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**Issue Date: 21 January 2011**

CASE NO.: 2008-LDA-00259

OWCP NO.: 13-104350

*In the Matter of:*

**BARBARA DILL**  
**o/b/o WADE DILL, DECEASED,**  
Claimant,

v.

**SERVICE EMPLOYEES INTERNATIONAL, INC.,**  
Employer,

and

**AIU HOLDINGS (FORMERLY AIG),**  
Carrier.

Appearances: Barbara Dill  
*in pro per*

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for Employer/Carrier

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U.S. Department of Labor  
Office of the Solicitor  
for the Director, Office of Workers'  
Compensation Programs

Before: Steven B. Berlin  
Administrative Law Judge

## DECISION AND ORDER

### Introduction

This is a claim for death benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, as extended in the Defense Base Act, 42 U.S.C. §1651. SEII is a government contractor that provided services in the war effort in Iraq. Claimant Barbara Dill alleges that her husband Wade Dill suffered a psychological injury as a result of his employment with SEII and that the injury led to his suicide. She initiated a claim with the Office of Workers' Compensation Programs, which in turn referred the case to this Office on or about May 19, 2008.

I held a duly-noticed hearing on January 7 and 8, 2010 in San Francisco, California. Claimant and Employer/Carrier were represented by their respective counsel of record.<sup>1</sup> Claimant testified on her own behalf. Employer/Carrier called psychiatrist Andrew Whyman, M.D., as a medical expert and Jamie Kerr as a percipient witness. I admitted numerous exhibits, including the depositions of two of Wade's former co-workers, Eric Olson and Carl Finto. I also admitted the report of Claimant's medical expert, psychiatrist Charles Seaman, M.D, as well as the reports of Dr. Whyman.<sup>2</sup> Post-trial, I allowed and now admit the deposition testimony another of Wade's former co-workers, Scott Anstead. Each party submitted a closing brief.

As I reviewed the record, I discovered that it was incomplete. Employer/Carrier's expert Dr. Whyman referred in his report to a supplemental report from Claimant's expert Dr. Seaman, yet the supplement was not on the record. I ordered the parties to submit the supplement and allowed them an opportunity to brief any issues the supplement might raise. Over Employer/Carrier's objection, I admit the supplement as ALJ Exhibit 11.<sup>3</sup>

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<sup>1</sup> Initially attorney Steven M. Birnbaum represented Claimant. I granted Mr. Birnbaum's petition to withdraw on August 7, 2009. Dennis F. Nalick appeared on Claimant's behalf on August 12, 2009. Following the hearing, at which Mr. Nalick represented Claimant, I disqualified Mr. Nalick in an Order issued on August 13, 2010. No attorney has appeared for Claimant since then.

The Director submitted a written position statement and did not appear at the hearing.

<sup>2</sup> I refer to the hearing transcript by page number as "Tr." At the hearing, I admitted Claimant's Exhibits 1 through 6, 8 through 13, 14 (except pages 1, 2, and 4), 15 through 20, 21 (except pages 1 and 2), 22 through 34, and 36 through 74 ("C.Ex."). I admitted Employer/Carrier's Exhibits 1 through 4, and 8 through 74 ("E.Ex."). I admitted as ALJ Exhibit 1 Claimant's pre-hearing statement dated May 5, 2009; as ALJ Exhibit 2 Claimant's exhibit list; as ALJ Exhibit 3 Claimant's witness list; as ALJ Exhibit 4 Employer/Carrier's prehearing statement dated May 5, 2009; as ALJ Exhibit 5 Employer/Carrier's witness and exhibit list; as ALJ Exhibit 6 the Solicitor's statement of position dated September 26, 2008; as ALJ Exhibit 7 Claimant's objections to Employer/Carrier's exhibits; as ALJ Exhibit 8 Employer/Carrier's objections to Claimant's witnesses; as ALJ Exhibit 9 Employer/Carrier's objections to the Claimant's exhibits; and as ALJ Exhibit 10 the parties' stipulations. Post-trial, Employer/Carrier moved to admit a supplemental report from medical expert Dr. Whyman; Claimant did not oppose; and I admitted the report as Employer/Carrier's Exhibit 60.

<sup>3</sup> Employer/Carrier objected that it had no notice that the supplement would be admitted because Claimant did not include it in her exhibit list and in fact didn't offer it at trial. I addressed this concern by allowing each party to brief the evidentiary value of the supplemental report and "any issues related to it." In addition, Employer/Carrier is not prejudiced. It was aware of the issues the Dr. Seaman addresses in his supplement: causation and whether Wade's suicide was the result of an irresistible impulse. Employer/Carrier also had a copy of Dr. Seaman's report, was aware of his opinion on these issues, and provided Dr. Seaman's supplement to Employer/Carrier's expert Dr. Whyman. In his report, which is on the record, Dr. Whyman addressed Dr. Seaman's opinions on these points. *See* E.Ex 44 at 34-35. Employer/Carrier's objection therefore is overruled.

## Issues

1. Is SEII liable for death benefits under the Act because Wade Dill's employment with SEII caused or aggravated his psychological condition in a way that led to his suicide-death? Yes. Wade's widow Barbara Dill showed that Wade's work for SEII required his long-term physical separation from his family and his exposure to a war zone environment replete with both generally stressful conditions and specifically stressful incidents. These were associated with changes in Wade's behavior, the collapse of his marriage, and Wade's suicide-death. That is enough to raise the statutory presumption of causation. *See* 33 U.S.C. §920(a). SEII failed to rebut the presumption.
2. Is the claim precluded as a worker's intended, willful act of killing himself? *See* 33 U.S.C. §3(c). No. Taken as a whole, the record shows that the suicide was the result of an irresistible impulse that followed a series of powerful, countervailing impulses over several weeks. The statutory preclusion thus does not apply.
3. To what compensation is Claimant entitled? Claimant is entitled to maximum death compensation from the date of Wade's death on July 15, 2006 through the period of her daughter's minority, which ended on July 10, 2008. Thereafter, she is entitled to half of Wade's stipulated average weekly wage, until such time as she remarries or dies. She also is entitled to certain other payments and to attorney's fees.

## Facts

### A. Stipulated facts.

The parties stipulated as follows:

- The Longshore and Defense Base Acts apply as to situs and status;
- An employer/employee relationship existed at the time of the alleged psychological injury that Barbara claims led to Wade's suicide;
- Wade Dill died in Redding, California on July 15, 2006;
- Notice was timely;
- Filing was timely;
- Wade's average weekly wage at the time of injury was \$2,024.24;
- Claimant Barbara Dill is Wade's widow and a dependent within section 9 of the Act;
- Wade's daughter Sara Dill was a dependent within section 9 of the Act until June 10, 2008;<sup>4</sup> and

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<sup>4</sup> I reject the stipulation as to Sara Dill's date of birth as it appears to be a typographical error on ALJ Ex. 10. Claimant submitted Sara's birth certificate, which shows a birth date of July (not June) 11, 1990. Sara's testimony also places her birth in July, not June. E.Ex. 97, 100-01. As stated in the section on disputed facts below, I find that Sara Dill's date of birth is July 11, 1990, and that she was a dependent within section 9 of the Act through July 10, 2008.

- Employer does not seek relief under section 8(f) of the Act.<sup>5</sup>

ALJ. Ex. 10; Tr. 5-6.

## B. Record Evidence as to Disputed Facts.

### 1. Events Prior to Decedent's Employment with SEII.

Wade and Barbara Dill married on March 4, 1989. Tr. 52. Their daughter Sara Dill was born on July 11, 1990. C.Ex. 68. Although Barbara described the marriage before Wade went to Iraq as happy and normal, “[l]ike any marriage” with its share of ups and downs, *see* Tr. 67, 72, 153, the record reflects something different. Barbara said Wade was a “perfectionist” with a temper, who could be “abrasive.” Tr. 70, 76. She said he angered easily over minor events, such as how she cut vegetables or selected asparagus at the market. Tr. 76-77 174-75. Wade provided the discipline for Sara, and this too was colored by anger. Tr. 66. For example, on one Christmas, because Sara had received a bad grade at school, Wade threw her Christmas present at her, then took it away. Tr. 176-77.

Wade was controlling. He made the financial decisions and allowed Barbara only \$10 as a weekly allowance. Tr. 54, 72. He limited her use of the home computer to games; he forbade her to go online. Tr. 173.

In her testimony, Barbara minimized the friction over Wade's behavior prior to his leaving for Iraq. She said she had no complaints about their marital arrangements. She noted that the family “never went without,” and she said she accepted Wade's argument that, if he made the decisions and any of them went wrong, “he could only blame himself.” Tr. 54-55. Barbara said there were squabbles over whether she was neat or organized enough, but nothing major. Tr. 70-71. She said she didn't think Wade was controlling. Tr. 79. Barbara said she and Wade didn't discuss their arrangements; that was just how it was.<sup>6</sup> Tr. 77-78. But she did need anti-depressants, and years later, when talking to a therapist, described herself as disturbed during this period about how Wade had acted. Tr. 169.

Wade's supervisor at Clark's Pest Control, where Wade worked immediately before SEII, noted similar behavior. Tr. 54-55. On a performance review in January 2004 he criticized Wade's interactions with supervisors and peers. E.Ex. 10 at 3. The performance review reflects that five or six subordinates complained about Wade, and other employees described him as “extremely demanding, unfairly judgmental, very temperamental, and at times borderline hysterical.” *Id.*

Wade had a history of impulsive spending. For example, he'd see a mannequin in a shop window and buy for Barbara every item of clothing shown on the mannequin. Tr. 79. He frequently traded his cars, each time incurring more debt because he would owe more money on the car he was selling than it was worth. Tr. 58-59. Sara testified that Wade traded his car on ten

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<sup>5</sup> The Director asserts that Employer/Carrier failed to submit a timely application for Section 8(f) relief. ALJ Ex. 6. This issue is moot: Employer/Carrier no longer requests 8(f) relief.

<sup>6</sup> Similarly, at a deposition, Sara described her relationship with her father as “good” and said that he'd been happy. But she also said that, even before going to Iraq, he'd get angry daily about issues like how Barbara spent money. C.Ex. 71 at 9, 13, 16. *Id.* at 13.

separate occasions the year before he went to Iraq. E.Ex. 44 at 14. By the time Wade left for Iraq, he and Barbara were \$300,000 in debt from refinancing a mortgage, credit card spending, and Wade's many car deals. Tr. 57-59, 62- 63, 82. Years earlier, in August 1997, Wade and Barbara had filed in bankruptcy. E.Ex. 9. There might have been an earlier bankruptcy as well. See E.Ex. 44.

Wade saw the SEII job as a way to handle the family's finances: working in Iraq for five years would give him the money to pay down the debt and set up a college fund for Sara and a retirement fund for himself and Barbara. Tr. 61, 68, 184. Barbara was against the idea, mostly because of what she'd seen on television about the Iraq war. Tr. 64-66. But Wade went forward with the job despite Barbara's doubts: He gave Barbara a power-of-attorney and left for training with SEII on November 18, 2004. *Id.*; C.Ex. 2.

## 2. Wade's Work with SEII and His Return Visits Home.

At hire, SEII sent Wade Dill to Houston for training and testing. C.Ex. 54. This included a psychological examination, during which Wade gave a history; he denied psychological problems other than insomnia and other sleep problems. Tr. 145; C.Ex. 54 at 6.

Wade arrived in Iraq in December 2004. SEII assigned him to vector control, work similar to what he'd been doing for Clark's Pest Control. He killed insects with chemicals and trapped rodents and feral animals, which he sent to veterinarians to be put down. C.Ex. 72. at 12. He worked twelve-hour days, seven days per week. C.Ex. 72 at 24. *Id.* at 19; C.Ex. 50 at 17. Initially, he shared a tent with eleven men and had difficulty sleeping. Tr. 90. He decided that he'd stay only a year. *Id.* Eventually, he got a private sleep area ("hootch"). Tr. 108. SEII soon made Wade a supervisor. C.Ex. 72 at 17-18.

Wade would call home every day around 7 p.m. (U.S. time) and talk to Barbara and Sara. Tr. 74; E.Ex. 44 at 16-17. He said he couldn't talk much about what was happening, but he'd ask Barbara how things were going at home. Tr. 75. He and Barbara also kept in contact through e-mail. A January 6, 2005 e-mail shows Wade intervening in a dispute between Barbara and Sara. See C.Ex. 21 at 4. As for his own living conditions, he wrote: "The environment that I live in is terrible from the food, weather, people, living accommodations, showers, bathrooms and just about everything else, so please understand this is very difficult for me to be without the nicer things in life." *Id.* He continued, "I LOVE YOU BOTH VERY MUCH!!!!!!!!!!!!!!" C.Ex. 21 at 3.

Barbara testified that with time, "it seemed like everything started breaking down." Tr. 75. Although in Iraq, Wade tried to continue to control the family finances. He'd tell Barbara what bills to pay, how much to pay on each, and what to do with the leftover money. Tr. 81; see C.Ex. 12 at 1-4; C.Ex. 21. He got angry if she strayed from his instructions. See E.Ex. 44 at 16-17. At the same time, Sara was presenting some adolescent problems, such as when – at age 14 – she took the car keys without permission and before she had a license. Tr. 164, E.Ex. 41 at 66-68.

Wade returned home for a couple weeks around March or April 2005. Tr. 74. Barbara said he didn't seem any different, except being a little grayer and more tan. Tr. 80-1. She said it took him about three days to readjust, but once he did, it was like he'd never left. Tr. 83. All three of them went to Oregon. Along the way, Wade traded in his car for a new BMW. C.Ex. 50 at 14-15. Barbara described the overall visit as "awesome." Tr. 80. She said it was difficult to take

Wade to the airport for his return flight: he cried at having to leave, something he'd never done before. Tr. 75-76, 80.

Back in Iraq, Wade continued to call home daily. Tr. 86. He was monitoring the bank accounts online and said he was pleased that the debts were going down. *Id.* He'd still sometimes get angry: He questioned Barbara about minor expenses, such as for gasoline or shampoo. *Id.* Barbara opened a separate checking account in her own name so that Wade couldn't track every expense. Tr. 86, 98.

According to Barbara's testimony, over the months, Wade reported several incidents he experienced as disturbing. There was an accident in which a truck driver Wade knew drove over an improvised explosive device. Tr. 90. Barbara said Wade would discuss hearing mortars whistle through the air. Tr. 90. She recalled a specific incident where Wade said he was almost hit by mortar fire while driving a pickup truck; he said he heard the mortar, knew it was heading for him, sped toward a bunker, and jumped in just in time to avoid the blast, which, he said, blew out the truck's windows. Tr. 90-93. Claimant testified that this incident scared decedent, that it resulted in one ear bleeding, ringing in the other, a constant headache until the day he died, and that he was sobbing as he recounted it to her. Tr. 93-4.

