and

INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA  
c/o American International Underwriters

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.

For The Claimant

JERRY MCKENNEY, ESQ.

JAMES L. AZZARELLO, JR., ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.  
Administrative Law Judge

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<sup>1</sup> Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

## DECISION AND ORDER

This is a claim for benefits under the Defense Base Act, 42 U.S.C. § 1651, et seq., an extension of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Service Employees International (Employer) and Insurance Company of the State of Pennsylvania c/o American International Underwriters (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on November 14, 2007, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 12 exhibits, Employer/Carrier proffered 28 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.<sup>2</sup>

Post-hearing briefs were received from the Claimant and the Employer/Carrier on the due date of June 2, 2008. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

### I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the date of alleged injury/illness from the zone of special danger is October 31, 2006.
2. That there existed an employee-employer relationship at the time of the alleged injury/illness.
3. That Employer/Carrier filed Notices of Controversion on April 12, 2007 and August 15, 2007.

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<sup>2</sup> References to the transcript and exhibits are as follows: Transcript: Tr.\_\_\_\_; Claimant's Exhibits: CX-\_\_\_\_; Employer/Carrier's Exhibits: EX-\_\_\_\_; and Joint Exhibit: JX-\_\_\_\_.

4. That an informal conference before the District Director was held on July 24, 2007.
5. That Employer/Carrier have not paid any disability or medical benefits.

## **II. ISSUES**

The unresolved issues presented by the parties are:

1. Causation; fact of injury.
2. The nature and extent of Claimant's disability.
3. Whether Claimant has reached maximum medical improvement.
4. Claimant's average weekly wage.
5. Entitlement to and authorization for medical care and services.
6. Attorney's fees, penalties and interest.

## **III. STATEMENT OF THE CASE**

### **The Testimonial Evidence**

#### **Claimant**

Claimant testified at formal hearing and was deposed by the parties on November 11, 2007. (EX-7). At the time of formal hearing, Claimant was 53 years old and lived with his sister and brother-in-law in Georgia. (Tr. 21). He was born in Griffin, Georgia, and grew up in Georgia and South Carolina. (Tr. 21-22). Claimant attended Georgia Southern University and graduated in 1977 with a bachelor's degree in psychology. Directly after college, he went to work for the State of South Carolina in the Department of Vocational Rehabilitation, where he worked for approximately one-and-a-half years. (Tr. 22). Claimant then worked in sales and sales marketing and management for over twenty years; the majority of his time was spent in Texas and Nevada. (Tr. 23). Claimant last worked in sales in 2003 and then commenced a career in truck driving. He drove trucks throughout the Southeast. (Tr. 24).

Claimant was hired by Employer to drive trucks and left for Iraq on October 31, 2005. He fulfilled his contract and left Iraq on October 31, 2006. Initially, Claimant was stationed north of Baghdad at a base called Anaconda. (Tr. 25). Approximately three to four weeks later, he was transferred to a Marine base, "TQ," in the Sunni Triangle. (Tr. 25-26). Claimant testified the area had a "very heavy" insurgent presence. (Tr. 26). Claimant was a bobtail driver for approximately six or seven months and was then promoted to a convoy commander's position. (Tr. 26-27). When asked whether there was any particular danger associated with being a convoy commander, Claimant responded: "Not really, other than that you're the first truck. That was about the only downside to that. But you had a driver, it was just the driver and yourself. When you're the convoy commander, you couldn't physically drive, you had to have a driver." (Tr. 28). Claimant drove primarily in the western Anbar province. (Tr. 29).

Claimant testified trips varied in duration according to how many IEDs (improvised explosive devices) were encountered along the way. (Tr. 29-30). Some of the IEDs were double- or triple-stacked and would blow up half the road. (Tr. 31).

Claimant testified that on November 12, 2005, as he was preparing to transfer from Anaconda to TQ, a mortar landed approximately fifty yards from his truck. Claimant testified there was "impact from the noise" and some rock and dirt landed on him. With regards to his ears, Claimant testified: "It was painful. I think that was the first time I noticed that after that my ears actually started ringing. I never had ringing in my ears before, but that sensation started about that time." At the time of formal hearing, Claimant still had ringing in his ears. (Tr. 34).

On February 15, 2006, Claimant was driving the lead truck for the convoy commander. As they were coming into the town of "Little Baghdad," a remote IED was set off. The convoy picked up speed as it went through the town, and three more IEDs were set off. Claimant stated: "I was real close on the gun truck and was getting ready to go around a curve, and actually an IED blew up right in front of me between me and the gun truck." He continued: "And the first I saw was just the white flash, and, you know, I-to be honest with you, I thought that was the bright

light of heaven. I thought I was actually on my way out. So then I realized, you know, a split second later the noise and the compression and everything that came with that, that I was still alive, thank goodness." Claimant stated the blast hurt his ears because the windows were down. (Tr. 35).

On March 7, 2006, one of the drivers in Claimant's convoy hit an IED and lost part of his hand. Claimant assisted in recovering the truck, which was "pretty blown up." (Tr. 36).

With respect to armor on vehicles, Claimant testified: "for the first 10 months I drove there, we drove all vehicles with no armor, so we were very susceptible to a blast. And then in my last two months there we actually got in some new trucks that were up-armored, and we felt fairly good about those until a couple days later one of our guys got really injured ... we found out that the weakness ... of that truck and the armor was in the door panels. So we had one of our drivers that got sent back home, got blown up pretty bad by an IED blast." On the convoy trips, drivers were supplied with vests and Kevlar helmets. (Tr. 37). Claimant further testified that "some of the guys would actually get extra bulletproof vests and stuff and try to take the plates out and either put them in the side panels or the doors or maybe lay them in the floor or something. But we weren't issued or authorized anything like that, any extra protection in our trucks at all." (Tr. 37-38). He stated he was not allowed to be armed. (Tr. 38).

Claimant testified he worked seven days per week and "pretty much" averaged one-hundred hours per week for the first six to eight months he was in Iraq. In response to whether Claimant got R&R every three months, he stated: "That's a little bit of a sore subject. We had access to R&Rs, but when you'd try to take them it didn't always work out. But in theory you had access to three R&Rs, I believe is what the company mandated, in a course of a year." Claimant testified he eventually took two out of the three R&R periods. (Tr. 38). Claimant stated he went to Thailand for approximately ten days. (Tr. 39).

Claimant's marriage of approximately eight years ended shortly before going to Iraq. He has an adult daughter from a previous marriage. (Tr. 39).

Claimant testified he went "outside the wire" approximately 130 to 140 times while in Iraq. He testified he was "scared every day" he was in Iraq. (Tr. 40).

On April 14, 2006, Claimant was driving back to TQ from Fallujah as the bobtail driver. (Tr. 40). A Marine gun truck slowed down, but one of the trucks in the convoy did not notice it and "slammed into the seven-ton gun truck and actually flipped it over on his side, ejecting and actually killing the gunner and then injuring the other two occupants in the truck also." (Tr. 40-41). Claimant was the first person on the scene. Claimant testified: "After I checked on my driver, I went back, and actually the driver, a female driver, they had pulled her out and just laid her on the road bed there, and I actually kind of took her vest and helmet, propped her up, gave her a little bit of an angle. And I just kind of held her up in my lap to try to comfort her. She was pretty delirious and banged up." (Tr. 41-42). Claimant stated a Marine gunner died as a result of his injuries, and Claimant attended the memorial service. (Tr. 42).

On May 22, 2006, one of the trucks in Claimant's convoy was hit by an IED with an incendiary device that created a fireball. The blast and fireball burned the driver and his truck. Claimant testified he knew the driver. Claimant testified he knew all of the drivers "very well," as they would eat together and sleep in the same area over the course of the year. (Tr. 42-44).