Wade came home a second time that summer or early fall (2005). Tr. 85. Barbara said this time he was different: he'd aged, his hair was very silver, and he was more "uptight." *Id.* They went to San Francisco and shopped. Tr. 86. In a later, post-suicide interview with one of Carrier's representatives, Barbara recalled that Wade got angry and threatened to leave her over a new pet cat. C.Ex. 6 at 24-25. She said she hadn't been surprised that he didn't like her buying a cat, but that she wasn't prepared for such a strong reaction. *Id.* at 26. Yet when she testified, Barbara said that Wade again seemed himself after about three days at home, that she couldn't remember anything exciting, that it had been nice to have him at home, and that when he left this time, he was calm – no crying. Tr. 86, 88-89.

Regardless of her descriptions of life in the fall of 2005, Barbara was experiencing significant problems, many related to Wade and the marriage. In October 2005, she began to see psychologist Anita Kemp. Tr. 144; C.Ex. 57. The visits continued for about three months. She described her marriage as abusive, said she wanted a divorce, and reported problems with Sara. C. Ex. 57 at 29. She reported nightmares, depression, difficulty making decisions, and decreased sleep and appetite. *Id.* Dr. Kemp assigned her a Global Assessment of Functioning of 55, which indicates moderate symptoms or moderate difficulty in social or occupational functioning, such as having few friends or having conflicts with peers or co-workers. *Id.* at 30.<sup>7</sup> Barbara was taking the anti-depressant Wellbutrin. *Id.* Over the next few weeks, she told Dr. Kemp that she was "very distressed," "dreading" her husband's upcoming (third) visit, and having difficulty completing tasks. *Id.* at 21, 23, 25.

Toward the end of the year, in December 2005, Wade transferred into a job as an "environmental technician" in a different unit. Tr. 100. Barbara recalled him explaining that he'd done it to make more money. *Id.* The new job required him to ensure the proper storage of hazardous waste such as motor oil, hydraulic fluid, and batteries. C.Ex. 73 at 8; E.Ex. 12 at 1.

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<sup>7</sup> See DIAGNOSTIC AND STATISTICAL MANUAL IV-TR at 34, of which I take official notice for accepted definitions of psychological terms, including Global Assessment of Functioning ratings.

Later that month, Wade came home for his third visit. Tr. 94. Barbara testified that he was often angry, distant, and not warm. She said he was mean to Sara, who by this time was having more significant problems. Tr. 95, 99, 104.

In particular, Sara had met Jamie Kerr, who had become her boyfriend. Tr. 273. Jamie was 25 years old, 10 years older than Sara. Tr. 146. Barbara had met Jamie as well, *id.*, but later testified she'd thought he was younger until Sara "blurted out" his age. Tr. 146. The considerable age difference was not the only problem: Jamie was dealing cocaine, and he was dealing it out of Wade and Barbara's house. Tr. 230. When Wade got home, he threatened Sara that he would put her in foster care and said he didn't want her living in the house any longer. Tr. 103-04.<sup>8</sup>

As Barbara related, by the end of the visit, Wade couldn't wait to get back to Iraq. Tr. 96. He'd been coming home about every four months and said that he wouldn't return for six, although – according to Barbara – he said it was only because of the cost. Tr. 96. Barbara blamed Wade's anger on his job: he'd started the new HAZMAT work, but SEII also was still requiring that he do the vector control job – along with the new assignment – until the Company could find someone to replace him. Tr. 100-01.

After Wade left, Barbara told her therapist Dr. Kemp that Wade had been "very emotionally abusive" and that she was extremely distressed and having physical symptoms. *Id.* at 19. Dr. Kemp reduced Barbara's Global Assessment of Functioning to 50, which reflects serious symptoms. *Id.* at 20; DSM IV-TR, *supra*. (By the next visit, Dr. Kemp again returned to Global Assessment of Functioning rating to 55. *Id.* at 17-18.)

### 3. Increasing Difficulties at Home.

In January 2006, the serious problems at the Dill household worsened. Sara was missing classes at school and was expelled. Tr. 102-04; C.Ex. 71 at 55-56. Wade found out and was angry. Tr. 102, 130; C.Ex. 71 at 55-56. According to Barbara, he didn't want to discuss it; he said the work in Iraq left him with enough on his mind. Tr. 105. This was a significant change from his earlier involvement in Sara's discipline.

On January 27, 2006, police arrested Jamie Kerr for possession of cocaine and a firearm. Despite Wade's sensitivity to Barbara's spending habits and his ongoing focus on controlling expenses, Barbara put up \$5,000 cash and encumbered the family house as security for a \$50,000 bail bond for Jamie. E.Ex. 16 at 14, 17 at 5; E.Ex. 44 at 29. Her explanation was that Sara had had "problems" with an "older man" the previous summer and now had become "hysterical" with Jamie's arrest; Barbara said she felt she had to make Jamie's bail for Sara's sake. Tr. 147-49, 237. Wade learned of all this, although it isn't certain on the record when. Tr. 237. Fortunately the bail bond was exonerated when Jamie pled guilty to possession of cocaine for

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<sup>8</sup> At her deposition, Sara said she noticed a change in her father, which she described as his doing his "own thing," not happy to be back, and not as affectionate as before. C.Ex. 71 at 27-9; 33-34, 38, 40. She said she didn't know of any increased fighting between her parents at that time. *Id.* at 52, 54.

sale and possession of a firearm and was sentenced to 180 days in the county jail, three years' probation, and a fine.<sup>9</sup> Tr. 274.

Despite all this, Barbara was allowing Jamie to continue to see Sara and to spend about one night per week at the house. Tr. 275-76. According to Jamie, he was supplying cocaine to both Barbara and Sara at this time. Barbara denies that he supplied cocaine to her, but I credit it, given that there are some general problems with Barbara's credibility and that it's difficult to understand otherwise why she'd let Jamie see Sara or stay at the house, or for that matter, why she put up his bail money. See Tr. 274-75, 367.

Sara's problems continued at her next school. She was expelled again, this time for using cocaine. Tr. 105; C.Ex. 71 at 58, 66. She testified at her deposition that her father knew she'd been expelled again, but she didn't know if he knew the reason. C.Ex. 71 at 58, 66. According to Barbara, she tried to tell Wade but stopped when he said that if he got distracted with home issues, he might "mess up" and get killed. Tr. 107.

Having started at a third high school, Sara was still dating Jamie. Tr. 106-07, 230; C.Ex. 71 at 102. She didn't know if Wade was aware of this before he next returned in June 2006. C.Ex. 71 at 74-75.

#### 4. Wade's Adverse Work Environment in Iraq and Reaction to the Increasing Problems at Home.

Barbara testified that in January or February 2006, Wade called her, sobbing: He had cleaned up after a soldier's suicide. Tr. 110. According to Barbara, Wade said that, although the body of the soldier had been removed, he had to clean "the drying brains and blood on the floor or wall." Tr. 110. He told her he felt like throwing up and that he couldn't stomach the smell. Tr. 110.

Wade was also concerned because the Iraqi Guard had been stationed next to his work yard. Tr. 109. He said the Iraqi Guard were targets of the insurgents, who "weren't good shots" and who might accidentally hit Wade while aiming for the Guard. *Id.* But he never mentioned any firings on the Iraqi Guard while there. *Id.*

Claimant also described an incident in the HAZMAT position, when hazardous waste material spilled and covered Wade. *Id.* Wade was angry because the barrel containing the material had been overfilled. *Id.*

Meanwhile, reacting to the events at home, Wade sent Barbara an eCard on February 18, 2006 with an image of the word "love" and a heart. *Id.* E.Ex. 19. This was a couple weeks after police arrested Jamie. The record contains only a truncated version of the text on the card, which reads:

I am sorry that I gave you an ultimatum such as the one I did but I am at the end.  
I am sorry for being over here but that is in the past and there is no going back.  
What Sara is doing is of her accord and I will no longer be responsible for her

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<sup>9</sup> The record doesn't show when Jamie served the 180 days' jail time. Arrested in January 2006, he wasn't in jail when Wade came home in June, less than 180 days later.

actions or consequences. I love you honey but I am tired of the situation we are in also. Like I said you have until next Friday to accomplish this. For your own good do not take this as a threat because if something is not in place by next Friday I will make the most difficult choice in my life that will affect you, Sara and your mom in the most grave way you can imagine and I will not look back. I am sorry you have to read these words and I know you are thinking how I could say I love you and say them to you. Out side of me being over here I have provided you and Sara the means for a comfortable life while I was gone, you and her have made some terrible mistakes as she continues to do so you still can't seem to tell me everything and keep secrets from me. I am no longer going to tolerate this and next Friday is D-Day for everyone. I have made my decision and will . . .

E.Ex. 19 [sic].<sup>10</sup> Nothing on the record clarifies what Wade expected Barbara to accomplish by the following Friday, but the stress in the marriage is evident in Wade's text.

Beginning in March 2006 and continuing for a few weeks, Barbara spent time at a "friend's" house and wasn't home to take Wade's phone calls. Tr. 278, 299. Sara took the calls and told Wade that Barbara was at a friend's. Tr. 278.

In April 2006, Wade wrote that Barbara should not "tap into what little [money] there might be, for I will become insane." E.Ex. 15 at 6. Missing is any statement that he loves Barbara and Sara. On May 5, 2006, he emailed Barbara:

I don't know what you are doing but spending \$150.00 a week on food at least and over \$50.00 every 5 days on gas; puts you on those two items alone over \$1000.00 per month. Just keep it up and I will be over here until 2008 trying to pay things off that's if we are still together. I had to cut back on Fowers to get you extra money for your checking account and I thought you said you were going to put your mom's check in the bank. You can not be stashing money in your drawer or what ever you are doing it needs to go into the checking account to show in your register. I guess old habits are hard to break, by the end of the month you are going to be over drawn and all you are achieving is nothing more than weakening my feelings for you. Don't you notice what is happening and if you think by F-ing up it will bring me back earlier; it might but not to the end you think. Every time I see this happening I just want to quite everything. The more money I have to put into your register for your mismanagement of the money means it doesn't go to help pay a bill off, thank you. If you look back over the last 17 plus months you and Sara sure haven't went without. So me always trying to build you up, fix things, help with the money, the lies and deceit has taken its toll and for all I was trying to accomplish all you can do is throw it back in my face for leaving. Please will you put the money where it needs to go, it is in the attachment, thanks.

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<sup>10</sup> Although Claimant didn't object to or supplement the exhibit that Employer/Carrier submitted, the exhibit has a handwritten note on it that reads: "Better copy to clearly show the date!" It doesn't show a date, and it ends mid-sentence. The exhibit notes that it is "Page 1 of 2," but no page 2 is included. The quoted text above is the entire text from the eCard.

E.Ex. 20 [sic]. Nothing on the record clarifies the lies of which Wade was accusing Barbara, but the further deterioration of the marriage is evident.

Barbara said that, by this time, Wade was so angry that she “hated” to take his phone calls; they left her crying. Tr. 111. Wade would make comments such as that he’d call again in three days, that is, if he were still alive. *Id.* At times, he’d threaten to leave her or to disappear and not send child support. Tr. 135.

Consistent with this, Jamie Kerr observed that, earlier on, Barbara would say she missed Wade, but as time passed, she spoke of leaving him. Tr. 280. She hired a divorce lawyer and on June 15, 2006 wrote to him that Wade was “acting crazy – threatening to come home because the check book wasn’t balanced.” E.Ex. 21 at 1. She asked the lawyer’s advice about changing the locks on the house and taking Wade’s personal belongings and car to his mother. *Id.*

#### 5. Wade’s Fourth and Last Return Home.

Events happened quickly when Wade returned for the fourth and final visit. The record doesn’t always show precise dates, but it does establish a chronology. Wade was scheduled home for rest and relaxation in July 2006 but arrived unexpectedly in the latter part of June.<sup>11</sup> Tr. 184. Barbara had just had a partial hysterectomy and bladder surgery and was using a catheter bag. Tr. 111-12.

When Wade arrived at the house, Barbara and Sara were not alone: two men were with them, Jamie Kerr and a man whom Barbara later described as a friend, Steven Lewis.<sup>12</sup> Curiously, when Barbara testified about these events, she neglected to mention that Mr. Lewis was there. *See* Tr. 254. Jamie recalled that when Wade arrived, either Barbara or Sara asked Jamie and Steven to get into the back bathroom and not come out. Tr. 281.

Barbara didn’t let Wade into the house; she went outside to talk to him. E.Ex. 44 at 19. She told him that she was upset with him, that she’d contacted a divorce lawyer because he’d threatened to cut her off financially, and that he’d have to stay elsewhere. Tr. 113-14. Wade took Sara and went to a hotel. Tr. 283; C.Ex. 71 at 77. Sara said that her father cried, something she’d never seen before. *Id.*

The next day, Wade returned home, found Jamie asleep, got him up, told him to get dressed, and started to drive him home. Tr. 284-85. Wade advised Jamie that the relationship with Sara was

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<sup>11</sup> From other dates on the record, it appears that Wade’s arrival must have been around June 20, 2006.

<sup>12</sup> Jamie described Mr. Lewis as the man Barbara “was seeing” but later admitted that he didn’t know the extent of the relationship. *See* Tr. 281, 300. Claimant testified that Mr. Lewis was a friend; they became romantically involved only after Wade died. Tr. 251. This is questionable. *See* E.Ex. 29 at 10; E.Ex. 44 at 7; Tr. 251-53, 370 (Barbara apparently was infected with a sexually transmitted disease in mid-June 2006; Wade didn’t have such a disease; his issue was trauma, not infection. *See* Tr. 95; C.Ex. 54 at 1-2.) But it is also largely inconsequential: the real issue is how Wade perceived Steven and Barbara, not whether they in fact were sexually intimate before Wade’s suicide. What Wade seems to have inferred is that Barbara “was out tramping around and left [Sara] alone . . . while [he] was working in Iraq,” and that during this time, Sara became involved with a much-older man, who was dealing drugs. *See* C.Ex. 8 at 3. Facts are sufficient on the record to show that Wade could have inferred all of that, regardless of the extent to which it was accurate.

over. Tr. 286. He asked Jamie about a car that had been in the driveway the night before. Tr. 287. Jamie said it belonged to Steven Lewis, whom Jamie described as someone Barbara was “hanging out with.” Tr. 288.

Wade reacted immediately: He said he was going to give his keys to Barbara because the marriage was over. He turned the car around and drove home. Tr. 288. According to Jamie, Wade went into the house for about 5 minutes, returned, and then drove Jamie home without saying what had happened. Tr. 289.

Barbara testified that Wade later returned and spent the night. Tr. 117-18. He asked where his gun was. Tr. 115-16. According to Barbara, she told him she’d put it away because she was afraid of it; she then told him where it was; and he got it and looked at, holstered it, and put it where he used to keep it. Tr. 116-17, 120-21. Barbara said this frightened her and that she couldn’t sleep. Tr. 117-18.<sup>13</sup> She said the next day Wade hit her dog and told Barbara to get out. Tr. 122-23. Barbara left and moved in with a friend.<sup>14</sup> *Id.* Sara continued to stay with Wade.