On another occasion, one of the trucks in the convoy hit a concrete barrier and, as Claimant was helping in the recovery of the vehicle, mortar fire came within "a couple hundred yards" of Claimant. (Tr. 44-45).

In late June or early July 2006, Claimant was driving with a convoy, along with an Army escort, to Kuwait. (Tr. 66). An IED exploded and "decimated" the lead Humvee. Two out of the three occupants in the vehicle were killed. (Tr. 67). Claimant stated the convoy "got very lucky in that almost at that same instance a British convoy or British patrol was coming up from the other side, so they actually—they saw the blast and everything, so they kind of spread out and did cover and did a perimeter for us. So I think that actually staved off an attack that day, because we would have been undercovered, and they would have taken us all out with not much problem at all." (Tr. 67-68). Claimant stated every base he was at in Iraq received incoming mortar and/or rocket attacks. (Tr. 69).

One night in July 2006, Claimant was driving the fifth truck in the convoy. He testified the fourth truck in the convoy got on the radio and reported taking on small arms fire. He then heard the sixth truck in the convoy report taking on small arms fire. (Tr. 45-46). Claimant testified he felt like he "got lucky that night, for sure." (Tr. 46).

Claimant arrived back in Georgia on November 2, 2006. (Tr. 47). He testified "it was just good to be home, you know, to be out of that environment and just, you know, the feeling that, you know, you were in a safe environment and you didn't have to—you know, you didn't have to worry about every second if something was going to happen to you or not. So it was very comforting just to know that you were back in the States again." However, Claimant also noticed that his patience and tolerance levels were not very good. He found himself getting angry and snapping at family members—something he had never done in the past. He was "snappy and irritable and grumpy." (Tr. 48). Claimant testified he "basically couldn't get to sleep." He elaborated: "I just didn't want to—it's like my body wouldn't slow down or unwind enough for me to get to sleep, so I had to lay in bed and toss and turn." Claimant stated he experienced sleeping problems in Iraq at times—normally he would return from driving and "crash out," but other times would be "so hyped up and excited" that he could not sleep. (Tr. 49). At the time of formal hearing, Claimant testified he could sleep well for a week or so and then not be able to sleep for a two to three day period. (Tr. 50).

With respect to his decision to get psychological help, Claimant testified: "That was probably in about February [2007]. And when I really realized I had a problem, I was driving one day kind of outside of town on a little two-lane country road, and I didn't think—I was kind of looking around thinking, wow, it's good to be back in the United States and, you know, the good greenery, because in the desert it's all brown and dirty and flat." He continued: "So I was just kind of admiring just being in some trees and stuff again. Well, I got ready to go around a curve, and right as I got into—before I got into the curve, I looked and realized that I was straddling the yellow line in the middle of the road. And I thought, well, this is stupid, you know, I'm back home. But yet in the desert you always drove in the middle of the road," because it was the

safest place to drive. (Tr. 51-52). Claimant stated he barely missed a head-on collision with another car and realized he was a danger to himself and other people and that he had "better talk to somebody" to see if he could "find out what was going on." (Tr. 52-53).

Claimant's brother-in-law, a Vietnam veteran with "stress-related" issues, recommended a psychiatrist, Dr. Christy, to Claimant. (Tr. 53). Dr. Christy was not taking any new patients and referred Claimant to Dr. Kittrell, a psychologist. (Tr. 53-54). Claimant has an undergraduate degree in psychology, but has never done any work in the field. (Tr. 54). Claimant's first seven or eight presentations to Dr. Kittrell were covered through employee benefits. (Tr. 54-55). Claimant initially presented to Dr. Kittrell early to middle February 2007 and went "a couple times a month," but then scaled back to "maybe every other month." (Tr. 55). Claimant testified his treatment with Dr. Kittrell had been "very helpful." (Tr. 56). When asked whether Dr. Kittrell had opined Claimant was at maximum improvement, Claimant testified: "No. He says that I still got a long way to go. He said that this could take-it will take years before I get ... back to where he thinks I need to be." (Tr. 56-57).

Claimant testified shortly after Dr. Kittrell issued a June 18, 2007 evaluation in which he opined Claimant should not drive a truck or seek employment until symptoms decreased, Claimant attempted to work. Claimant attempted truck driving for approximately five weeks. (Tr. 57). He stated that Dr. Kittrell "was right, I got to the point that I couldn't do it anymore. It just-the anxiety levels and stuff were so high, and there's just the sights and the sounds and the feel of being back in the truck just brought back ... so many of those memories from the desert that I'd get to the point I'd start to walk up and get in a truck I'd break out in a cold sweat and start shaking." (Tr. 58). The trucking company for which Claimant worked was AXLINE Trucking, a division of Panther Expedited Trucking. (Tr. 58). Since attempting trucking again, Claimant has "worked a couple part-time things with a company that does internal pipeline coating." Regarding the pipeline coating job, Claimant testified: "Other than the physical part of that wears me out, I'm old. So other than that that I can do everything else." Claimant elaborated: "But it hasn't been easy, I'll put it that way." (Tr. 58).

Claimant did not think he could return to Iraq and drive a truck. (Tr. 58). As to why not, he stated: "Well, I don't think there's enough money you could pay me, for one, and I don't think there is enough people that could whip my butt to get me to go back and put me in that environment anymore, to be honest with you. I just—I couldn't do it. I couldn't take it." (Tr. 59).

When asked whether Claimant had noticed any unusual reactions to loud noises upon his return from Iraq, Claimant testified: "Oh, yeah. You know, I'm totally paranoid. If any loud noise goes off around me, I'm ducking or getting under something, no matter—without bothering of where it came from and what it is. I just—you know, I react instead of wait and see what's going on like most normal people do." (Tr. 59). Claimant testified the day before formal hearing he was at a restaurant and a balloon popped and he "dove under the table and was shaking." (Tr. 59-60). A few days before the restaurant incident, Claimant was driving next to a car that blew a tire, and the noise "freaked" him out. (Tr. 60). He stated he started swerving, shaking, and hyperventilating. (Tr. 60-61).

Claimant testified before going to Iraq, his hearing "was okay. It was not the greatest, but it wasn't that bad." Claimant stated he had no ringing in his ears prior to going to Iraq. When Claimant went to Thailand on R&R at the end of March 2006, he purchased hearing aids, at a cost of 6,800 bhat (Thai currency) or \$1,400.00-\$1,500.00, Claimant approximated. (Tr. 61-62). Claimant was not wearing his hearing aids at formal hearing and testified he did not need them in quiet environments but wore them in environments with loud background noise. (Tr. 62-63). When asked whether he thought his hearing loss/problems had to do with exposures in Iraq, Claimant testified: "I believe the loudness of the noises and the close proximity of some of those loud noises over there caused that." (Tr. 63-64).

Claimant testified he had never been to a psychologist, psychiatrist, or marriage counselor prior to going to Iraq, nor had he ever had any prescription for any antidepressant. He stated: "Before I went over there, I was, you know, pretty easygoing, you know, just kind of go through life, enjoy being here, you know, that type of scenario." Claimant stated since his return from Iraq, his "whole attitude has changed." He elaborated: "In fact, I got a bad attitude now ... I don't like being around people. I don't want to talk to people, I don't want to listen to anybody's stuff ... the further away I am from people the better off I am, you know." (Tr. 64). Claimant

further stated: "I just—you know, relationships, I don't deal—you know, I don't deal with females now the same way I did. Like I said, my temper is short. I yell and get upset and go off for no reason at my family, and I just—I don't like to expose people to that. And I never was like that before." Claimant stated he was "very isolated." (Tr. 65).

Regarding sales work, Claimant testified that "you have to go out and talk to people. And that's why I said I don't want to be in sales, because I don't want to talk to people because I'm afraid I'd tell them where to go, you know, as opposed to making somebody else mad and, you know, dealing with anything else from ramifications from that, I'd just as soon not deal with it." (Tr. 65). He stated he needs "to find something that I can do, and I'm hoping that, as I start to look, it will be something that's home-based and quiet, I'm hoping. That would be—at this point, that would be something I probably could do. Like I said, the less exposure I have with people, probably the better off I'd be now." (Tr. 65-66).

On cross-examination, Claimant testified he was happy and proud to have done his job in Iraq. (Tr. 71-72). Being in Iraq was an adventure and his job was exhilarating and triggered an adrenaline rush. (Tr. 72). Claimant testified his earnings for his year in Iraq were approximately \$104,000.00 to \$106,000.00. (Tr. 73). He enjoyed working with the employees with whom he worked closely. (Tr. 74). Upon his return from Iraq, he "felt at times more comfortable in that war environment" than he did at home. (Tr. 76). Claimant testified he missed the adrenaline and would "drive my car 140 miles an hour down the freeway to get a little bit of that back." (Tr. 77).

Toward the end of his time in Iraq, Claimant stated his "coping mechanism was, I built up a numbness to everything. So toward the end I was so numb that, no, I didn't get that pure exhilaration that I did earlier on. When you hear the first couple of, you know, bullets go whizzing through your truck, you go, ha, this is kind of cool it didn't hit me." He continued: "After a while you go, this ain't so cool anymore. You just—you know, you don't deal with that aspect of it. And you tone your senses down. You become numb. I would say I was like a vegetable when I came out of there. I had no emotions and no feelings." (Tr. 77).

Claimant testified the town in which he lives in Georgia is a "bedroom community" of approximately fifty-thousand people. (Tr. 77). Regarding his daily activities upon his return from Iraq, Claimant stated: "My days are pretty uneventful. I don't do that much when I get up, just get up, and depends on what's going on. I try to do a little exercise or calisthenics or something. I try to run sometimes. I try to stay physically fit. I'll maybe spend some time on the computer or whatever, or reading, and that's pretty much about it." (Tr. 78-79).

Regarding what steps he takes on the average day to get himself back into the workforce, Claimant stated: "I'm not sure. I guess part of that is trying to figure out what I want to do, what I want to be in the workforce, and what I'd be capable of doing. I don't necessarily go out on, like, a job interview just to be going to have a job, per se. You know, I'm trying to decide what I want to do with myself, and something I can do. And like I said, it would be—you know, my best-case scenario of a work environment would be working out the home, maybe on the computer doing some kind of business or something like that." (Tr. 79-80). He agreed that he had not taken any tangible step to re-enter the workforce. (Tr. 80).

Claimant testified he can drive a car as needed. He stated his lifestyle is "boring by choice." (Tr. 81). Claimant does not have problems negotiating an airport and flying by himself. (Tr. 82-83). Claimant invested a portion of his earnings from Iraq and manages the investments himself. (Tr. 84-85).

Claimant's perception was that Employer's management was getting "more stupid over time," which was "pissing" him off, and drove him to his decision to not extend his contract. He testified he had a "belligerent" attitude towards management, which escalated over time. (Tr. 86-87). Claimant stated he left Iraq of his own volition and did not consider himself disabled at that time. (Tr. 87). Claimant testified he was mentally and physically capable of performing his duties as convoy commander in the days and weeks prior leaving Iraq. Claimant elaborated: "I was probably the same vegetable the day I went home as my last day over there. But, like I said, I was out of that environment, so, you know, I didn't have to think about, you know, the responsibilities at that point in time." (Tr. 88). Claimant testified when he left Iraq, he intended on continuing his trucking career in the United States. (Tr. 93).

Claimant testified before he left for Iraq he noticed he would have difficulty hearing conversation speech when there was background noise, but not to the extent he did upon his return from Iraq. (Tr. 94). He stated he had not sought medical treatment for the ringing in his ears. (Tr. 95).

Claimant testified he understood his present condition to be a result of his cumulative experiences in Iraq. When asked whether he could isolate a specific, significant traumatic event that was key, Claimant responded: "I think they all combined together closely, one after the other and the other. I think it was the whole culmination of that year spent over there in that environment. I mean, some were more disheartening to me than others." (Tr. 98). He continued: "And, like I said, you know, you see a young kid that's, you know, in their early twenties laying there dead, that's a sad thing, they don't get to continue their life on. But, you know, the most traumatic to me was the one where our driver, because he didn't get enough sleep, you know, ran into and turned over and killed a Marine. You know, to me, that's a total loss of life just because somebody's too tired in that environment. It's sad." (Tr. 99). Claimant testified that as a bobtail driver he assisted with wounded people but had never handled a dead body. (Tr. 100).

## **The Medical Evidence**

### **Dr. Gary Kittrell**

Dr. Kittrell was deposed by the parties on January 11, 2008. Dr. Kittrell is a psychologist and holds four degrees from Georgia State University: a B.S. in psychology; a Master's in school psychology; a Ph.D. in psychology (1991); as well as a specialist's degree in forensics in psychology. (CX-12, pp. 4-5). Dr. Kittrell has worked in schools and the juvenile justice system, has been the director of court services in Clayton County, Georgia, as well as a community treatment center in that county, and held various positions in education, such as supervising school psychologists and doing forensics. (CX-12, pp. 5-6). He has been in private practice for approximately fifteen years—approximately half his practice is clinical and half is forensic. Dr. Kittrell is a member of the American Psychological Association, the Georgia Psychological Association, as well as the American College of Forensic Examiners. (CX-12, p. 6).

Claimant first presented to Dr. Kittrell on February 14, 2007, and has seen Dr. Kittrell approximately nine times. (CX-12, p. 7). Dr. Kittrell testified Claimant "presented with symptoms of severe stress reaction." (CX-12, pp. 7-8). Claimant complained of symptoms associated with job stress and inability to function on jobs or in the community. Claimant was "sort of isolating himself and was over-anxious and depressed." Dr. Kittrell stated Claimant "didn't have a significant history of that prior to experiencing a particular job in Iraq as a truck driver and was concerned that he was a whole lot different than he used to be and was wanting to get back to his original functional self." (CX-12, p. 8).

Dr. Kittrell's eventual diagnoses, based on the Diagnostic and Statistical Manual of Mental Disorders Fourth Edition (DSM-IV) criteria, were post-traumatic stress disorder and major depressive disorder, moderate recurrent. (CX-12, p. 13; EX-5, p. 1).

In a U.S. Department of Labor Work Capacity Evaluation, dated June 18, 2007, Dr. Kittrell opined Claimant was not competent to perform his usual job, as "PTSD [and] panic will render him incapable of driving a truck." He also stated he did not recommend employment for Claimant until Claimant's symptoms decreased. (EX-5, p. 4).

In his testimony, Dr. Kittrell discussed the various DSM-IV criteria for PTSD and explained how Claimant met each criterion. (CX-12, pp. 13-19, 68-77). Dr. Kittrell testified he found that Claimant "did fit criteria for post-traumatic stress disorder as indicated by fitting both criteria under section A, 'The person experienced, witnessed, or was confronted with an event that involved actual or threatened death or serious injury or a threat to their physical integrity of-of themselves or others.' And number two under section A was, 'The person's response involved intense fear, helplessness, horror involved with that negative-' " (CX-12, pp. 13-14). When asked what Claimant had experienced that would qualify him for the criteria, Dr. Kittrell responded: "Well, he was a truck driver in Iraq. He-I believe I remember him saying he was over 100 missions outside the green zone, which is supposed to be more safe than not." He continued: "And he was outside of that area in hostile territory there and experienced a lot of threat involved with that, some explosions, some people getting hurt, various incidents that he reported that certainly would fit the criteria for him being at personal risk and-and others around him at personal risk-and folks getting hurt." (CX-12, p. 14). Dr. Kittrell stated he

had had an opportunity to review Dr. Griffith's report, which he described as "superficial." When asked whether it is necessary under the DSM-IV criteria for the person killed to have been a close friend or relative, Dr. Kittrell responded: "It's not. Not only is it not necessary that they be any—in any way connected with you, it's not necessary for someone to die. It's only necessary for the person to subjectively experience a significant threat based on negative environmental conditions." (CX-12, p. 15).