On June 23, 2006, Wade quit his job. He e-mailed SEII that his problems at home made it impossible for him to go back to Iraq. C.Ex. 61A. In the next days, he took Sara to Jamie’s house, said he was soon leaving the country, advised them to get their lives together, and gave them \$13,000. Tr. 289-91; C.Ex. 71 at 82-3. He told Jamie not to worry about the \$5,000 bail money and that he shouldn’t repay Barbara. Tr. 292, 313. He told Sara and Jamie not to tell Barbara where they were, and they went to a motel. Tr. 86, 293.

Wade then took Sara to get her a car. *Id.* at 87. He told her not to go back to the house and gave her dishes, a vacuum, and other items from the family house. *Id.* at 88-89. He also gave her a purse with a memory stick in it; the memory stick contained a picture of Wade with a caption that reads, “I did exist and loved you.” *Id.* at 90.

Strangely, Sara characterized Wade’s behavior at this time as normal, albeit a bit absent-minded. *Id.* at 88. She did find it peculiar, however, given Jamie’s history, that Wade advised them to “trust each other and love each other.” *Id.* at 91. After Wade’s several comments about “going away for awhile,” Sara said she asked him at the beginning of July if he were planning to kill himself. *Id.* at 93-94. He denied it. *Id.*

At trial, Barbara testified that Wade was overly-sensitive at this time and cried over trivial matters. Tr. 120. She said his appearance was frightening: he had dark circles under his eyes, had lost weight, his body shook, and he had “nervous” breath. Tr. 114-15. At other times, Barbara reported that Wade looked twenty years older and like he’d lost twenty to thirty pounds. E.Ex. 36 at 113; C.Ex. 50 at 76.

Yet comparing photos taken at a Christmas party before Wade first went to Iraq to those taken a few days before his suicide show no appreciable difference in his appearance. *Compare* C.Ex. 10; C.Ex. 27. His medical records show a constant weight of about 185 to 190 pounds pre-

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<sup>13</sup> Barbara testified that, later, after they’d separated, Wade was trying to get Barbara to come back and told her that he’d thrown away the gun, but according to Barbara, he eventually he admitted that wasn’t true. Tr. 121, 140.

<sup>14</sup> The record never establishes whether the friend was Steven Lewis.

deployment, mid-employment, and at the coroner's report. C.Ex. 22, 52; E.Ex. 28. Barbara might have seen Wade as deteriorating physically, but objectively there was no significant change.

Continuing to live apart, Barbara and Wade met on occasion. Sometimes Wade's usual anger surfaced. For example, out for lunch, Wade told the sandwich maker that she'd made the worst sandwich he'd ever eaten. *Id.* at 52.

But Wade did other things that reflected new and disturbing behavior. According to Barbara, he took her work clothes, her jewelry, a computer, and some rifles out of the house. Tr. 125-26. Barbara told him to return the clothes, and he agreed she could have them back. Tr. 125. Barbara's direct assertiveness marked a change in the relationship.

When Barbara went to pick up the clothes, she found that Wade had destroyed many of their household goods and appliances. Tr. 127-28, 138. As she recounted:

He had – he had like pulled out the refrigerator from the wall, unscrewed the backing, and literally chopped through way up at the top of this housing of little tiny wires about this big around, just – tons of those little tiny wires and he just cut all the way through them. It looked like a million of them. Ruined a brand new refrigerator. Then he had a brand new front loading washer and dryer, did the same thing. But once he was done destroying something, he would push it back, put it all back together, at least the outside part, push it back, and have everything on top of them, just like nothing was wrong. He destroyed all of our TVs, all our – we had Bose surround – stereo surround sound system in the living room. He had taken the fronts off of all of the speakers and just scrambled them. My VCR, you pick it up and it rattles back and forth.

Tr. 128.

A photograph shows how Wade left the bedroom. He took the mattress off the box spring, and arranging family photos into letters of the alphabet, he'd spelled out the word "goodbye" on the box spring. *See* E.Ex. 10; Tr. 131, 134. Barbara said he also piled sheets and blankets onto the mattress and doused them in lighter fluid. Tr. 131-32.

According to Barbara, Wade also cancelled the auto insurance without telling her. Tr. 134. She found out when she got a refund of the premium. *Id.* She confronted Wade, who calmly told her to return the refund to the insurance company. *Id.*

Somewhere around July 2, 2006, Wade went for about a week to Puerto Rico, where his mother and sister were living. Tr. 122, 131.<sup>15</sup> He returned around July 9, 2006, and by the next day it was evident that his thinking had shifted. E.Ex. 41 at 97. He told Jamie he was getting his family together and demanded back the \$13,000. Tr. 295; E.Ex. 41 at 98. According to Sara, only \$8,500 was left (although \$2,000 of the spent \$4,500 had gone for the car), and Wade, who had no history of violence around his family, attacked and choked Jamie. E.Ex. 41 at 98-99.

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<sup>15</sup> From the fact that Wade went for about a week on returned around July 9, 2006, I infer that he went to Puerto Rico on or about July 2, 2006.

Jamie said he then found more of the money in the car and gave the money back to Wade. Tr. 291, 295. Wade took Sara to a hotel, where they stayed. E.Ex. 41 at 100. The next day, Wade took the car and returned it. E.Ex. 41 at 99.

Yet, no sooner did Wade take this stance, than he began to shift again. Barbara characterized Wade at this time as sweet one minute and evil, vicious, and cruel the next. Tr. 139. She recalled a time when he grabbed her hand and put it to his heart, grabbed the other and put it to his cheek, and told her she was the most beautiful bride and was so beautiful with their daughter. Tr. 140. Then he dropped her hands and said “And you’re going to lose everything . . . . Without my income, you’re going to lose it all.” Tr. 141.

Barbara saw Wade twice before the suicide that July. The first was for Sara’s birthday on July 11, when Wade admitted that he’d destroyed the household goods. Tr. 138; E.Ex. 41 at 101. According to Barbara, Sara was there and was very skinny, with sores up and down her arms. Tr. 138. Sara recalls the gathering as “awkward” and “uncomfortable”; she said her parents didn’t really talk. C.Ex. 71 at 101. Following the gathering, apparently at Wade’s request, Barbara took Sara to stay with her. E.Ex. 41 at 101; C.Ex. 3 (thanking Barbara for taking care of Sara).

Barbara saw Wade the last time on the day before the suicide. Tr. 142. She told him that, for their marriage to continue, he needed to get help. Tr. 123-24. He gave her a letter (the “Aloha” letter), which reads like a suicide note (*see* its text below). Tr. 124, 142. He also gave her some money for the mortgage and a last will and testament. *Id.* Barbara said she only read the will at the time, not the note. Tr. 143. The will is dated July 10, 2006; Wade leaves Barbara “all his worldly belongings for her to do as she pleases.” C.Ex. 14 at 5.

The “Aloha” letter is addressed to Barbara and is undated. It reads:

It gave me great joy and relief when you told me that you would take care of Sara, which makes this all that much easier. By the time you read this I have close my eyes for the last time; when you told me that you could not stay with me while I was in therapy which could take several months possibly or when you thought it was long enough was an indication that you are very comfortable at your safe house which is why I know you didn’t have Sara stay with you the night of her birthday because you know she would probably tell me which is why you took her to stay with Jamie. I guess the lying will not stop and with that said we know it will not work.

I have been waiting these last couple of days for you to help out on what to do with the bills being as you are the only one with a checking account and you have said nothing. You talk about begging me to stop certain things; how many times did I do the same thing of you when I felt that I was dealing with all the decision making [undecipherable] though I ask you for help. Here I am getting ready to do the same thing again; deal with house, stay there with Sara, pay the bills and you being somewhere else safe and away from the pressure.

I will be taking the memories and visions of you and Sara and all the pleasures that you two brought to my life as my eyes close for the last time. I am so sorry

honey for the pain I have brought you and hope that you and Sara can heal one another. I am not sure what you want to tell Sara or the rest of the family but I hope you will take my action to your grave and just tell everyone that I ran. I am sorry to ask you to carry this burden; the final decision is yours.

The property payment is due today so you will need to take care of that. I know you are going to be angry about the bills and hope you are not going to have to move your mom; but up to now all you care about is your stuff so you could move it to your safe house.

Please be good to Sara and care for her; she is registered to start school at Oasis on the 21<sup>st</sup> of August. I feel that I am rambling so will close.

I love you but need you by my side to help me help you to realize that you still love me, but I think you are not ready for that. I told you that I was afraid and isn't ironic that you told me to suck it up (not in so many words but it is what you meant).

P.S. thank you for staying with me last night.

All my love

C.Ex. 3.

Wade had asked Barbara to call him on July 16, the day he ultimately killed himself, but Barbara says she didn't call him or speak to him that day. Tr. 150, 218.

During his last couple of days, Wade was calling Jamie to ask where Barbara and Sara were. Tr. 297. He left a voicemail that he needed somebody to call him. *Id.* To Jamie, Wade seemed upset. Tr. 311. Wade didn't mention anything to Jamie about suicide, but according to Jamie, Barbara told him that Wade had discussed it with her. Tr. 309.

Prior to taking his life, Wade drafted five notes on hotel stationary. In one he wrote, "My wife pushed me to this she wants the life insurance money stop her . . . she has power of attorney and in debt 10's of thousands of dollars." C.Ex. 8 at 1. Another reads, "Do not release my remains to her. The state can take care of them." *Id.* at 2. A third is addressed to Barbara and reads: "After you left yesterday and the way you were pushing me and push me to do this. I waited by the phone for you to call and save me. You could have saved me and did nothing. Your husband Wade." *Id.* One note is addressed to the police and gives Barbara's work contact information. Wade asks the police to save Sara from Barbara, for Barbara "will destroy [Sara] like she did me." He adds: "My wife knew I was going to do this and did nothing to help me." *Id.* In a fifth note Wade writes: "My wife also allowed a 25 year old man to have sex with my 15 year old daughter and move into our house while she was out tramping around and left our daughter alone. This was done while I was working in Iraq . . . please help [Sara], take her from my wife." *Id.* at 3.

Wade killed himself on July 16, 2006. C.Ex. 28 at 1.<sup>16</sup>

#### 6. Post-suicide events.

Five days after Wade's suicide, Barbara went to Shasta Community Health Center for a neuropsychiatric consultation. E.Ex. 29 at 7. She described Wade as controlling and eventually aggressive. *Id.* She said he controlled their finances, shopping, and meals. *Id.* She described Wade's history of anger and said that while he'd been away, she'd "realized how oppressed she was." *Id.* From Barbara's comments, the examiner noted that Wade had periods of what sounded like mania. *Id.* Barbara told the examiner that before Wade returned from Iraq the last time, she'd already prepared to leave. *Id.* He noted that Barbara had "already filed for divorce [and] got restraining order." *Id.* As Barbara said when the claims examiner interviewed her, she said that shortly before the suicide Wade told her he wouldn't live without her and she'd "challenged him" not to kill himself. *Id.* at 7-8.

#### 7. SEII's Evidence of Wade's Working Conditions in Iraq.

SEII offered the observations of three men who worked with Wade in Iraq: Carl Finto, Eric Olson, and Scott Anstead.

- Carl Finto supervises both vector control and HAZMAT workers for SEII in Iraq. C.Ex. 72 at 14. He met Wade while Wade was still in Vector Control, they talked daily, and he recruited Wade into HAZMAT. *Id.* at 8-9, 13. He was Wade's supervisor starting at some point before June 2005. *Id.* at 35-36.
- Eric Olson was a HAZMAT supervisor who met Wade in mid-2005. C.Ex. 73 at 3. He recommended Wade for the vector control supervisor job. *Id.* at 16.
- Scott Anstead first met Wade at Clark's Pest Control in 2001, well before they'd gone to Iraq. ALJ. Ex. 10 at 6. At that time, they saw each other once or twice per week at work and had a good working relationship but didn't socialize. *Id.* at 6-7. It was Mr. Anstead who told Wade about the job with SEII, and they both were hired as vector control specialists. *Id.* at 7-8. They worked together in Iraq for about seven months (February to about August 2005). *Id.* at 9.

Mr. Anstead confirmed that he and Wade had been in roughly some thirty mortar attacks while Wade was in Vector Control and that they were supposed to dive into a bunker whenever there was a mortar attack. *Id.* at 17. He couldn't confirm the particulars of the attack Barbara related (when Wade had to exit a vehicle before the windows were blown out). *Id.*

Part of Mr. Finto's job was to receive injury reports, and he didn't recall Wade's reporting any ear or hearing problems from an explosion. C.Ex. 72 at 43, 45. He said that if Wade had

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<sup>16</sup> Barbara's trial testimony in January 2010 was that she didn't remember Wade's threatening to kill himself. Tr. 135. But when she spoke to Carrier's investigator years earlier in November 2006, she said that, when Wade said he still had his gun, she'd been concerned that he was threatening to kill himself, and she'd tried to dissuade him. C.Ex. 50 at 57, 71-2.

reported an ear injury to a medic, there would be an incident report in the file, *id.*, and the record contains no such report.

Mr. Olson confirmed that Wade worked with him on the clean-up after the soldier's suicide. C.Ex. 73 at 30. The body had already been removed. *Id.* at 31. Their job was to clean up the blood; they did it by spraying chlorine and then rinsing with water. *Id.* at 30. Mr. Olson said Wade didn't express any feelings at the time. *Id.* at 31.

Although the managers (Finto and Olson) didn't recall Wade's being depressed, acting abnormally, or complaining about the job, co-worker Anstead did. Toward the end of the summer 2005, he noticed that Wade was getting agitated and angry; in fact, on one occasion his anger was directed at Mr. Anstead, who found Wade "kind of scary," "very high-strung," looking for fights, and not acting as he normally did. ALJ Ex. 10 at 10. Mr. Anstead also recalled an incident after Wade was denied a promotion: Wade threatened to kill a certain supervisor if he saw him. *Id.* at 12, 19-21. According to Mr. Anstead, Wade's behavior was such that, if he hadn't been transferred to other work, he wouldn't have been allowed to stay in Iraq. *Id.* at 12. Mr. Anstead thought Wade needed help. *Id.* at 16. They didn't see each other during Wade's last year. *Id.* at 22.

Even the managers were aware of some problems. Mr. Finto recalled Wade's having difficulty with Sara's behavior (such as truancy) and with Barbara's handling of Sara's problems before March 2006. C.Ex. 72 at 27-29. He recalled a conversation with Wade about divorce, although he wasn't sure who was pursuing it. *Id.* at 28-9. Consistent with Barbara's reports, he said Wade complained about the long work hours, but no more than all the employees did, and that he complained about having to work two jobs during his transition to HAZMAT. *Id.* at 56-57. Similarly, Mr. Olson said Wade was upset before his last trip home because he couldn't reach Barbara. C.Ex. 73 at 33. And he was distracted because Barbara was leaving him. *Id.* at 34.

Overall, the co-workers tend to corroborate Barbara's rendition of what Wade was telling her.

## 8. Expert Evidence.

Both parties relied on what amounts to a psychiatric post-mortem of Wade Dill. There were no psychiatric records on which the parties could rely beyond Wade's innocuous report at the time SEII hired him that he had insomnia at times. As no mental health professional had examined Wade while he was alive, both parties retained experts to gather what information they could from interviews of Barbara and Sara and a record review. Claimant's expert psychiatrist Dr. Seaman also interviewed Mr. Anstead; SEII's expert Dr. Whyman reviewed Mr. Anstead's deposition.

Dr. Whyman termed the process a psychological or psychiatric "autopsy" – an effort to reconstruct the life of the deceased; determine whether he had a psychological disorder and, if so, whether it was job-related; and in this case, decide whether Wade was "responsible for his suicide." Tr. 326-27. Dr. Whyman said that he was the doctor who had introduced the use of such "autopsies" at Pacific Medical Center but that he'd not previously done one in a legal – as opposed to a medical – setting. Tr. 332. In a medical setting, the purpose of the exercise is to "teach medical practitioners about the life and death of people they treat." *Id.*

The idea was to collect as much information as you could from the patient, if I happened to see the patient who subsequently died, and/or relative or other people, and then present that to a grand rounds of physicians so that they'd get a much clearer understanding of the soul and person that died . . . . This was an attempt to add something new to the – the training of physicians.

Tr. 333. What Dr. Whyman was offering for the present case was, in his view, simply an application of the same methodology in a legal setting. *Id.* Dr. Whyman believed there was a professional literature about psychological autopsies, but he hadn't kept up with it. Tr. 332-33.

A factor that distinguishes the psychological autopsy in this case from others that Dr. Whyman described is that, in the present case, neither Dr. Whyman nor any mental health professional had been treating Wade; no one could offer an opinion based on first-hand knowledge, nor were there treatment records to evaluate. The "autopsy" wasn't aimed at supplementing what the treating mental health professionals already knew; it required the psychiatrist to construct an opinion without the benefit of any prior contact with the patient – whether directly as the treating psychiatrist, indirectly through others who treated him, or even from medical records alone.

Dr. Whyman readily acknowledged that this left him less comfortable than if he'd seen the deceased or had psychiatric records from a doctor who had. He viewed the absence of these sources to pose major risks, but still, in Dr. Whyman's view, the risks didn't preclude a useful analysis if the expert could collect "enough relevant information" from sources such as family members, especially if the family had been around to observe the deceased in the time leading up to the suicide. Tr. 334. Of course, here, the family members were not in Iraq with Wade, and were around him only in the last two or three weeks before his suicide. Dr. Whyman felt that, "The more facts you have, the more comfortable you are; and the less facts you have, the more you are ending up speculating." Tr. 336. Still, he felt the process was no more controversial than any other in psychiatry. Tr. 335. He said he was "very comfortable" with the opinions he was giving. Tr. 336.

The "psychological autopsy" presents a general evidentiary problem, which I detail below. The general problem is complicated here because Barbara and Sara had only limited contact with Wade in the twenty or so months before the suicide, and neither was entirely reliable when talking to the interviewing psychiatrists. And whatever Dr. Whyman's testimony, his opinion reflects significant uncertainty; indeed, it could be that Dr. Whyman was comfortable with his opinion because he couched it in uncertainty. Nonetheless, here's what the experts reported:

*Claimant's psychiatric expert Dr. Seaman.* At Claimant's request, psychiatrist Charles Seaman, M.D.,<sup>17</sup> interviewed Barbara and Sara Dill and Mr. Anstead, did a document review, and on January 3, 2008, issued an expert report. *See* C.Ex. 34.

Testifying at trial about her interview, Barbara said that, although she hadn't taken any medication that would have affected her memory, she found herself unable to keep the "story straight." Tr. 183. And, in fact, not all of what Barbara told Dr. Seaman was consistent with what she said elsewhere.

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<sup>17</sup> Dr. Seaman is a board-certified psychiatrist. *See* C.Ex. 41. Without objection, I find him a qualified medical expert in that specialty.

Some of Barbara's report to Dr. Seaman was uncontradicted or consistent with other evidence on the record. Barbara told Dr. Seaman that Wade's mother "jumped from husband to husband," his younger brother died in a motor vehicle accident in 1991, and his sister died in what might have been a suicidal drug overdose in 2004. C.Ex. 34 at 4-5. She gave Dr. Seaman a work history for Wade, mentioned his remote history of marijuana use, and described how he controlled the family finances. *Id.* at 5. She said that by 2004 Wade at times was angry and verbally abusive about the finances and that she'd gone on anti-depressants and occasional pain pills. *Id.* at 4. Of the work in Iraq, Barbara spoke of how Wade "choked up" after the mortar attack in the summer of 2005 and sobbed after he cleaned up the soldier's suicide. *Id.* at 5-6. Barbara saw their marriage as beginning to deteriorate in 2005 following the mortar incident. *Id.* at 5.

Barbara gave Dr. Seaman some details about how Wade was doing when he returned from Iraq the last time. Before he got there, Barbara had changed the locks on the house – a strong indicator of the growing distance between them. *See id.* at 3. When Wade arrived, he'd said he thought she'd always hate him, that he was tired, and that he didn't want to go back to Iraq. *Id.* at 6. He acknowledged that he needed psychological help but said he'd only get it if Barbara came back to him; she said he'd have to get help first, but he refused. *Id.* at 6-7.

Others of Barbara's statements were less consistent with the generally available facts. For example, she described Wade's arrival in June 2006 without mentioning Jamie Kerr's or Steven Lewis' being at the house or anything about Wade's interaction with Jamie the following day. *See C.Ex.* 34 at 6. She mentioned that Wade called her from Puerto Rico soon before the suicide and asked what he'd done to make her so angry; she didn't mention that elsewhere. *See id.* Although she told Dr. Seaman that early in their marriage Wade physically threw her pet cats, E.Ex. 31 at 36, at trial she denied that Wade had done that and didn't know why she'd said it to Dr. Seaman. Tr. 178. When Dr. Seaman asked if Wade was on guard (apparently in the sense of hypervigilance), she'd said that he had been even before going to Iraq. E.Ex. 31 at 58. Yet at trial, when asked the same question, she claimed not to understand. Tr. 179.

Sara's information for Dr. Seaman was limited because her parents hadn't shared much with her about their disputes and concerns. Sara confirmed Barbara's renditions about the mortar and suicide clean-up incidents. C.Ex. 34 at 7. She also confirmed that, by Wade's second return home, he was preoccupied with financial problems. *Id.* Sara told Dr. Seaman that her parents seldom fought before her father went to Iraq, but after he went, he became unreasonable about money, and they fought about that. *Id.* at 7. She related that shortly before the suicide, Wade had blamed Sara for his problems with Barbara. *Id.* at 8.

Dr. Seaman concluded to a reasonable medical certainty that severe dysfunction in Wade's marriage was the major cause of his suicide. *Id.* at 11. In Dr. Seaman's opinion, the major reason the marriage became dysfunctional was the physical distance between Wade and Barbara, a condition that Wade's job imposed on them. *Id.* In his opinion, the conflicts in the marriage that pre-existed Wade's employment in Iraq "significantly and rapidly intensified" once he and Barbara were physically separated. *Id.* As Dr. Seaman explained, being away, Wade's information about Barbara's activities and feelings became limited, as did his awareness of the changing home situation. *Id.* at 12. Dr. Seaman viewed the money problems as a symptom of the marital dysfunction that the physical distance between Wade and Barbara caused. C.Ex. 34

at 13. Wade was left to speculate and to feel a loss at “not having significance or control in the family other than providing a paycheck.” *Id.* Dr. Seaman concluded that the stresses of the work in Iraq, when combined with the stress of the physical separation, produced increasing emotional distance, emotional intensity, distortion, erratic behavior, and finally Wade’s suicide. *Id.*

Dr. Seaman diagnosed (on Axis I) an Adjustment Disorder with Mixed Disturbance of Emotions and Conduct (DSM 309.4).<sup>18</sup> *Id.* at 13. He explained that the adjustment disorder was associated with the dysfunction of Wade’s marriage, and the mixed disturbance of emotions and conduct reflected Wade’s emotional history of anxiety, depressed mood, anger, frustration, and intense emotional needs and his conduct history, which included his destruction of property, erratic and inappropriate behavior, and suicide. Dr. Seaman stated that adjustment disorders are associated with suicide attempts and suicide. *Id.* at 14.

In a supplemental report (February 11, 2009), Dr. Seaman reemphasized that Wade’s work experiences also contributed to the scenario, and he opined that Wade’s suicide was “the irresistible result of a mental disorder.” ALJ Ex. 11 at 3.

I will defer a discussion of Dr. Seaman’s analysis to my discussion about whether Wade’s suicide was intentional.

*Defense medical expert Whyman.* Defense psychiatrist Dr. Whyman<sup>19</sup> interviewed Barbara and Sara Dill, did a document review, reviewed both of Dr. Seaman’s reports, and prepared a report (dated April 20, 2009). *See* E.Ex. 44 at 1-30. Barbara Dill’s information again was generally – but not entirely – consistent with what she said elsewhere. *See id.* at 1-15. She described much as before Wade’s family background, military service, work history, and their getting together as a couple. *Id.* at 13-14. She said how, along with the mortgage and other expenses, Wade’s car-trading increased their debt. As before, she said that when Wade left for Iraq, he’d said their debt was \$300,000. *Id.* at 14-15. Much as elsewhere, Barbara described Wade’s reaction to the explosion and the suicide clean-up. *Id.* at 5, 8. She said that, as Wade’s time in Iraq passed, he told her he was losing his feelings for her; eventually (in Barbara’s view) he became hateful, called her names, and threatened to take their property and disappear.

At some variance from other renditions, this time Barbara said that Wade knew Sara was using drugs, cutting school, and not coming home at night.<sup>20</sup> E.Ex. 44 at 9. And this time she said

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<sup>18</sup> Dr. Seaman added a “v-code” of Partner Relational Problem (v. 61.10). *Id.* He offered a provisional diagnosis on Axis II of Obsessive-Compulsive Personality Features. *Id.* He found insufficient evidence to diagnose Posttraumatic Stress Disorder or Major Depressive Disorder, and he didn’t posit a Global Assessment of Functioning (Axis V). *Id.*

<sup>19</sup> Dr. Whyman is a board-certified psychiatrist. *See* E.Ex. 45. Without objection, I find him a qualified medical expert in that specialty.

Claimant objected to Dr. Whyman’s testimony at trial to the extent that it was based on anything he learned after his report, dated April 20, 2009. Claimant argued that she was entitled to a report, and Employer/Carrier should have updated Dr. Whyman’s report if anything he learned subsequent to his report changed his opinion. Tr. 328-29. The objection was mooted, however, when Dr. Whyman testified that nothing he saw or heard, including the evidence at trial, changed in his opinions or conclusions. Tr. 330-32.

<sup>20</sup> Barbara misstated that she first learned of Jamie’s cocaine dealing in May 2006; she clearly knew of the dealing no later than January of that year, when she bailed him out of jail. *See id.* at 10.

Wade's primary reason for taking the SEII job was to fund college for Sara (not to pay off debt or save for retirement). *Id.* at 2. As Dr. Whyman observed, Barbara recalled Wade's pre-Iraq anger but minimized its importance (*id.* at 14). For example, she recalled an incident when a driver behind Wade was tailgating, and Wade jumped out of the car, went to the other driver's window, and yelled "I'll kick your ass." *Id.* at 14. She described occasions when Wade punched the wall or Sara's door or yelled and screamed or spoke in a "commanding," intimidating tone. *Id.* But she described all this as "little temper tantrums" and said Wade's temper was basically no different from anyone's. *Id.* at 6, 14.

Describing the evening Wade arrived on his last return from Iraq in June 2006, Barbara said she told Wade he couldn't stay and asked him to take Sara to a hotel, which he did. E.Ex 44 at 10. But she said nothing about Jamie Kerr's or Steven Lewis' being there or that she hid them in a bathroom. She reported that Wade had lost 25 pounds, his skin was loose, he was shaking, and he was stressed. *Id.* at 11. But, as I discuss elsewhere, this appears to be exaggerated. She told Dr. Whyman that Wade never threatened suicide: as she perceived it, he was threatening to kill or hurt her, not himself. *Id.* Again, this is inconsistent with what she told others.

Barbara told Dr. Whyman that, by the time Wade died, their debt was down to \$150,000. This assertion is difficult to accept: It reflects a decrease of \$150,000 in about nineteen months when Wade's gross earnings for that time would have been about \$165,000 before taxes and living expenses, including the mortgage payment.<sup>21</sup>

When Dr. Whyman interviewed Sara, she confirmed that her father was "controlling" and liked nice cars. Consistent with other testimony, she said he tried to control all the home expenditures from Iraq and that it was difficult; she also said he got angry about "the littlest things." E.Ex. 44 at 16-17.

As Sara remembered, the circumstances gradually worsened over time, and by Wade's last trip home, they were bad. Sara admitted that she was "acting out" and "being bad." *Id.* at 18. She mentioned the two school expulsions, the first for attendance and the second for drug use. *Id.* She said that she'd started using cocaine when she was 15 but (perhaps mistakenly) didn't think Barbara told Wade at the time. *Id.* She recalled that when she was 15, Wade had a temper and would yell and scream (but wasn't violent). *Id.* at 18. She said that when he got home on the last trip, he was angry and "really crazy." *Id.* at 19. He'd insisted that Sara clean her room immediately and had been angry with Barbara because the house was a mess and Barbara was spending too much money. *Id.* at 19. This, of course, is inconsistent with the other times she or Barbara described his arrival, in which they said Barbara didn't let him into the house. Sara also told Dr. Whyman she was still doing drugs and was on drugs when her father arrived; she thought her father could tell. *Id.* at 19-20. Consistent with Barbara's comments, she said that, in the following days, Barbara moved in with a friend, and Sara moved in with Jamie. *Id.* at 19.

Sara also told Dr. Whyman about how Wade had given her and Jamie \$13,000 and told them to figure things out; that they were still using drugs and spent a lot of the money; that Wade went to

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<sup>21</sup> There's a possibility that Barbara was referring to a somewhat later date. She received life insurance of \$250,000 and might have used it to pay down the debt. Remarkably, at her deposition, Barbara testified that she didn't remember what she did with the insurance money. That is certainly difficult to credit.

Puerto Rico; and that when he returned, he discovered them “messed up,” demanded the money back, learned that only \$8,000 was left, and started choking Jamie. *Id.* at 1920.

Despite an extensive review of all this material, Dr. Whyman was unable to reach a diagnosis that reflected anything more than significant uncertainty. I will discuss below in detail this crucial limitation in Dr. Whyman’s report. He offers some argument and conclusions following a tentative, guarded diagnosis, but, absent a diagnosis to a reasonable medical certainty – or even one that Dr. Whyman could say was medically more probable than not – his additional conclusions are of little use.