With respect to Criterion B, Dr. Kittrell opined Claimant fit all five criteria, where only one is necessary for a diagnosis of PTSD. (CX-12, p. 16). Regarding Criterion C, Dr. Kittrell explained how Claimant fit five of the seven criteria, and partially fit under a sixth, where fitting only three is required for the diagnosis of PTSD. (CX-12, pp. 17-18). With respect to Criterion D, Dr. Kittrell opined that Claimant fit all five criteria, when only two are needed for a diagnosis of PTSD. (CX-12, pp. 18-19).

When asked whether he felt comfortable with his diagnosis of PTSD, Dr. Kittrell testified Claimant would "jump right out of the book. I'm surprised his picture's not by the definition here." (CX-12, p. 19). When asked whether he had taken any steps to rule out symptom magnification, Dr. Kittrell stated: "Well, I always do that—in treatment. I do that formally when I'm doing forensics. This is not a forensic case. So I do not give formal instruments. I use my clinical judgment. And in my judgment, he's not feigning symptoms. Now, it is very common for PTSD patients to exaggerate their feelings, because that's what it is in definition." Dr. Kittrell continued: "Basic definition, post traumatic stress disorder, is an exaggeration of an emotional response to negative environmental conditions. So naturally, they're going to exaggerate their symptoms." (CX-12, p. 20).

Dr. Kittrell addressed a November 2, 2007 MMPI-2 report, administered by Dr. Griffith and scored by Dr. Rubenzer, and opined there was "no doubt" the MMPI-2 supported his diagnosis of Claimant. (CX-12, pp. 20-22). Dr. Kittrell stated the MMPI-2 is approximately 550 questions and is "a very poor test" for PTSD patients. He elaborated: "I rarely use it, because they simply by definition can't go through that much without getting

fidgety and without stressing out over it and—and thinking that, you know, somebody's up to something with the questions and all kinds of reasons. He stated Claimant "did what most PTSD patients would do, which is to get squirrely towards the end of the test." (CX-12, p. 21).

Dr. Kittrell opined Claimant's MMPI-2 results were very consistent with PTSD. He stated the report "mentioned the client is overwhelmed by anxiety, tension, depression, feels helpless, alone, inadequate, insecure, believes life is hopeless, nothing's working out. And he has trouble concentrating, making decisions. He's disorganized. He has elevated stress level. He tends to overreact to even minor stress and he may show rapid behavioral deterioration. That's what PTSD does to somebody." (CX-12, p. 21). Dr. Kittrell continued: "Under mental health considerations, it mentioned that he has severe anxiety-based disorder. That's what PTSD is. And schizoid features, I believe they mentioned, which is very common for PTSD patients. They mentioned under personal injury considerations individuals with the pattern in personal injury cases reporting strained, traumatic situations in their recent past. Well, that—that's what PTSD is. 'He appears to be anxious, tense, nervous, depressed, unhappy, and sad.' That's what PTSD is. 'Feels vulnerable and overreacts.' So the MMPI, what was interpretable from it, is a good working definition of PTSD." (CX-12, pp. 21-22).

Dr. Kittrell discussed his diagnosis of major depressive disorder. He stated Claimant had reported improvement in his depression, but still considered Claimant to have a "moderate" level of symptoms of depression. (CX-12, p. 23).

When asked his opinion as to whether Claimant's psychological condition had worsened as a result of his exposures in Iraq, Dr. Kittrell responded: "That would be my perception, that the job in Iraq was certainly not good for him. ...I think it had a negative impact on him. I don't think there's any doubt about that." (CX-12, pp. 23-24).

Dr. Kittrell stated he had worked with "probably a couple thousand" PTSD cases, and treatment "really depends on the case." (CX-12, p. 24). He referred Claimant to Dr. Asad Naqvi, a psychiatrist, who prescribed an antidepressant, Lexapro. (CX-12, p. 25).

Dr. Kittrell stated Claimant had a strong desire to work. He recommended Claimant avoid truck driving and Claimant not return to his former position in Iraq. He stated Claimant went against his recommendation and took a job truck driving, which "did not work out well at all" because Claimant "was having over-response situations, you know, even to the extent I worried about road rage for him. Little things would just ignite memories, flashbacks, agitation, and verbal aggression." Dr. Kittrell stated "it was an exacerbation of his symptoms for him to try to go back to work when he did." (CX-12, p. 26). Dr. Kittrell testified PTSD is a "long-term type of illness" and requires years of ongoing treatment. He stated he has considerable experience in dealing with people with PTSD and usually has "a few" patients with PTSD who have come out of war zones at all times. (CX-12, p. 27).

Dr. Kittrell testified he does not mandate to his patients whether they work or not but, rather, makes his recommendation or input. He supports his patients "either way they go unless I think they're going to be a harm to themselves or others. Regarding Claimant, Dr. Kittrell stated: "He's not in the category where he's going to be suicidal or homicidal. But he could-if-if on a job, you know, if he has a flashback or-or dissociative experience, then he could end up getting hurt or hurting others." He continued: "And so I don't highly recommend that he do any work involving any kind of machinery or anything like that right now. And-and I don't think he's going to be able to sell stuff either because of his agitation." Dr. Kittrell opined, "for a while," it would be better if Claimant did not have a job dealing with the public. (CX-12, p. 28).

On cross-examination, Dr. Kittrell testified he currently had three workers' compensation patients. (CX-12, p. 32). Dr. Kittrell stated there were a number of instruments to test for PTSD, and the most frequently used were the "impact on events scale, the civilian Mississippi scale, which focuses on symptoms of PTSD, post-traumatic cognitions inventory, PTSD checklist, civilian and military, Perdue PTSD scale revised, a short screening scale for PTSD, traumatic events questionnaire." (CX-12, pp. 34-35). Dr. Kittrell testified he considered the PTSD checklist for military as "one thing that's in my head," but did not formally administer the test to Claimant. (CX-12, p. 35). Dr. Kittrell stated he does not need test instruments in his clinical work because of his ability to gather information regarding diagnoses over the course of treatment. (CX-12, p. 36). He testified Dr. Griffith would have been incorrect in utilizing anything in his head for the purposes of evaluating

Claimant because "he's not in a clinical relationship and he needs to get objective data through psychological testing." (CX-12, pp. 37-38). Dr. Kittrell further opined that Dr. Griffith, as a psychiatrist rather than a psychologist, was not qualified, without additional training, to do psychological testing or a full-scale psychological evaluation; he stated psychiatrists are qualified to address symptoms and medication. (CX-12, p. 38).

Dr. Kittrell testified PTSD involves exaggeration in that patients feel "so intensely disturbed when they're not in danger," and what makes PTSD a disorder is that patients cannot control such exaggeration. (CX-12, p. 41). In Dr. Kittrell's opinion, Dr. Griffith was "way off base" in finding Claimant had a character disorder because Claimant does not fit the criteria for a personality disorder. (CX-12, p. 54). Dr. Kittrell stated Dr. Griffith's report was superficial in that one interview and one test is not considered a full assessment according to the American Psychological Association. (CX-12, pp. 54-55).

Dr. Kittrell agreed that he had handled approximately three civilian contractor cases, only one of which, other than Claimant, was a PTSD case for a contract employee with workers' compensation available coming out of a conflict. (CX-12, p. 63).