For what it’s worth, Dr. Whyman expounded at trial how Wade’s “very substantial” developmental difficulties and disappointments over the years led to a “mild” dysthymia, which was followed in the last couple months of Wade’s life by a more acute depression, when “things seem to change for him.” Tr. 347-48.

In his report, Dr. Whyman explained in greater detail why he thought Wade’s suicide reflected developmental problems and progressive non-work-related stressors. E.Ex. 44 at 34. He noted some history of psychopathology in Wade’s birth family, Wade’s propensity to become angered or enraged, his car trading, and his efforts to control the family finances. *Id.* at 31-33. Dr. Whyman opined that Wade needed to control everything but couldn’t control his anger, his spending, his wife’s supposed imperfections, or his daughter’s adolescent excesses. E.Ex. 44 at 34. He accumulated large debts and saw himself as unable to get ahead. *Id.* He thought if he went to Iraq, everything would improve. *Id.* Over time, he was increasingly suspect of his wife, increasingly negative about her attempts to manage matters, and eventually learned about Sara’s activities. *Id.*

In Dr. Whyman’s view, nothing that happened to Wade in Iraq affected his long-time depression. Tr. 348. Yet Dr. Whyman conceded at trial that events such as a clean-up of human detritus following a suicide are stressful, and that Wade had three or four experiences in Iraq that anyone would find stressful (apparently referring to incidents such as the mortar attack and so forth). Tr. 359. But Dr. Whyman concluded that these didn’t affect Wade any more than temporarily because, if their effect was anything more, there should be evidence of Wade’s taking steps to get medical attention, commenting to co-workers, behaving in a way that that supervisors would note, or otherwise acting in a way resulting in the documentation of an emotional reaction. Tr. 360. Dr. Whyman conceded that Wade might have become “hysterical” once or twice in Iraq, but found this unconvincing as a sign that anything in Iraq was affecting Wade because Wade had done the same when he was living at home. Tr. 348-49.

What this neglects is that Wade did complain about these events at the time they happened. Sobbing, he complained to his wife and made some complaints to his supervisors. And co-worker Anstead testified that he was with Wade in Iraq, they were in some thirty mortar attacks together, and by the end of the summer of 2005, Wade was getting agitated and angry in a way that Mr. Anstead found “scary,” as if he were looking for fights, and – of the greatest relevance here – not acting as Wade normally did. Mr. Anstead had worked with Wade for four years; he knew what was normal for Wade.<sup>22</sup> Despite Wade’s apparent long-standing psychological

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<sup>22</sup> On March 15, 2010, Dr. Whyman issued a supplemental report. E.Ex. 60. He addressed the deposition of Scott Anstead and found it did not affect his opinion regarding Wade’s suicide. *Id.* at 1. Rather, he found Mr. Anstead’s

symptoms, he'd never sought mental health treatment before. Why expect him to do so while in Iraq – where he might risk being sent home and losing his job?

Dr. Whyman rejected Dr. Seaman's opinion that the separation between Wade and Barbara were a major cause of the progressive difficulties that led to the suicide. E.Ex. 44 at 35. As he wrote:

It is entirely speculative to suggest that the separation between Mr. and Mrs. Dill led to progressive difficulties for [Wade]. Mr. Dill, indeed, chose to leave home in what he perceived to be a crisis situation at a time when his daughter was entering that delicate and difficult age of early adolescence. She developed major difficulties and he then blamed his wife for them. [¶] Mr. Dill's unfortunate suicide was the culmination of all the things that had gone wrong in his life. They had no relationship to his employment overseas in Iraq.

*Id.* Dr. Whyman similarly discounted Wade and Barbara's separation (as well as the events in Iraq) in his testimony, concluding that Wade would have killed himself even if he'd never gone to Iraq:

Q. Would it be fair to say then that he was heading towards suicide regardless of Iraq?

A. Yes.

Q. It was just a matter of time?

A. Well, it was a matter of time given all of the other things that happened. Now take out the Iraq experience, it would have happened.

Q. Well, if he would have just stayed home and – things would have gone [this way] without any changes?

A. Well, you can't speculate if he would have just stayed home. He left home because there was a crisis.

Q. That was a financial crisis?

A. Well, it was a financial and emotional crisis. He – he came up with a miraculous idea to make everything better because everything was going sour. It wasn't just, "We're having a little trouble financially, but we've got a wonderful situation here." And that's why it was [such] a precipitous [leave-taking].

Tr. 357.

But isn't it Dr. Whyman who is speculating? There is no evidence that Wade left home because there was a crisis. Wade's departure might have been abrupt, but as I discuss below, Wade had a propensity to act impulsively; an impulsive action, standing alone, doesn't demonstrate a crisis. Certainly Wade had financial concerns, and at times he was angry with Barbara and Sara. But he had full-time employment at a job that he'd had for some time. He was in a long-term marriage and had a daughter who was an adolescent but who seemed to be doing fine. His mother-in-law

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deposition testimony to support a conclusion that the work for SEII had nothing to do with Wade's emotional difficulties. *Id.* at 2.

had given him and his wife a house. Yes, there was a mortgage on the house, and when combined with his other debt, he owed a substantial amount, but it was nothing extraordinary. He saw work for SEII in Iraq as a way – not to work himself out of a financial crisis such as a house foreclosure or to solve “everything” miraculously as Dr. Whyman suggests – but as an opportunity to make considerably more money for the same kind of work and, over time, to reduce the family’s debt and provide funds for Sara to attend college and for Wade and Barbara to retire more comfortably.

I agree with Dr. Whyman that Barbara minimized the problems that pre-dated Wade’s leaving, but I don’t see any foundation to conclude that Wade’s suicide was just a matter of time irrespective of events associated with his assignment to work in Iraq. I am unwilling to dismiss as insignificant and temporary Wade’s experiences in Iraq with the mortar explosion, the suicide clean-up, his colleague’s hitting an improvised explosive device, the threat of a stray bullet, isolation and separation from his family, the difficult climate, the extraordinarily arduous work hours, or getting doused in hazardous waste.

And as Dr. Whyman acknowledged, it would require speculation to say what would have happened had Wade stayed home. There is no reason to assume that events as stressful to him would have occurred anyway, events equal to his daughter’s dating a man ten years older than she, who was dealing cocaine out of the family house; his daughter’s being expelled twice from school, once for drug use; his wife’s spending \$5,000 plus encumbering the house to pay the drug-dealer’s bail; his wife’s “befriending” a man to the extent that her teenage daughter was regularly being left at home with the drug dealing boyfriend and no supervision; and Wade’s coming home to find the locks on the doors changed, that his wife had hired a lawyer, that she wouldn’t let him into the house, and that she had a male “friend” inside. If anything is reasonably certain, it is that many of these events would not have happened had Wade stayed home and not gone to work for SEII in Iraq.

Dr. Whyman also concluded that Wade’s suicide was a willful act and not the result of an irresistible impulse. Tr. 348, 358. To Dr. Whyman, that an impulse is “irresistible” means that the person couldn’t have acted differently; there were no options; the person lacked enough control to do something else. Tr. 340-41.

Dr. Whyman found that Wade had choices up until the moment he took his life. Tr. 358. Dr. Whyman read the suicide notes to show a negotiation between Wade and Barbara that was part of a weeks’-long evolution of Wade’s idea of killing himself. Tr. 362. When the negotiation failed, Wade proceeded to the suicide. Tr. 348. He had a choice not to do it, and had things gone differently he wouldn’t have done it. Tr. 362. But, as it worked out, Wade saw himself in a losing situation, losing more and more ground over the course of some weeks, and decided to kill himself. Tr. 362-63.

### C. Credibility and Findings.

Barbara and Sara credibly establish the central outlines of the family dynamic prior to Wade’s employment with SEII and as it changed over the approximately twenty-one months between Wade’s accepting the job and his suicide. When it comes to particular details, however, I cannot rely entirely on the evidence that either offers.

Far more of the detail comes from Barbara, who candidly admitted that she has memory problems. Tr. 261-62; E.Ex. 40 at 29. But that isn't the only factor that limits Barbara's credibility. Barbara also, perhaps through honest misperception, mischaracterized events to minimize Wade's behavior before he went to Iraq and exaggerate it afterward. Examples include Barbara's finding Wade's efforts to control family expenses from Iraq excessive, but his limiting her to \$10 per week for discretionary spending before he left somehow not too controlling. She was shocked when Wade hit her dog on a trip back from Iraq, but minimized that he supposedly threw her cats long before. She was shocked that Wade cancelled the auto insurance without telling her, but far less surprised about his unilateral decision to go to Iraq. She took great note of Wade's insulting a sandwich-maker when on a visit back from Iraq, but neglected how he'd reacted in earlier years to her selection of asparagus, not to mention his road rage and other similar incidents, which she discounted as having a temper like everyone else. Barbara's description of changes in Wade's physical appearance after going to Iraq at best is exaggerated.

Some of Barbara's statements appear flatly false. She admitted that her statement to Dr. Seaman about Wade's throwing cats was false. Her descriptions of the evening when Wade arrived in June 2006 repeatedly neglect that Messrs. Kerr and Lewis were in the house. Her testimony and other statements were inconsistent about whether Wade threatened suicide. Her statements about the chronology of her developing relationship with Mr. Lewis raise questions.

But the overall deterioration of the marriage and the interaction between Wade and Barbara during the months they were living separately appear consistently on the record, not just from Barbara, but from all the witnesses and the other evidence taken as a whole. Wade's emails initially include his protestations of love for Barbara and Sara; the later ones are cold, angry, or threatening, or they accuse Barbara of lies and deceit. Scott Anstead confirms the frequent mortar attacks as of the time Barbara said Wade was upset about these, and Eric Olson confirmed that the clean-up after the suicide was an assignment he and Wade worked on. This lends support to Barbara's reports that Wade cried following the clean-up and was distressed following the mortar explosion; it's at least highly likely that the underlying events happened. Psychologist Anita Kemp's treatment notes written about a year after Wade went to Iraq show that by then Barbara was experiencing the marriage as distressing, dreading Wade's upcoming visit, and in fact found Wade abusive during the visit when it happened. Wade's SEII managers confirmed that toward the end of Wade's time in Iraq, he was complaining of marital discord and stress about Sara's behavior.

The evidence similarly shows that, when Wade went to Iraq, things changed at the Dill household. Barbara had new responsibilities, such as running the finances and disciplining Sara. She began using the family computer more. As time passed, she grew increasingly intolerant of Wade's control: She opened a checking account in her own name; she hired a divorce attorney and a therapist; and she stopped taking Wade's phone calls. Sara was repeatedly expelled from school, once for drugs. She was fifteen years old and dating a man ten years older who was selling drugs out of the Dill house. When the man was arrested, and knowing how insistent Wade was about controlling the finances, Barbara not only posted \$5,000 cash bail; she also encumbered the family house to secure the \$50,000 bond.

The record evidence also presents a consistent picture of the events after Wade returned home in June 2006. Barbara had seen a divorce lawyer, wouldn't let Wade into the house, and had him leave with Sara. He discovered the next day that when he'd arrived the night before, Barbara

and Sara hadn't been home alone; Barbara's male "friend" and Sara's 25-year-old drug-dealer boyfriend had also been there. As shown later in Wade's suicide notes, he apparently concluded that Barbara was having an affair with her male "friend," Mr. Lewis, and he told Jamie that his marriage was over.

Having said that his marriage was over, a few hours later, Wade was with Barbara at the house and spent the night. But the visit ended when he asked about his gun and the next day threw Barbara out. Whatever he might have thought of Jamie, he thought his daughter was better off with Jamie than with Barbara, and he arranged for them to live together, gave them \$13,000 cash, household equipment, and a car to get started, and blessed their life together before leaving to be with his mother and sister in Puerto Rico. He gave Sara a zip drive with a notation that it was proof that he'd existed. He then destroyed many of the household goods and appliances in the family home and did so in a way that can only be characterized as bizarre, suggesting at least to a lay observer some degree of mental disturbance. He removed clothes that Barbara would use for work. He arranged family photographs to form letters of the alphabet and spell out the word, "Goodbye."

Wade left around July 2, 2006 for Puerto Rico, and by the time Wade returned around July 9, his attitudes were the diametric opposite. He told Barbara that he'd got rid of the guns, knew he needed psychological help, and wanted her back. He told Jamie he was getting the family together and took back Sara. Far from blessing the relationship of Sara and Jamie, Wade demanded a return of the \$13,000, and when he didn't get it, choked Jamie. He returned Barbara's clothes. He arranged a birthday gathering for Sara and asked Barbara to come, which she did.

Then, when Barbara refused to return to him until he'd completed therapy, Wade shifted again. On July 15, 2006, he gave Barbara the "Aloha" letter, which reads like a suicide note. He continued to try to make contact with her and called Jamie to find out where she was. From his additional suicide notes, it seems as though he continued to hope that Barbara would come back to him at that time (rather than wait until he'd concluded therapy), and that he killed himself only when he gave up.

## Discussion

### I. Compensable Injury and Liability.

#### A. The section 20(a) presumption.

"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 – (a) That the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). This presumption is grounded in the humanitarian purpose of the Act, favoring awards in arguable cases. *Leyden v. Capitol Reclamation Corp.*, 2 BRBS 24 (1975), *aff'd mem.*, 547 F.2d 706 (D.C. Cir. 1977).

For the presumption to arise, a claimant has the burden to establish each element of a *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). He must establish that: (1) he sustained physical harm or pain, and (2) working conditions existed or

an accident occurred in the course of his employment that could have caused, aggravated, or accelerated the harm or pain. *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 182 (1991). A claimant's credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981). Once a claimant meets his burden of establishing these elements of a *prima facie* case, the presumption serves as a causal connection linking the harm with the employment. *Uglesich*, 24 BRBS at 182-183.

The quantum of proof required of a claimant at this stage is less than a preponderance of the evidence; it is enough if a claimant produces "some evidence tending to establish" both the injury and the connection to covered employment. *Brown v. I.T.T.-Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990). A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). A claimant need not offer medical evidence that the working conditions could have caused the harm. See *U.S. Industries-Federal Sheet Metal, Inc.*, *supra*, at 608. For example, evidence that a claimant sustained chest pain at work is sufficient without evidence of a myocardial infarction. See *Volpe v Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1982).

The claimant is not required to show unusually stressful conditions in order to establish a *prima facie* case. *Sewell v. Noncommissioned Officers Open Mess*, 32 BRBS 127 (1997), *reconsideration en banc denied*, 32 BRBS 127 (1998). Even where stress caused by work is relatively mild, the claimant may recover if a resultant injury and disability occur. *Sewell*, 32 BRBS 127; *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); 1B Larson's Workers' Compensation Law, § 42.25 (f), (g). That anyone can experience anxiety or other similar emotional conditions is irrelevant: the issue is the effect of the working conditions on the particular worker involved, and an employer takes her employees as she finds them with any pre-existing frailties. See *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1988). The appropriate legal standard is whether claimant's work was "a" cause of the psychological condition that led to the suicide attempt, not "the" cause of the condition. *Konno*, 28 BRBS 57; see generally *Director, OWCP v. Potomac Elec. Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979) (work injury results in psychological problems, leading to suicide).

Under the Defense Base Act,

The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose.

*O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 506-07 (1951).

The purpose of this doctrine is to extend coverage in overseas employment such that it includes injuries regardless of whether they occur within regular working hours or at a worksite or in an activity related to the job. *Id.* at 506; see *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 481 (1947). This broad reading of the scope of employment "is in accord with the humanitarian nature of the [Longshore] Act as exemplified [in the section 20(a) presumption]." *O'Keefe v. Smith, Hinchman & Gryllis Associates*, 380 U.S. 359, 362-63 (1965) (death benefits available

after employee drowned in a weekend boating accident thirty miles from his job at a defense site in South Korea).

The zone of special danger extends to risks of employment that are “foreseeable, if not foreseen . . . .” *O’Leary*, 340 U.S. at 507 (citation omitted). The zone ends where the event has “become so thoroughly disconnected from the service of [the] employer that it would be entirely unreasonable to say that the injuries suffered by him arose out of and in the course of employment.” *Id.* at 507. The Ninth Circuit has cited with approval a Board decision that provides an example of an injury that fell outside the zone, *Kirkland v. Air America, Inc.*, 23 BRBS 348, 349 (1990). *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 1091-92 (9th Cir. 2004). As the Court explained, referring to that case,

An employee was murdered during a burglary of his home. The employee’s wife was implicated in the crime by the two men who confessed, one of whom was believed to be her boyfriend. The ALJ denied the widow’s claim for benefits and the BRB affirmed, concluding, among other things, that her participation in the murder of her husband “effectively severed any causal relationship which may have existed between the conditions created by his job and his death.”

*Id.* at 1092 (citations omitted).

Claimant has established each element of her *prima facie* case. Wade’s suicide is unquestionably an injury. Claimant introduced evidence of conditions occurring within the zone of special danger that could have been a cause of Wade’s suicide, including the separation from his family and the exposure to traumatic wartime dangers.

*Events occurring in Iraq.* Employer/Carrier doesn’t dispute that, to the extent Wade’s stressful work environment aggravated his mental condition and led to his suicide, this was within the zone of special danger, nor could it. Those stressful events occurred directly within the course and scope of Wade’s employment.

Claimant introduced evidence that Wade experienced potentially traumatic events on the job in Iraq, including the clean-up of the suicide, the mortar attack, getting covered with hazardous waste, and the colleague hitting the improvised explosive device. Wade reported these incidents to Barbara. His former co-worker confirmed numerous mortar attacks; his supervisor confirmed the suicide clean-up. Given that Barbara’s testimony about Wade’s reactions to these and similar incidents was consistent with the co-workers’ testimony about the underlying incidents, I accept Barbara’s testimony about Wade’s “sobbing” responses on the suicide clean-up and the most serious mortar incident. Barbara testified that Wade had no history of crying; his tearful reactions are at least some evidence that the events were affecting him significantly at the time. Defense expert Dr. Whyman concedes that incidents of this kind would be stressful to anyone. This evidence, standing alone, is sufficient to raise the 20(a) presumption. Nonetheless, and in the alternative, I will discuss Wade’s separation from his family.

*Psychological effects of Wade’s separation from this family.* Employer/Carrier disputes that Wade’s physical separation from his wife and daughter falls within the zone of special danger. I find, however, that it does.

Wade's separation from his wife, daughter, and home life was a required condition of the employment, necessitated because the worksite was in an active war zone. SEII didn't offer Wade an option to bring his wife and daughter with him; they had to remain behind. It is foreseeable (if not foreseen) that the physical separation of family members, especially when the worker is assigned to a location where death and serious injury are commonplace, will strain marriages and affect people mentally, especially anyone who might have a pre-existing mental condition (as defense expert Dr. Whyman thinks Wade probably did).

The Ninth Circuit has repeatedly held that the assignment of workers to remote, isolated locations brings about foreseeable injuries that come within the special zone of danger. For example, when an employer required a worker to live in distant Guam where "one really had no life but the company's life," even when workers at 11:00 p.m. drove to and parked at a seaside site at the farthest end of an island road, perhaps for romantic reasons, the employer was liable when their parked car was hit by an oncoming vehicle, injuring one of the two parked workers. *Self v. Hanson*, 305 F.2d 699, 702-03 (9th Cir. 1962). The Court explained that it was the remote work setting that engendered the need for "recreation," bringing the injury within the scope of employment – where in an ordinary environment, it would have occurred on a detour and been outside the scope of employment. *Id.*

In another case, it was the lengthy periods of isolation for workers assigned to tiny Johnson Atoll that made it foreseeable, not only that there would be social clubs serving alcohol, but that the workers would engage in horseplay, during which a worker might be injured. *Kalama Services*, *supra*, at 1092. As the Court said,

Of particular note is the fact that Johnston Atoll is a small, remote island – only two miles long and one-half mile wide – which offers residents few recreational opportunities. We agree that, under these circumstances, horseplay of the type that occurred here is a foreseeable incident of one's employment on the atoll.

*Id.*, citing *Self* and other cases.

The remoteness and isolation of Claimant's assigned workplace in Iraq produced results that here similarly fall within the zone of special danger.<sup>23</sup>

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<sup>23</sup> Employer/Carrier misplaces its reliance on *Gillespie v General Electric Co.*, 21 BRBS 55 (1988). There, a worker assigned to a military base in Germany died accidentally while engaged in autoerotic asphyxiation. The Board rejected the administrative law judge's finding that decedent was engaged in recreation; it held on the contrary that there was no evidence bearing on decedent's motivation for what he was doing and nothing to relate it to his work. *Id.* at 58. This, the Board held, took it out of the zone of special danger.

It is difficult to square this with the Ninth Circuit's holding in *Self*. There, it was foreseeable that workers in a remote place, needing "recreation," would engage in romantic "parking," which brought them within the zone of special danger. Nothing in *Self* explains the couple's "motivation" for "parking"; it is characterized as "recreation," possibly romantic. The point in *Self*, as in *Kalama Services*, is that employment at a distant military base that results in the worker's isolation makes foreseeable that the worker will require "recreation," and that this brings such "recreation" within the zone of special danger. Perhaps changing attitudes toward masturbation since the 1980's might lead the Board to affirm the administrative law judge in *Gillespie* today, and not inquire about a married worker's motivation when separated from his wife, he engaged in a sexual activity, which by being solo, allowed him to remain faithful to his wife. Con't . . .

Having met the requirement of bringing her theory within the zone of special danger, Claimant also produced sufficient evidence (*i.e.*, at least some evidence) to show that Wade's suicide could have resulted from the physical separation between them. The evidence is abundant and undisputed that Wade was a man to whom the control and discipline of his wife's and daughter's behaviors were paramount considerations. He made considerable efforts to continue to control their behavior and the family finances despite his separation from his family. These efforts included not only daily phone calls, but also the careful online monitoring of family expenditures and the specific, particularized direction of those expenditures. Wade's primary motivation for taking the work in Iraq was financial. If anything, this would tend to reinforce Wade's determination to control family expenses: Uncontrolled expense would defeat his purpose in taking on this dangerous and demanding (seven days per week; twelve hours per day) work.

Claimant showed how, when Wade went to Iraq and lost significant control over his wife's and daughter's actions and over the family finances, there occurred a devastating devolution of conditions at home. Wade's communications (e-mail, telephone, and in person while on home visits) deteriorated over time from caring and loving (albeit still controlling), to angry, to threatening and enraged, to attempting to disengage (at least as to Sara), to (as Barbara perceived them) at times hate, until they included behavior that, as I described above, was at best bizarre. As revealed in Wade's suicide notes, from his perspective, over the 21 months he was gone, his family life collapsed as his wife failed to assume primary care of Sara, failed to control the expenses adequately, and finally, failed to maintain her marital fidelity. Wade's suicide followed within about three weeks his discovery of what appeared to him to be Barbara's infidelity.

I find that Claimant has shown sufficient evidence of a link between the suicide and both Wade's work-related physical separation from his family to raise the statutory presumption of compensability. *See* 33 U.S.C. §920(a). To the extent that Claimant insufficiently demonstrated this link based on this evidence, standing alone, when combined with the evidence related to specific traumatic events and adverse working conditions in Iraq, she had more than met her burden to raise the presumption.<sup>24</sup>

#### B. Employer/Carrier Failed to Rebut the Section 20(a) Presumption.

Once a claimant introduces sufficient evidence to raise the 20(a) presumption, the burden of production shifts to the employer to rebut the presumption by producing substantial evidence that is "specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651 (9th Cir. 2010); *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280-81 (1994) (burden of persuasion remains on the claimant; burden of production shifts). The administrative law judge's

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In any event, unlike *Gillespie*, the present record includes evidence about what motivated Wade's suicide, and, as I held above, there is evidence to show that Wade's suicide could have been connected to this work experience (both in Iraq and as a result of the separation from his wife). *Gillespie* thus has little to say about the present case.

<sup>24</sup> As discussed in the text above, a claimant need not produce medical evidence to raise the section 20(a) presumption. I therefore did not reach Dr. Seaman's opinion in the section 20(a) discussion in the text. As I turn below to Employer/Carrier's evidence, I will consider the expert evidence. That evidence raises complex questions of admissibility and weight. In general, however, Dr. Seaman offers expert medical opinion that finds that the suicide resulted from the strain of the separation when set into the context of the incidents he experienced in Iraq.

task is to decide, as a matter of law, whether the employer submitted evidence that could satisfy a reasonable factfinder that the injury was not work-related; weighing of credibility has no place in determining whether the employer met its burden of production at this step of the analysis. *Ogawa*. If the employer rebuts the presumption, the presumption no longer controls, and the issue of causation must be resolved on the evidence as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

“Substantial evidence as used in the Act ‘is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Matter of D.C. Workmen’s Comp. Act*, 554 F.2d 1075, 1084 (D.C. Cir. 1976), *cert. denied sub nom. J. Frank Kelly, Inc. v. Swinton*, 429 U.S. 820. *See Avondale Industries v. Pullman*, 137 F.3d 326, 328 (5th Cir. 1998); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003). The proof required is less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence. *See Avondale, supra; Charpentier, supra*. When there has been a work-related incident followed by an injury, the employer can rebut the presumption by introducing medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation. *Stevens v. Todd Pac. Shipyards*, 14 BRBS 626 (1982), *aff’d mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984); *Champion v. S & M Traylor Bros.*, 14 BRBS 251 (1981), *rev’d and remanded*, 690 F.2d 285, 15 BRBS 33 (CRT) (D.C. Cir. 1982).

Here, Employer/Carrier relies on the opinion of Dr. Whyman to rebut the statutory presumption of compensability. Essentially, Dr. Whyman opines that Wade’s work in Iraq didn’t affect him psychologically, that any effect the physical separation of Wade and Barbara might have had is speculative, and that Wade’s suicide was a progression of his pre-existing personality defects and non-work-related stressors. I will find, however, that this opinion lacks substance and that Employer/Carrier therefore fails to rebut the presumption of compensability.

Both parties’ experts were faced with the task of evaluating a deceased person’s psychological condition; each expert offered what the cases call a “psychological autopsy.” Neither party objected to the admissibility of the other’s “autopsy” report, and I admitted both experts’ opinions. I must yet determine, however, what weight, if any, I can attach to the opinions of either expert.

An administrative law judge is not bound by common law or statutory rules of evidence but must conduct hearings to best ascertain the rights of the parties. *See Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997). The judge has broad discretion in the admission of evidence and may be reversed only if an evidentiary ruling is arbitrary, capricious, or an abuse of discretion. *See Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153, 155 n.1 (1985).

Although not controlling, the Federal Rules of Evidence, the general regulatory scheme, and relevant case law nonetheless guide an evaluation of expert scientific opinion. The rules of evidence in our regulations (not applicable in Longshore or Defense Base cases) provide the following guidance:

If scientific, technical, or other specialized knowledge will assist the judge as trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

29 C.F.R. §18.702.

The regulation tracks the Federal Rules of Evidence as they existed prior to the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). Following that decision and consistent with it, the Federal Rules of Evidence were amended to add that the evidence is admissible as an opinion or otherwise:

if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

The added language reflects trial courts' gatekeeping responsibility to ensure that "any and all scientific testimony or evidence admitted is not only *relevant*, but *reliable*. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). "Proposed testimony must be supported by appropriate validation – *i.e.*, 'good grounds,' based on what is known." *Id.* It must "fit" the facts of the case. Thus, knowledge about the phases of the moon might be relevant to a determination whether a particular night was dark (if darkness is an issue), but "(absent credible grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night." *Id.* at 591.

If the proposed evidence is validated appropriately and likely would assist in the determination of relevant facts, the test for admissibility is guided by such factors as:

1. Whether the theory or technique in question can be (and has been) tested;
2. Whether it has been subjected to peer review and publication;
3. The theory or technique's known or potential error rate; and
4. Whether the theory or technique has attracted widespread acceptance within a relevant scientific community.

*Daubert* at 593-94. These factors are examples; the list is not exclusive. As the Court explained:

The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability of the principles that underlie a proposed submission. The focus, of

course, must be solely on principles and methodology, not on the conclusions that they generate.

*Id.* at 595 (footnote omitted). The essential determination is whether the expert employs in the courtroom “the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).<sup>25</sup>

The expert evidence must “fit” the facts in contention; this requires more than “bare relevance.” *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir. 1994). Scientific expert testimony introduces special dangers to the fact-finding process because it “can be both powerful and quite misleading because of the difficulty in evaluating it.” *Daubert*, 509 U.S. at 595 (internal quotation marks and citation omitted). Therefore, as the Ninth Circuit observed on the *Daubert* remand, such evidence must speak clearly and directly to an issue in dispute and do so in a way that is not misleading. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1321 (9th Cir. 1995) (*Daubert II*).

Significant in the analysis is “whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.” *Daubert II*, 43 F.3d at 1317. If the evidence is not based on independent research, the court must determine whether there exists any “other objective, verifiable evidence that the testimony is based on ‘scientifically valid principles.’” *Id.* at 1317-18. Peer review could supply such objective, verifiable evidence; the expert could also explain how he reached his conclusions and point to an objective source, such as a treatise, a professional association’s policy statement, a published article in a reputable scientific journal, or similar objective sources. *Id.* at 1319.