#### **Dr. John Griffith**

Dr. Griffith was deposed by the parties on April 8, 2008. He is a board-certified psychiatrist and pharmacologist. (EX-28, pp. 4, 15-16). In the past ten to twenty years, ninety-plus percent of his practice has been in psychiatry as opposed to pharmacology. (EX-28, p. 13). In addition to his medical training at the University of Tennessee and his service as a psychiatrist in the United States Air Force, Dr. Griffith has held a number of academic posts and is currently on the volunteer faculty at the University of Texas. (EX-28, pp. 11-13). He has authored numerous contributions to medical literature, but nothing on the subject of post-traumatic stress disorder. (EX-10, pp. 4-8). Dr. Griffith was affiliated with the Veterans Administration between the years of 1965 to 1986. (EX-28, p. 5). He has either treated or evaluated a "considerable number" of post-traumatic stress disorder patients over the course of forty years. (EX-28, p. 9).

Dr. Griffith was examined regarding the diagnosis of PTSD. In a clinical setting, a patient is interviewed and symptoms are reviewed. If PTSD is diagnosed and compensation is involved, malingering must be ruled out. Dr. Griffith testified there was no standard procedure in ruling out malingering, but his practice is to administer the MMPI-2. (EX-28, pp. 7-8). Dr. Griffith stated PTSD is easily and often imitated. Therefore, in a forensic setting, it is incumbent upon an examiner to test for malingering. (EX-28, pp. 8-9).

Dr. Griffith testified a diagnosis of PTSD requires a severe, isolated triggering event. (EX-28, p. 16). He stated the severity of such event has to be the type that causes such instability that there is a persistent inability to interact socially, maritally, or in a work situation. (EX-28, p. 17). Dr. Griffith testified "near misses," no matter how dangerous, do not meet the criteria for a traumatic triggering event, nor do a string of near misses or chronic stress. (EX-28, pp. 21-22).

Dr. Griffith stated all of the symptoms of PTSD are subjective in nature and cannot be verified objectively. (EX-28, p. 18). The clinician also uses subjective means in evaluation, creating a two-tiered subjective mechanism leading to a diagnosis of PTSD. (EX-28, pp. 18-19). Dr. Griffith did not know of any test instrument that could either confirm or reject a diagnosis of PTSD. He explained that the MMPI-2 is a test that shows whether a person is exaggerating or lying and "can go a long way to validating a diagnosis," but should not be used to make a diagnosis. (EX-28, pp. 19-20). Dr. Griffith also stated the diagnosis of PTSD "is in much doubt. It's never been validated scientifically. And there are numerous papers criticizing it. It might just be another Gulf War Syndrome." (EX-28, pp. 17-18).

Dr. Griffith examined Claimant on November 2, 2007, and issued a preliminary report on December 23, 2007, as well as an addendum responding to Dr. Kittrell's deposition testimony on April 6, 2008. (EX-9; EX-28 (Exhibit 3)). He stated Claimant "was a gentleman throughout the interview, very cooperative, very smooth, and likable." (EX-28, p. 26). In evaluating Claimant, Dr. Griffith spent a total of five hours interviewing Claimant and administering the MMPI-2. (EX-28, p. 34). In his report, Dr. Griffith reviewed Claimant's life history and noted Claimant's father had died at age 34 in a motor vehicle accident. He also noted that after Claimant returned from Iraq he drove a truck, but stopped after five to six weeks because it

was "too stressful." Claimant complained of fear, anxiety, and flashbacks from being in a truck and smelling diesel. Claimant also caught himself driving in the middle of the road as he had been trained to do in Iraq. At the time of the interview, Claimant was unemployed and planned to locate a job that was not too physically demanding. Dr. Griffith noted Claimant admitted that "in terms of working he has a 'poor attitude.'" (EX-9, p. 2).

In his December 23, 2007 report, Dr. Griffith summarized Claimant's experiences in Iraq: "[Claimant] was recruited to go to Iraq in Oct 31, 2005. He attempted to say that he was not aware he would be in a war zone but admitted he was told that he risked being gassed, kidnapped, wounded, and killed. There he described eleven incidents involving IEDs, mortar fire, small arms fire, and motor vehicle accidents. He was asked to name the one that was most traumatic. He said that this was when a truck ahead of him accidentally struck another vehicle, causing a young soldier to be thrown to his death and some injury to a woman driver. He did not see the accident but was there as first aid was being administered to the young soldier and 'held the woman truck driver in his lap until she could be helped.' She was not seriously wounded and returned to duty. In this and the remaining incidents he mentioned he did not suffer bullet wounds, bullets to his cab, injury to truck or driver from an IED, or have his clothes blown off or dirt or gravel embedded in his skin secondary to explosive blasts." (EX-9, p. 2).

Dr. Griffith reviewed Claimant's treatment with Dr. Kittrell. He noted Dr. Kittrell diagnosed PTSD; major depression, recurrent, moderate; and cognitive disorder NOS (rule/out). Claimant stated his treatments with Dr. Kittrell were helpful, but he could not say how. Claimant took an antidepressant, Lexapro, but stopped after a short period. (EX-9, p. 3).

Claimant described his symptoms as being short tempered with family, a "don't care attitude," falling asleep, "stomach problems," ringing ears, and an inability to drive a truck while retaining the ability to drive a car. Claimant stated his symptoms have continued since his return from Iraq and have not improved. He also stated medicine "didn't help." (EX-9, p. 3).

Dr. Griffith's impression was: "depression, NOS;" "personality disorder, NOS. Consider passive dependent;" "lawsuit; change in living circumstance;" and "90/90." Dr. Griffith attached the report of the MMPI-2 administered on the date of examination. (EX-9, p. 4).

Dr. Griffith opined in his report: "The diagnosis of PTSD cannot be supported because the 'trauma' was insufficient for that diagnosis. [Claimant] had been made aware that he would be in a war zone and that casualties were likely. He was not a close friend or relative of the soldier who died. The other person injured was not seriously injured and returned to duty. [Claimant] by contrast, had no injuries during his entire time in Iraq. The tragedy was one that is often observed in civilian life but PTSD is not a recognized outcome. Moreover, Dr. Kittrell has not documented or rationalized his diagnosis of PTSD nor taken steps to rule out malingering or symptom magnification. This is required for a PTSD diagnosis made if a lawsuit is pending." (EX-9, p. 4).

Dr. Griffith also addressed Claimant's complaints of depression. He stated "Such 'depressions,' if they may be called that, are common among people who attempt to adjust to a mundane life after being in a different and often dramatic environment." He continued: "It may be reasoned that the same things that draw men and women into work in a war zone are the very factors they miss in civilian life. Nostalgia, however, is not an 'injury' or 'illness.' My reasons for this conclusion are: 1) The patient claims to be ill but avoids treatment recognized as effective in depression. 2) His symptoms do not improve with time. 3) He was slow to find a job, did not stay on the job, found another job but did not stay on that job either. 4) He once worked as a vocational rehabilitation counselor. 5) He has not tried to find a place of his own to live but lives with relatives and, 6) claims occupational 'disability.' Also noted is the fact that he attempted to claim that he was kept in Iraq against his will." (EX-9, p. 4).

Dr. Griffith concluded: "[Claimant]'s MMPI suggests 'a tendency to exaggerate symptoms, a situation that the assessment psychologist should consider in the evaluation.' However, the basic problem has to do with his personality. [Claimant] presents as a bright, civilized, educated individual but his MMPI described him as 'problematic' in terms of his personal

relationships in lacking basic social skills and being 'behaviorally withdrawn'... 'never establish lasting, intimate relationships.' This is reflected in [Claimant]'s life history of education, job changes, changing from a white collar to truck driving profession, multiple marriages, and lack of permanent domicile at 53." (EX-9, p. 5).

Dr. Griffith testified the MMPI-2 confirmed a diagnosis of depression. He opined Claimant "was depressed because he had gone from a battle situation to a civilian situation," which is a "quite common" occurrence. (EX-28, pp. 28, 33). Dr. Griffith characterized Claimant's depression as mild to moderate and not severe enough to be disabling. (EX-28, pp. 28, 30). He stated Claimant was depressed as a result of "the life he chose to lead." (EX-28, p. 38).