As Rule 702 acknowledges, an expert’s use of reliable methods and principles is not an assurance that those methods and principles have been reliably applied. When an expert purports to apply principles and methods in accordance with professional standards and yet reaches a conclusion that other experts in the field would not, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust By and Through Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

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<sup>25</sup> Psychological questions require additional flexibility when applying the *Daubert* factors:

Several courts have commented on the particular need to reach beyond these four [*Daubert*] factors in cases involving psychiatric, psychological, or other ‘social science’ testimony. *See, e.g., United States v. Simmons*, 470 F.3d 1115, 1122-23 (5th Cir. 2006) (upholding the admission of a psychologist’s testimony regarding the behavior of a sexual assault victim even though it did not - because of “inherent limitations” of research in that field of study - satisfy the four *Daubert* factors); *Longoria v. Texas*, No. 5:02cv112, 2007 WL 4618452, \*4 (E.D. Tex. May 18, 2007) (characterizing expert testimony concerning “social sciences” as a “special circumstance” because the “research, theories, and opinions cannot have the exactness of ‘hard’ science methodologies”); *Blanchard*, 207 F. Supp. 2d at 316 (“The reliability of expert opinion testimony based on psychiatric or psychological observation and analysis does not readily lend itself to evaluation using the specific *Daubert* factors.”). One court explained that, when dealing with “social science” testimony, “other indicia of reliability . . . including professional experience, education, training, and observations” guide the inquiry.” *Longoria*, 2007 WL 4618452, at \*4.

*In re Neurontin Marketing, Sales Practices, and Products Liability Litigation*, 2009 WL 3756328 (D. Mass.) at \*4.

Experience alone – or in conjunction with other knowledge, skill, training, or education – may be a sufficient foundation for expert testimony. See *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997). Peer review is not required in every case. See *Clausen v. M/V New Carrisa*, 339 F.3d 1049, 1061 (9th Cir. 2003). But if the expert relies solely on experience, he must explain how that experience led to the conclusions reached, why the experience is a sufficient basis for the opinion, and how the experience relates to the facts of the case; a trial court’s gatekeeping function is more than simply “taking the expert’s word for it.” *Daubert II*, 43 F.3d at 1319 (“We’ve been presented with only the experts’ qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that’s not enough.”).

Yet questions of admissibility should take into consideration that, “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Daubert*, 509 U.S. at 595. Thus, when the trial court, acting as gatekeeper, admits expert testimony as within *Daubert*, it remains for the factfinder to determine the weight to be placed on the expert opinion.

The present parties offer no authority for the proposition that an opinion based on a psychological autopsy is admissible or entitled to any weight. But several courts have accepted psychological autopsies, if properly conducted by an appropriate expert, as being within the *Daubert* requirements. A district judge recently surveyed the cases and wrote:

In forming these opinions, Dr. Maris [the suicidologist] utilized a “psychological autopsy,” a diagnostic technique that he developed to evaluate causation of individual suicides. Dr. Maris has described the psychological autopsy as a standardized, systematic checklist which could be used to assemble and organize information so that a qualified suicidologist or other appropriate health care professional would have the information necessary to consider all of the various risk factors which may or may not have contributed in a material way to any person’s suicide or suicide attempt. Defendants prudently are not pressing a general challenge to the “psychological autopsy” model; this approach has been published in peer-reviewed scientific literature and has been described by numerous courts as a generally accepted methodology for analyzing what led to a suicide.<sup>26</sup>

*In re Neurontin Marketing, Sales Practices, and Products Liability Litigation*, 2009 WL 3756328 (D. Mass.) at \*6 (citations to the district court’s record and footnote omitted). As the district court concluded:

This approach will never produce the definite and testable results expected and demanded in many scientific inquiries; it is, however, the generally accepted

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<sup>26</sup> Citing *Stupak v. Hoffman-La Roche, Inc.*, No. 07-15980, 2009 WL 1616713, \*5 (11th Cir. June 10, 2009) (describing seventeen case reports of completed suicides in connection with use of a certain medication as “inconclusive” because “nothing close to a psychological autopsy was performed on any case”); *Giles v. Wyeth, Inc.*, 500 F. Supp. 2d 1048, 1061 (S.D. Ill. 2007) (listing numerous courts that have held that “a psychological autopsy is a generally accepted methodology for determining the cause of a suicide”); *Blanchard [v. Eli Lilly & Co.]*, 207 F. Supp. 2d [308] at 313 n. 2 [D. Vt. 2002] (“The psychological autopsy is a generally accepted methodology for trying to determine what led to a suicide.”); *Cloud v. Pfizer, Inc.*, 198 F. Supp. 2d 1118, 1135 (D. Ariz. 2001) (noting that psychological autopsies “appear to be generally accepted”).

methodology for analyzing the causes of a particular suicide and far from the “junk science” that *Daubert* and Rule 702 are designed to exclude.

*Id.* at \*9; *but see Halvorsen v. Plato Learning, Inc.*, 167 Fed. Appx. 524, 531 (6th Cir. 2006) (unpublished decision) (affirming magistrate judge’s rejection of psychological autopsy where the doctor did not review the relevant medical records and had never performed such an autopsy before).

Following *Daubert*’s teachings and taking guidance from the Federal Rules of Evidence and related sources, I find that psychological autopsies, if performed in a way that fits the facts, can be admitted as reliable and relevant to a determination on the merits. But what of the particular autopsy-based opinions offered here?

After a careful analysis of Dr. Whyman’s opinion, I have concluded that it fails to rise to the level of substantial evidence. To reach this conclusion, I have not weighed Dr. Whyman’s credibility. Rather, my conclusion turns on the reservations that Dr. Whyman himself placed on his opinion.<sup>27</sup>

In particular, Dr. Whyman details for thirty pages in his report the information he gathered about Wade. E.Ex. 44 at 1-30. His summary of his interview of Barbara Dill occupies over fifteen single-spaced pages, and he devotes more than five additional pages to his interview of Sara Dill. He reviews the transcripts of Dr. Seaman’s interviews of Barbara Dill and the transcripts of the depositions of Barbara and or Sara. He summarizes some of Wade’s medical records as well as other information.

Based on all this, however, Dr. Whyman’s diagnosis reveals that he was left significantly uncertain about Wade’s condition. As Dr. Whyman recited it:

DIAGNOSIS:

Axis I: Probable Major Depressive Episode.

Probable Dysthymia.

Relationship Problem.

Axis II: Probable narcissistic personality features.

E.Ex. 44 at 30. The reference he cites to define these diagnoses is the industry standard, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4th ed., text revision (DSM-IV-TR) (American Psychiatric Association). *Id.* at 35.

As Dr. Whyman’s report reflects, the DSM structures an assessment on different axes; these are numbered I through V. *See* DSM-IV-TR (APA 2000) at 27. Dr. Whyman’s diagnoses are limited to the first two of these axes (I and II); he does not address the remaining three (III through V). This reflects a preliminary limitation in how completely Dr. Whyman is willing to assess Wade’s condition.

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<sup>27</sup> I note as well Dr. Whyman’s failure to meet the requirements set out in cases such as *Daubert*.

Dr. Whyman then limits three of the four diagnoses he offers by specifying that they are “probable.” Looking to the DSM, which Dr. Whyman cited, a “probable” diagnosis is not a diagnosis at all: the DSM does not provide for “probable” diagnoses.

The DSM does, however, allow for a “provisional diagnosis.” That designation places the diagnosis in a group that the DSM entitles, “Ways of Indicating Diagnostic Uncertainty.” *Id.* at 4-5. Specifically, a “provisional” diagnosis is used when, “Enough information [is] available to make a ‘working’ diagnosis, but the clinician wishes to indicate a significant degree of diagnostic uncertainty.” *Id.* at 5. By definition, a provisional diagnosis is one that, not merely indicates uncertainty, but does so to a significant degree.

That leaves Dr. Whyman’s fourth diagnosis, “Relationship Problem.” Again, the definitions in the DSM on which Dr. Whyman relies (and the industry standard) include no such diagnosis. There are, however, a group of conditions that, while not themselves mental disorders, are denoted as “Other Conditions That May Be a Focus of Clinical Attention.” *Id.* at 24-25. These include, “Relational Problems,” such as “Partner Relational Problem” (V61.10) (a finding that Dr. Seaman reached) and “Parent-Child Relational Problem” (V61.20). *Id.* at 25. As these conditions’ designators (V61.10 and V61.20) indicate, they are conditions that the DSM groups as “V codes.” *See id.* at 5. V codes are another of the “Ways of Indicating Diagnostic Uncertainty.” *Id.* at 4-5. In particular, the use of a V code indicates: “Insufficient information to know whether or not a presenting problem is attributable to a mental disorder . . . .” *Id.* at 5.

Thus, giving the benefit of the doubt to Dr. Whyman’s imprecise references to the DSM, and assuming that he was referring to definitions in the DSM with very similar names (as opposed to non-existent definitions), every aspect of Dr. Whyman’s assessment reflects a degree of uncertainty expressly denoted either as “significant” (in the case of the mental disorders) or at the least enough to render the information “insufficient” (for the V code).

The result is that Dr. Whyman’s discussion of the science doesn’t fit the facts of the case. For example, Dr. Whyman’s reference to the science that links depression more frequently than Posttraumatic Stress Disorder to suicide is relevant only if he diagnosed Wade with depression; he was unable to do that without significant uncertainty. Dr. Whyman’s diagnostic uncertainty similarly undermines his explanation of how Wade’s long-standing, pre-existing mild depression would have led to a major depressive episode and suicide irrespective of his working for SEII; Dr. Whyman lacked confidence in both the Dysthymia and the Major Depressive Episode diagnoses. Dr. Whyman’s inability to reach a reliable diagnosis thereby leaves his opinions on causation insufficiently substantial.

Even were I to reach Dr. Whyman’s causation analysis, I find it speculative and unbased. (This, of course, is unsurprising, given the doctor’s uncertainty regarding diagnosis.) As I discussed above, Dr. Whyman fails to consider the relevant information on the record when he concludes that neither the conditions in Iraq nor the separation of Wade from his wife and daughter aggravated (to any extent) his mental condition. If anything, Dr. Whyman’s theory that Wade developed a new depressive disorder in the last couple months leading up to his suicide suggests the opposite: After all, that two-month period began with Wade still in Iraq, still separated from his wife and daughter, and apparently (according to Dr. Whyman) feeling more out of control

than ever; the change in diagnosis indicates that events occurring at that time had a profoundly negative impact on Wade's psychological condition.<sup>28</sup>

Dr. Whyman failed to point to any literature, peer reviewed articles, or his own experience as a psychiatrist to suggest that an already depressed person wouldn't be adversely affected when thrust into a war zone thousands of miles from his family and home, separated from them for 21 months (excepting short visits), and subjected to the incidents that Wade experienced in Iraq, not to mention the stress on his marriage. Dr. Whyman posited only a theory developed for this litigation, not a scientific theory for which he offered any objective basis. These are the factors, which, under *Daubert*, make questionable whether the opinion passes the threshold into admissibility.

I find that Employer/Carrier failed to introduce substantial evidence to rebut the presumption of compensability.

## II. Claimant's Remedy Is Not Precluded As a Willful, Intentional Act.

Employer/Carrier contends that it is relieved of any obligation to pay compensation because Wade's suicide was an act of willful intent. As the statute mandates, "No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." 33 U.S.C. §903(c).

Claimant disputes this and asserts that Wade's suicide was the result of an irresistible impulse, negating intent. For it is settled that, "Where an employee's death does not stem from a 'willful intent' to commit suicide, but is instead caused by an irresistible suicidal impulse resulting from an employment-related condition, Section 3(c) does not bar compensation." *Maddon v. Western Asbestos Co.*, 23 BRBS 55, 61 (1989);<sup>29</sup> see *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994).<sup>30</sup>

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<sup>28</sup> Dr. Whyman's conclusion, at least as to the lack of impact of the stressful events in Iraq, if accepted, would turn the statutory scheme on its head. Dr. Whyman admits that anyone would find some of Wade's experiences in Iraq stressful. But he finds Wade must have experienced only short-term stress because, had he experienced more, he would have complained to his co-workers or sought mental health treatment, or his supervisors would have noticed.

Yet it is Employer/Carrier's obligation to offer substantial evidence to rebut the statutory presumption of compensability, not Claimant's obligation to demonstrate to a medical certainty that decedent was injured. Employer/Carrier offered nothing to show that it interviewed all – or even most – of Wade's former co-workers and that these people confirmed that he had no complaints about cleaning sprayed brain tissue off the walls and floor or getting hazardous waste spilled on him or having to jump from his vehicle to avert an incoming mortar attack. Employer/Carrier offered no evidence of the adequacy of mental health treatment that it made available to workers in Iraq, that it told Wade that treatment was available, or that it assured him that, if he sought treatment, it wouldn't affect his employment security.

And, as I stated above, Dr. Whyman's opinion lacks substance because Wade in fact did talk to people about the incidents in Iraq (and his devolving marriage), and his co-worker did observe changed behavior in their wake.

<sup>29</sup> Citing *Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), *aff'd in pertinent part sub nom. Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979); see also, *Voris v. Texas Employers Insurance Association*, 190 F.2d 929 (5th Cir. 1951); *Terminal Shipping Co. v. Traynor*, 243 F. Supp. 915 (D. Md. 1965).

<sup>30</sup> As with compensability, the statute sets up a presumption that, absent substantial evidence to the contrary, "the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." 33 U.S.C. §920(d). The presumption carries no evidentiary weight; it simply shifts the burden to the employer to prove

Thus, in *Maddon*, the Board affirmed an administrative law judge's award of compensation based on a "chain of causation" analysis (that the decedent's work-related exposure to asbestos caused lung cancer, the effects of which included depression, and the depression led to a suicide without rational intent). The claimant's expert psychiatrist interviewed the widow, reviewed the decedent's records, and opined that "the industrial injury causally contributed to a mental condition which prevented [decedent] from forming a rational intent to suicide." Testifying for the defense in that case as here, Dr. Whyman reviewed the decedent's medical records and opined that the suicide was neither irrational nor spontaneous. The administrative law judge found that "Dr. Whyman's opinion did not convincingly refute" claimant's psychiatrist's opinion and that the bar in section 3(c) of the Act did not apply.

The determination whether a decedent acted willfully and intentionally, as opposed to as a result of an irresistible impulse, is obviously fact-intensive. In *Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), decedent's psychiatrist had been seeing him for three years at the time of the suicide. The psychiatrist stated that decedent had an "obsessive-compulsive type" personality, which left him frequently feeling that he was inadequate or a failure; that this made him work harder; that as his business suffered reverses, the feelings of inadequacy intensified during decedent's last month or two before his death; and that, "at the time he shot himself the decedent was aware of the consequences of his act but was without capacity to control what he was

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up enough evidence from which a factfinder could make a contrary finding. See *Del Vecchio v. Bowers*, 296 U.S. 280, 285-86 (1935). Once the employer presents substantial evidence, the claimant must carry the burden of persuasion based on the record as a whole, without the benefit of a presumption.

The Supreme Court's 1935 analysis in *Del Vecchio* raises questions about how the section 20(d) presumption applies in suicide cases. In *Del Vecchio*, decedent was found shot to death, apparently by his own hand. The Court reasoned that the factfinder had to decide between two conclusions: "either the decedent accidentally killed himself, or he committed suicide." As the Board has recognized, the Supreme Court thus "was using the term 'suicide' to refer to death caused by an injury that is willfully and intentionally self-inflicted." See *Cooper v. Cooper Assoc.*, 7 BRBS at 861. Thus, once the employer showed substantial evidence of suicide (as opposed to accident), the presumption evaporated from the case because the fact of a suicide implied willful intent.