Dr. Griffith stated he is not an expert in scoring or interpreting the MMPI-2, and is "not a specialist in the sense that a clinical psychologist would be." (EX-28, p. 37).

When asked his opinion as to whether Claimant had PTSD, Dr. Griffith testified: "I don't think it's a viable diagnosis because he identified the most important stressor in his experience in Iraq as being in a string of trucks and learning that a truck ahead of him had collided with a military vehicle in front of it and turned it over and killed a young man, a young Marine, I believe, and injured the truck driver. And he checked on the driver that had, the truck driver that had hit the military vehicle and then checked the driver of the military vehicle. And he said he held her in his lap, which of course is not a good thing to do. And that just doesn't qualify for PTSD." (EX-28, p. 41). Dr. Griffith elaborated that PTSD "is a subjective sort of thing, and he identified the most, the greatest stressor as the automobile, or the truck accident. None of the people that he knew were friends or acquaintances. Since they were in the military, they are not supposed to fraternize. So that if you then say, well, would a lesser event have occurred, well, if it's a lesser than the one he's talking about, then of course it wouldn't qualify for PTSD." (EX-28, p. 42).

Dr. Griffith testified the MMPI report suggested that Claimant was exaggerating or adding to his symptoms. Claimant's "fake bad scale was close to significant but not quite." (EX-28, p. 43). In using the MMPI-2, Dr. Griffith compared the report to his psychiatric evaluation to test for veracity. (EX-28, p. 45). Dr. Griffith likened his use of the MMPI to an

orthopedic surgeon who obtains information from an MRI without knowing how the image is generated. (EX-28, pp. 45-46). Dr. Griffith disagreed with Dr. Kittrell's opinion that it was the nature of people with PTSD to exaggerate; he stated the "nature is to down play the symptoms, not to talk about the symptoms." (EX-28, pp. 47-50).

Dr. Griffith opined Claimant could and should attempt to engage in some kind of employment. (EX-28, p. 48). He evaluated Claimant for a cognitive disorder, but did not find any. (EX-28, pp. 54-55).

On cross-examination, Dr. Griffith recognized the DSM-IV is the standard for making a diagnosis in psychiatry. (EX-28, p. 57). He agreed Claimant had never been diagnosed or treated for any psychiatric condition prior to his going to Iraq. (EX-28, p. 58). Dr. Griffith agreed there are a number of tests used to determine whether someone has PTSD. (EX-28, pp. 89-90).

Dr. Griffith stated Claimant's complaints were consistent with the diagnosis of PTSD. (EX-28, pp. 69-70). He noted Claimant described a number of incidents he experienced in Iraq, including being shot at, and agreed being shot at can "sometimes" cause PTSD. (EX-28, pp. 73-74). He also agreed, by standard definition, an individual does not have to be touched in order to develop PTSD. (EX-28, p. 65). Dr. Griffith stated Claimant saw someone killed and saw the body. (EX-28, p. 74). He also testified seeing someone blown up in front of you can cause extreme emotional distress. (EX-28, p. 67).

Regarding the MMPI-2, Dr. Griffith stated he did not know what either the "FP" or the "PK" scales were and that he was not an expert in MMPI-2 interpretation. (EX-28, pp. 76, 78-79).

Dr. Griffith stated he did not mention the fake bad scale at all in his report; he stated he mentions the fake bad scale in his reports if the score is elevated. (EX-28, p. 98). Dr. Griffith stated Claimant "just barely" passed the fake bad scale. (EX-28, p. 103). He stated Claimant met all criteria in the Department of Veteran's Affairs' definition of PTSD except for the trauma element. (EX-28, pp. 132-133). Dr. Griffith acknowledged that the fact that Claimant lost his father when he was seven years old could make him more sensitive to vehicle crashes. (EX-28, p. 168). He stated that repeated exposure to stress may predispose one to PTSD, but there still must be at least one episode of severe trauma. (EX-28, p. 191).

Regarding whether Claimant met the DSM-IV definition of a personality disorder, Dr. Griffith testified: "Might not have, he's not a, how would I put it, he's not a textbook personality disorder by any means, he's got a lot of good qualities." (EX-28, p. 155). He stated that if there was no personality disorder, it would not change his diagnosis of depression. (EX-28, p. 213). Dr. Griffith opined Claimant's personality disorder was an impairment, in that Claimant "can't decide what he wants to do," but was not disabling. (EX-28, p. 214).

Dr. Griffith testified the MMPI-2 indicated Claimant was not lying. (EX-28, p. 201). He stated a person can have symptoms of PTSD without having PTSD, because they never experienced the requisite initial trauma. (EX-28, p. 205). Dr. Griffith testified he had not diagnosed Claimant as a malingerer or malingering nor had he ever accused Claimant of malingering. (EX-28, p. 208). He explained that "malingering is where a person invents symptoms for the purpose of gain, either monetary or to get out of a difficult situation. Exaggerating is where one starts naming symptoms that they might have had, but they might have been sometime ago..." (EX-28, p. 231).

### **The Vocational Evidence**

No vocational evidence was presented in this matter aside from Claimant's pre- and post-injury work history. In his answers to Employer/Carrier's interrogatories, Claimant stated he worked for Axline Trucking between June and July 2007, earning approximately \$850.00 per week. Claimant was also employed on a "part-time," "job by job basis" performing internal coating work on pipelines with Intra Coat Pipeline Services between the dates of July 20 and July 27, 2007 as well as August 13 and August 23, 2007, earning approximately \$975.00 per week. (EX-11, p. 8).

### **The Contentions of the Parties**

Claimant avers his psychological condition has worsened as a result of his work in the zone of special danger. Specifically, he asserts he has post-traumatic stress disorder, depression, and possible cognitive problems as a result of his exposures in the zone of special danger. Claimant further argues his hearing worsened as a result of his exposures in the zone of special danger and he should be granted Section 7 benefits and reimbursement for his hearing aids. Claimant contends he is entitled to temporary partial disability benefits from June 18, 2007 to present and continuing.

Employer/Carrier contend Claimant is not disabled as he does not suffer from post-traumatic stress disorder and his depression is not severe enough to keep him from working. If it is found that Claimant suffers a compensable injury, Employer/Carrier submit Claimant is partially disabled and his post-injury employment establishes his residual earning capacity. Employer/Carrier further argue Claimant's reasonable and necessary medical care was discharged through an employee assistance program and no further care is needed. Finally, in the event compensation benefits are awarded to Claimant, Employer/Carrier assert Claimant's average weekly wage should be based upon wages Claimant earned while in Iraq **as well as** wages earned before and after he was in Iraq.

#### IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. 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).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved

adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

#### **A. The Compensable Injury**

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that 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 or psychological 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. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9<sup>th</sup> Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

## **1. Post-Traumatic Stress Disorder**

The DSM-IV describes the essential feature of PTSD as the "development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person." (Diagnostic Criteria for 309.81, PTSD, p. 424).

Characteristic symptoms resulting from extreme trauma include persistent re-experiencing of the traumatic event, persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness, and persistent symptoms of increased arousal. Traumatic events that are experienced directly include, but are not limited to, military combat, violent personal assault, being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents, or being diagnosed with a life-threatening illness.

Witnessed events include, but are not limited to, observing the serious injury or unnatural death of another person due to violent assault, accident, war, or disaster or unexpectedly witnessing a dead body or body parts. Traumatic events can be re-experienced in various ways, commonly the person has recurrent and intrusive recollections of the event or recurrent distressing dreams during which the event is replayed. Stimuli associated with the trauma are persistently avoided. Id.

A differential diagnosis requires that malingering be ruled out in those situations in which financial remunerations, benefits eligibility and forensic determinations play a role. Id., at 427.

## **2. Witness Credibility**

I was impressed with Claimant's testimony, which I found to be sincere and credible. His testimony at formal hearing as well as at deposition regarding his experiences in Iraq and symptoms is consistent with his presentations to both Drs. Kittrell and Griffith. Further, as discussed below, neither Drs. Kittrell nor Griffith nor Claimant's MMPI-2 results suggest Claimant is malingering. Accordingly, I credit Claimant's testimony.

### 3. Claimant's Prima Facie Case

In the present matter, Claimant testified about various accidents and attacks upon his convoy during operations. Claimant recalled one occasion in which a mortar landed approximately fifty yards from his truck. On another occasion, an IED exploded directly in front of his vehicle. Claimant also described other IED attacks in which other drivers in his convoy were injured. Claimant recalled a situation in which the vehicles directly in front and behind him in the convoy received small arms fire; Claimant's vehicle, however, was not hit. Claimant also recalled an accident in which a truck slammed into a Humvee, injuring the driver of the truck as well as Marines in the Humvee. One of the Marines died as a result of his injuries. Claimant was the first person on the scene and held the driver of the Humvee in his lap in an effort to comfort her as she was "pretty delirious and banged up." Accordingly, I find he was exposed to sufficient trauma to support a presumptive **prima facie** case.

Claimant described his symptoms as fear, anxiety, flashbacks, trouble sleeping, being short with family members, hypersensitivity to loud noises, and emotional numbness and isolation. On one occasion following his return to Georgia, Claimant caught himself driving in the middle of the road as he had been trained to do in Iraq. Based on his subjective presentation, Claimant's treating psychologist, Dr. Kittrell, diagnosed Claimant with PTSD. While he did not perform any objective diagnostic testing, he did review the November 2, 2007 MMPI-2 and rendered an opinion on a subjective basis that Claimant was not malingering.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical and/or psychological harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. 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).

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on or before October 31, 2006, his last

day of exposure to his working conditions, and that his working conditions and activities on that date and before in Iraq could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

#### 4. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical and/or psychological harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT) (5<sup>th</sup> Cir. 1998); 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). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); 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").

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). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which

aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5<sup>th</sup> Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5<sup>th</sup> Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

I find Employer/Carrier have rebutted Claimant's **prima facie** case. Dr. Griffith opined the events urged by Claimant as a basis for his PTSD condition do not conform to the DSM-IV. He maintained Claimant does not have a triggering event of sufficient severity to meet the criteria of PTSD. While Dr. Griffith diagnosed depression, he opined the depression was not disabling and Claimant could and should engage in meaningful employment. Accordingly, since I have found Claimant's **prima facie** case rebutted, I must consider and weigh all of the evidence of record.

#### 5. Weighing All the Evidence

If an administrative law judge 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. 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); Director, OWCP v. Greenwich Collieries, supra.

Based on the record as a whole, I find and conclude Claimant established that he suffered a psychological harm or injury as a result of his employment with Employer in Iraq. Specifically, I find and conclude Claimant suffers from depression and post-traumatic stress disorder. Claimant testified he had never been to a psychologist or psychiatrist nor had he taken antidepressants prior to going to Iraq. He credibly testified about various accidents and attacks upon his convoy during operations. Claimant stated that toward the end of his time in Iraq, he built up a "numbness to everything" as a coping mechanism to stress. When Claimant left Iraq, he was "like a vegetable" and "had no emotions and no feelings." Claimant described his symptoms upon his return from Iraq as fear, anxiety, flashbacks, trouble sleeping, being short with family members, hypersensitivity to loud noises, and emotional numbness and isolation. He also caught himself driving in the middle of the road as he had been trained to do in Iraq.

Claimant presented to his treating psychologist, Dr. Kittrell, with symptoms of "severe stress reaction." Dr. Kittrell's eventual diagnoses, based on the DSM-IV, were PTSD and major depressive disorder, moderate recurrent. On June 18, 2007, Dr. Kittrell opined Claimant was not competent to perform his usual job as a truck driver and did not recommend employment for Claimant until his symptoms decreased. In his deposition testimony, Dr. Kittrell discussed the various DSM-IV criteria for PTSD and explained how Claimant met each criterion. Regarding the traumatic events experienced by Claimant in Iraq, Dr. Kittrell testified Claimant was "...in hostile territory there and experienced a lot of threat involved with that, some explosions, some people getting hurt, various incidents that he reported that certainly would fit the criteria for him being at personal risk and--and others around him at personal risk--and folks getting hurt." He opined Claimant's MMPI-2 results were very consistent with PTSD. Regarding malingering, Dr. Kittrell distinguished between treatment and forensic cases. He stated that he performs objective diagnostic testing in forensic cases but always considers symptom magnification in treatment and uses his clinical judgment to rule out malingering. In Dr. Kittrell's judgment, Claimant was not feigning symptoms.

Dr. Griffith, Employer/Carrier's evaluating physician, diagnosed Claimant with depression and personality disorder; he rejected Dr. Kittrell's diagnosis of PTSD. Dr. Griffith administered the MMPI-2 and stated Claimant "just barely" passed the fake bad scale. While Dr. Griffith testified the MMPI report suggested that Claimant was exaggerating or adding to his symptoms, he found the MMPI-2 indicated Claimant was not lying. Nowhere in either his testimony or his reports did Dr. Griffith opine Claimant was malingering. He testified the MMPI-2 confirmed a diagnosis of depression, but characterized the depression as mild to moderate and not severe enough to be disabling. While Dr. Kittrell considered a potential cognitive disorder, Dr. Griffith evaluated Claimant for such disorder and did not find any. Dr. Griffith opined Claimant's complaints were consistent with the diagnosis of PTSD, but stated a person can have symptoms of PTSD without having PTSD, because they never experienced the requisite initial trauma.

Dr. Griffith's basis for concluding PTSD was not a viable diagnosis was that Claimant did not experience sufficient trauma for such diagnosis. He testified "near misses," no matter how dangerous, do not meet the criteria for a traumatic triggering event, nor do a string of near misses or chronic stress. Dr.

Griffith concluded: "The diagnosis of PTSD cannot be supported because the 'trauma' was insufficient for that diagnosis. [Claimant] had been made aware that he would be in a war zone and that casualties were likely. He was not a close friend or relative of the soldier who died. The other person injured was not seriously injured and returned to duty. [Claimant] by contrast, had no injuries during his entire time in Iraq. The tragedy was one that is often observed in civilian life but PTSD is not a recognized outcome."

Dr. Kittrell rejected Dr. Griffith's conclusion that Claimant did not suffer sufficient trauma to meet Criterion 1A of the DSM-IV. When asked whether it is necessary under the DSM-IV criteria for the person killed to have been a close friend or relative, Dr. Kittrell responded: "It's not. Not only is it not necessary that they be any—in any way connected with you, it's not necessary for someone to die. It's only necessary for the person to subjectively experience a significant threat based on negative environmental conditions." I credit Dr. Kittrell's assessment. Claimant credibly testified regarding a number of traumatic experiences in Iraq that would meet the requirements of the DSM-IV. The record is unclear as to whether Claimant actually witnessed a dead body. However, it is clear that Claimant observed serious injury to others due to accident. He also directly experienced events involving his and others' physical integrity, as he was in convoys that took on mortar and small arms fire. I find Dr. Griffith was overly restrictive in his interpretation of the exposure criterion of the DSM-IV. Accordingly, I find and conclude the record as a whole supports Dr. Kittrell's diagnosis of PTSD. I further find malingering has been ruled out, as Dr. Kittrell's opinion on a subjective basis that Claimant is not malingering is supported by Claimant's objective MMPI-2 results. Accordingly, I find and conclude, based on the record as a whole, Claimant established he suffers from PTSD and depression as a result of his employment with Employer in Iraq.

## **6. Claimant's Hearing Loss**

Claimant contends his hearing worsened as a result of exposures to noise while in Iraq.

To establish an occupational loss of hearing under the Act, audiological evaluators "shall use the criteria for measuring hearing impairment as published and modified from time-to time by the American Medical Association in the Guides to the Evaluation of Permanent Impairment, using the most currently

revised edition of this publication." 20 C.F.R. Section 702.441(d). To determine hearing impairment, the AMA Guide requires that the evaluator:

- (1) test each ear separately with a pure-tone audiometer and record the hearing levels at (a) 500 Hz; (b) 1,000 Hz; (c) 2,000 Hz; and (d) 3,000 Hz;
- (2) total these four decibel values for each ear separately;
- (3) consult the appropriate table for percentage of monaural hearing impairment;
- (4) consult the appropriate table to determine percentage of binaural hearing impairment; and
- (5) consult the appropriate table to determine the impairment of the whole person.

Guides to the Evaluation of Permanent Impairment, p. 247 (5th Ed. 2001).

No such evaluation has been performed in this instance. While the LS-18 states Claimant suffered injuries to his hearing (CX-6), the joint stipulations (JX-1) do not specifically list hearing loss as an issue in this matter. Accordingly, I find and conclude the issue was not fully litigated and decline to make any findings on such issue.

#### **B. Nature and Extent of Disability**

Having found that Claimant suffers from a compensable injury (PTSD and depression), the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). 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." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological

impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). 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. 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). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. 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 Corporation, 25 BRBS 128, 131 (1991).

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

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. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

### C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., *supra*; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

No doctor of record has opined Claimant is at maximum medical improvement. Claimant testified Dr. Kittrell informed him it could take "years" before he was at maximum medical improvement. Accordingly, based on the medical evidence of record, I find and conclude Claimant is **temporarily** disabled.

In the June 18, 2007 U.S. Department of Labor Work Capacity Evaluation, Dr. Kittrell opined Claimant was not competent to perform his usual job, as "PTSD [and] panic will render him incapable of driving a truck." He also stated he did not recommend employment for Claimant until his symptoms decreased. Accordingly, I find and conclude Claimant has established that he is unable to return to his regular or usual employment as a truck driver due to his work-related injury and, therefore, has established a **prima facie** case of total disability.

### D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978). The claimant's obligation to seek work does not displace the employer's **initial** burden of demonstrating job availability. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986); Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Claimant contends the best evidence of his post-injury wage-earning capacity is \$975.00 per week—the weekly wage he earned while working at Intra Coat Pipeline Services. Employer/Carrier similarly assert Claimant is partially disabled at worst and his CONUS wage rate establishes his residual earning capacity. Dr. Kittrell restricted Claimant from driving trucks and Claimant testified he could not remain at his post-injury trucking job due to the effects of his PTSD. The position at Intra Coat Pipeline Services was on a part-time, job by job basis, and Claimant worked less than three weeks. Accordingly, I find and conclude Claimant's attempts to secure employment subsequent to his injury do not rise to the level sufficient for a finding of suitable alternative employment. As Employer/Carrier have the burden of establishing suitable alternative employment and did not submit any further vocational evidence, I find the record lacks sufficient detail to find suitable alternative employment. Moreover, I find the sporadic work efforts at trucking and with Intra Coat Pipeline Services do not constitute substantial gainful employment, nor are they representative of Claimant's wage-earning capacity. Accordingly, I find and conclude Claimant remains totally disabled.

## **E. Average Weekly Wage**

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), 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. SGS Control Services v. Director, OWCP, supra, 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).

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. 33 U.S.C. § 910(a). 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. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

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.

Claimant worked substantially the whole of the year and was a seven-day worker rather than a five- or six-day worker. Accordingly, I conclude that Sections 10(a) and 10(b) of the Act cannot be applied and Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

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.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that 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 injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

Employer/Carrier contend that Claimant's average weekly wage should be based on his wages earned before he worked for Employer in Iraq as well as wages earned subsequent to his return from Iraq. They assert Claimant's condition should be treated as an occupational illness with a latency period, citing Johnson v. Director, OWCP, 911 F.2d 247 (9th Cir. 1990). Without deciding whether occupational disease standards apply to PTSD, under Section 10(i) of the Act, the "time of injury" is defined as the date on which the claimant or employee becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of the relationship between the employment, disease, and the disability. See Coughlin v. Bethlehem Steel Corp., 20 BRBS 193 (1988) (lung condition). However, where the work-related wage loss pre-dates the "time of injury," the average weekly wage should reflect earnings prior to the onset of the disability, rather than the subsequent earnings at the later time of awareness. Wayland v. Moore Dry Dock, 21 BRBS 177 (1988).

In the present case, the parties stipulated the date of the alleged injury/illness from the zone of special danger was October 31, 2006. Claimant testified he realized he needed psychological treatment in February 2007. Accordingly, I find the period Claimant was in Iraq should be used to determine his average weekly wage. Employer's wage data shows Claimant was

paid \$97,774.51 between January and December 2006.<sup>3</sup> (EX-2; CX-4). This figure is roughly consistent with Claimant's testimony that he earned between \$104,000.00 and \$106,000.00 while in Iraq. Claimant was employed in Iraq between October 31, 2005 and October 31, 2006. Accordingly, I find and conclude Claimant's average weekly wage is best reflected by dividing the \$97,774.51 earned by 52 weeks, yielding an average weekly wage of \$1,880.28. Accordingly, I find and conclude that Claimant is entitled to the maximum compensation benefit rate of \$1,114.44 as a result of his October 31, 2006 psychological injury.<sup>4</sup>

#### **F. Entitlement to Medical Care and Benefits**

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also 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, 257-258 (1984).

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<sup>3</sup> Claimant contends he was paid \$97,774.51 between January 1 and November 7, 2006, a period of only 44.43 weeks, yielding an average weekly wage of \$2,200.64. Claimant apparently bases this contention on a handwritten note on his wage records stating: "Please note: This employee is withdrawn from 11/07/2006. (EX-2; CX-4). However, as the wage records start payment as of January 2006 and do not correlate the payments to the periods for which payments were made, I find it is reasonable to conclude the \$97,774.51 reflects Claimant's total earnings while in Iraq between October 31, 2005 and October 31, 2006.

<sup>4</sup> See National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, <http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm>.

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4<sup>th</sup> Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Having found that Claimant sustained a compensable injury (PTSD and depression) as of October 31, 2006, Employer/Carrier are responsible for all reasonably and necessary medical care and treatment causally related thereto pursuant to Section 7 of the Act.

## V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, the parties did not stipulate as to when Employer/Carrier were advised of the Claimant's injury/illness. I find it reasonable to conclude Employer/Carrier were advised of Claimant's injury as of February 14, 2007, the date of Claimant's first presentation to Dr. Kittrell, as such presentation was covered by Employer/Carrier. Employer/Carrier filed notices of controversion on April 12, 2007 and August 15, 2007.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.<sup>5</sup> Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by March 14, 2007, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer did not file a timely notice of controversion on March 14, 2007, and is liable for Section 14(e) penalties from March 14, 2007 until April 12, 2007.

## VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the

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<sup>5</sup> Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 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.

#### VII. 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 the Claimant's counsel. 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.<sup>6</sup> 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.

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<sup>6</sup> 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 (1<sup>st</sup> Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **August 17, 2007**, the date this matter was referred from the District Director.

### VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from October 31, 2006 to present and continuing, based on Claimant's average weekly wage of \$1,880.28, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's October 31, 2006, work injury, pursuant to the provisions of Section 7 of the Act, including all treatment relating to Claimant's PTSD and depression. 33 U.S.C. § 907.

3. Employer shall be liable for an assessment under Section 14(e) of the Act for the period from March 14, 2007 until April 12, 2007, as provided herein.

4. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

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); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

**ORDERED** this 28th day of August, 2008, at Covington, Louisiana.

**A**

LEE J. ROMERO, JR.  
Administrative Law Judge