But, as the Board also recognized in *Cooper*, psychological injuries come within the Act, and where a mental impairment results from work-related injury and leads to suicide, the suicide might not be willful or intentional within the meaning of section 3(b): the stresses and strains of work can cause an irresistible suicidal impulse. *Id.* at 861-62. Consistent with this, in 1989, the Board held in *Maddon*, *supra* (which involves a mental condition that precluded volition) that, "Section 3(c) is complemented by the presumption at Section 20(d), 33 U.S.C. §920(d), which places the burden on employer to establish that the injury was occasioned by the employee's willful intent to kill himself." The Board cited *Del Vecchio* for this proposition. See *Gould v. General Dynamics Corp.*, 26 BRBS 88 (ALJ) (1992) (holding in a suicide case that section 3(c) did not apply when employer failed to offer evidence to rebut the section 20(d) presumption).

It thus, is perplexing that the Board subsequently held, in a case where an irresistible impulse was at issue, that: "Where, as here, it is uncontested that the death was the result of suicide, the presumption applies but is rebutted." *Konno*, *supra*, citing *Del Vecchio*. This could be read as an inflexible application of *Del Vecchio* to all suicide cases, irrespective of whether the suicide was arguably the result of an irresistible impulse and not intentional. As it turns out, though, the administrative law judge in *Konno* weighed the evidence as a whole and found the suicide not willful, and the Board affirmed. The Board's discussion of the presumption thus was *dicta*.

I view a reading of *Konno* as negating the presumption in all suicide cases as an over-extension of *Del Vecchio*, which was discussing only *intentional* suicides; such a holding would be inconsistent with *Cooper* and *Maddon*. I therefore will apply the presumption to the present case, which raises an issue of an *unintentional* (although not accidental) suicide. But, much as in *Konno*, the issue will become moot, as I will find that Employer/Carrier rebutted the presumption, and I therefore address the record as a whole irrespective of the presumption.

doing.” *Id.* at 857. The administrative law judge credited the psychiatrist’s opinion and awarded death benefits, and the Board affirmed.

In *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994), decedent had been working as a foreman at a marine terminal, where local authorities were investigating a loss of about \$500,000 worth of cargo over five years. The prosecutor had summoned decedent, along with all the other workers, to the grand jury. Meanwhile, in the year before his death, decedent had repeatedly been upset at work when his employer, for example, criticized him for being three minutes late for work, refused to help him locate a particular shipment, questioned him about a missing bill of lading, and came to his house on a day he’d called in sick (supposedly to deliver a paycheck, but decedent thought it was to check up on him). The administrative law judge credited expert psychiatric opinions that decedent’s conditions at work, combined with the grand jury investigation, caused decedent to become depressed and led to an irresistible suicidal impulse: the depression caused “tunnel vision” which led decedent to the irrational view that suicide was the only alternative. *Id.* at 64. The Board affirmed. *Id.* at 65.

Before turning to the experts whom the parties retained for the litigation, I consider the substantial record of Wade’s consistent, long-standing impulsive behavior. In the year before going to Iraq, despite the attention he gave to family finances, Wade traded cars ten times. He often was “under water” on each car he traded, meaning that the trade led to new debt without paying off the old. Although Wade controlled Barbara’s spending so closely that he allowed her only \$10 per week for her personal expenses, on at least a couple occasions he saw a mannequin in a store window and bought for Barbara everything shown on the mannequin. His pattern of overstated angry outbursts appeared as spontaneous, impulsive events. They involved his family (such as the incident with Sara’s Christmas present), his co-workers at Clark’s Pest Control, and complete strangers, such as in the road rage incident. Wade’s decision to apply for and accept the SEII job itself appears impulsive (or, as Dr. Whyman described it, “precipitous”).

On his first trip home from Iraq, Wade stopped while driving on a road trip with the family, went into a BMW store, and traded his car again. A new BMW isn’t a frugal choice, and Wade wasn’t even going to be home to drive the car. It was especially questionable to trade for an expensive performance car when Sara, then age 14, had recently taken the car keys apparently to drive without permission or a license.<sup>31</sup> Wade’s altercation a few months later with his long-time co-worker Scott Anstead sounds impulsive as well, as did Wade’s reaction to being passed-over for a promotion.

The last month of Wade’s life was characterized by a series of changing and reversing thoughts, feelings, and actions. Wade cried when Barbara wouldn’t let him into the house when he arrived early from Iraq. But he went back to the house the next day to reassert his place in the family. It was only when he discovered that another man had been in the house with Barbara the previous evening that he reversed (and literally turned around a car he was driving) to give Barbara the house keys because, as he said, his marriage was over. Yet, within hours, he was back at the house to be with Barbara, and they spent the night together, apparently in the same bed. By morning, he was throwing Barbara out of the house, having insisted that she return his gun and abused her dog.

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<sup>31</sup> Wade bought this car in March or April 2005. Sara was born in July 1990.

Within a day or two of telling Jamie Kerr that Kerr's relationship with Sara was over, Wade was blessing the relationship, giving Sara and Kerr money and a car, and advising them to make a life together – encouraging his teenage daughter's relationship with a 25-year-old convicted drug dealer. He gave his daughter something so that she'd be able to recall she once had a dad, strongly suggesting a suicide plan, and he went to see his mother and sister, which also could be consistent with a suicide plan. His leaving the extraordinary "goodbye" message constructed of family photographs was entirely consistent with suicide. At the same time, Wade's bizarre destruction of the family household goods strongly suggested that he was experiencing powerful emotions while exhibiting these changing plans and attitudes.

Within a week, Wade was back, throwing out Jamie Kerr, demanding the money he'd given Sara and Jamie, choking Jamie, and asserting that he was putting his family back together. He arranged to see Barbara and ask her to get back together. He was willing to go into therapy if that would bring back Barbara. He arranged a birthday party for Sara. His behavior was that of a man who saw himself as having a future.

Then, within two or three days, when Barbara said Wade had to get the therapy before she'd come back, Wade shifted 180 degrees again. He begged Barbara to come back, and from the calls and the suicide notes, appears to have been waiting for Barbara to agree. Waiting, he wrote not one, but five, suicide notes, all of them accusatory toward Barbara in a way very different from what he wrote in the "Aloha" letter that he gave Barbara the day before. He then killed himself.

Set against those facts, I consider the parties' expert opinions:

Dr. Seaman has impressive overall credentials. Having received his medical degree in 1983 and completed a psychiatric residency in 1987, Dr. Seaman went on to achieve board-certification as a psychiatrist in 1991, with further specialized board certifications in addiction psychiatry (1993 and 2002) and forensic psychiatry (1999). The board certification in forensic psychiatry followed a two-year training fellowship at the University of California (Davis). The program included training in, among other areas, suicide assessment, psychiatric disability, and workers' compensation. C.Ex. 41. Dr. Seaman has about four years' experience as a Medical Director with the Department of Veterans Affairs, at which he was engaged, among other activities, in the assessment and treatment of veterans with Posttraumatic Stress Disorder. He remains active as a clinical psychiatrist. As with Dr. Whyman, nothing on the record shows any particular expertise with the "psychiatric autopsy" of a person who died without a history of mental health treatment, but unlike Dr. Whyman, Dr. Seaman has specialized training and certification in forensic psychiatry, including suicide cases. His experience with persons who had psychiatric injuries in connection with a war effort is considerably more recent and more extensive than Dr. Whyman's, but both psychiatrists have experience with such injuries.<sup>32</sup>

As with Dr. Whyman, Dr. Seaman's opinions suffer a limitation because he also had to do his psychiatric autopsy with no treatment history. Neither doctor could consult with any treating mental health professional or review treatment records. And Dr. Seaman also had to rely on

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<sup>32</sup> See the discussion of Dr. Whyman's credentials and experience in footnote 34 below.

Barbara and Sara, whose information – although accurate in general – was not as reliable in the details.

Unlike Dr. Whyman, however, Dr. Seaman did reach a diagnosis: Adjustment Disorder with Mixed Disturbance of Emotions and Conduct. Reviewing that diagnosis in the DSM shows Dr. Seaman’s analysis and findings have a reasonable fit with what the record shows about Wade. *See* DSM at 679-83.<sup>33</sup> Consistent with Dr. Seaman’s report, the DSM states, “Adjustment Disorders are associated with suicide attempts [and] suicide . . . .” *Id.* at 680.

Dr. Seaman also pointed to an objective study to support his inferences. He cites a 2007 U.S. Army study that showed fifty percent of completed suicides in Army personnel “were associated with failed marital/intimate relationships” and that other (non-intimate) failed relationships were reported for another fifteen percent of completed suicides. ALJ Ex. 11 at 1. He opines that, “In the Army, the most obvious causal factor for relationship failures is separation from spouse or intimate partner due to military service.” *Id.*

Dr. Seaman’s analysis finds objective scientific support and fits the facts sufficiently to be reasonably reliable and be accorded considerable weight.<sup>34</sup>

Following his analysis and diagnosis, Dr. Seaman concludes that Wade’s suicide was the result of an irresistible impulse. ALJ Ex. 11 at 3. He states:

An Adjustment Disorder is [a] psychiatric condition that is associated with distress and/or mental/emotional impairment. The mental/emotional impairment may include loss of impulse control, failure to see alternative options, distorted perceptions, excessive intense emotions, poor judgment, and impaired cognition.

ALJ Ex. 11 at 3. Dr. Seaman thus opines: “Wade Dill’s suicide was the result of the severe emotional distress and mental/emotional impairment of his Adjustment Disorder and was, therefore, the irresistible result of a mental disorder.” *Id.*

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<sup>33</sup> The DSM states that an Adjustment Disorder “is a psychological response to an identifiable stressor or stressors that results in the development of clinically significant emotional or behavioral symptoms . . . within 3 months after the onset of the stressor(s).” DSM at 679. It may be caused by a single stressor but also may be caused by multiple stressors, such as “marked business difficulties and marital problems.” *Id.* Dr. Seaman identifies multiple stressors very similar to those listed in the DSM: work difficulties flowing from (1) both long work hours and especially stressful incidents such the mortar attacks and suicide clean-up and (2) marital problems flowing from Wade’s physical separation from his family that the work required. ALJ Ex. 11 at 2-3. (Dr. Seaman also cites the weather in Iraq and Wade’s conflicts with supervisors. *Id.*) Although the disorder should resolve within six months, it may continue for a prolonged period if the stressors continue. DSM at 679. This case contains ample evidence of prolonged exposure to stressors.

<sup>34</sup> Dr. Seaman’s diagnosis might be lacking in how it addressed Wade’s pre-existing behaviors such as impulsive buying, the unusual degree of control that he demanded, and his episodes of near-explosive, inappropriate rage. Dr. Seaman states that this is why he specified that Wade’s Adjustment Disorder was “with Mixed Disturbance of Emotions and Conduct” (DSM 309.4). I don’t find this entirely convincing, or at least it would have to relate to stressors that pre-dated Wade’s employment with SEII. I thus don’t accept Dr. Seaman’s opinion in every aspect. But Dr. Seaman was well-aware of Wade’s history in this regard and took it into account. I therefore can give considerable weight to his opinion.

Dr. Whyman disputes Dr. Seaman's conclusion but offers little by way of explanation.<sup>35</sup> Dr. Whyman read the suicide notes as showing a negotiation between Wade and Barbara that was part of a weeks'-long evolution of Wade's idea of killing himself. Dr. Whyman opines that, even with the negotiation's failure, Wade still had a choice whether to take his life and decided to do so. Although this might well be enough to rebut the statutory presumption that Wade's act was not willful, it is unpersuasive on the record taken as a whole.

In particular, I reject Dr. Whyman's conclusion for several reasons. First, it is the culmination of an analysis lacking sufficient certainty to formulate a diagnosis; that necessarily colors the rest of Dr. Whyman's analysis. If Dr. Whyman can offer only a provisional or "probable" diagnosis, rather than one to a reasonable certainty, he cannot fit Wade's behavior into an established scientific framework that the diagnosis implies. The analysis lacks the rigor that characterizes the practice of an expert psychiatrist. *See Kumho Tire, supra*.

Second, Dr. Whyman's conclusion doesn't fit the facts. Wade was not involved over a period of weeks in a negotiation that failed, after which he considered his options and decided to kill himself. The record shows Wade sustaining a series of powerful swings in emotion, thinking, and action over his last weeks. As late as the day before his suicide, he chose to leave his property to Barbara and thanked her for agreeing to take care of Sara. By the next day, he was writing suicide notes blaming Barbara for everything, accusing her of being an unfit wife and mother, and asking authorities to protect his daughter against her. A couple weeks before the suicide, he shifted from taking parental control of his daughter's relationship with Jamie Kerr by

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<sup>35</sup> Dr. Whyman's general credentials are easily as impressive as Dr. Seaman's, although he lacks the training in forensic psychiatry and suicide. Dr. Whyman is a licensed San Francisco psychiatrist. His training was at some of the nation's leading universities. He completed his psychiatric residency in 1973 and was board-certified in 1977. He published several articles between 1969 and 1991, and in the 1990's spoke frequently on the subject of psychological injuries and workers' compensation. E.Ex. 45; Tr. 323-25. Earlier in his career, Dr. Whyman directed a psychiatric in-patient program, including a training (residency) program. Tr. 324-25. He then went into private practice. *Id.* Now partially retired, Dr. Whyman works about one week per month, exclusively on medical-legal work. Tr. 325.

Although his general expertise is thus beyond question, Dr. Whyman pointed to no specialized expertise in the area of suicide; he did not describe himself as a "suicidologist," as did experts in some of the cases I cited above, and he offered no examples of psychological autopsies he identified as being on suicide cases. He's worked with patients who had symptoms associated with Posttraumatic Stress Disorder after the Vietnam War, yet said nothing about suicides in that context. Tr. 325-26.

Dr. Whyman has had some general professional experience that called upon him to develop a better understanding of people who had died by gathering information from family members and other associates. He testified that when at the Pacific Medical Center (in the Vietnam years from 1972-73), he started a program that included, as he described them, "psychological autopsies." Tr. 326-27; E.Ex. 45 at 1. These "autopsies," however, were considerably different from what he and Claimant's expert did for the present case: They involved patients in the Pacific Medical Center program, that is, people for whom the treating professionals and records were available. Tr. 332-33. In the present case, there are neither treating professionals nor treatment records.

Beyond these readily distinguishable autopsies, Dr. Whyman has had some limited experience developing opinions in workers' compensation cases involving claimants who had died. The total number of these, together those at the Pacific Medical Center, is about a dozen. Tr. 338. But Dr. Whyman didn't specify how many of the dozen studies he did without information from any treating mental health professional or any treatment records. In all, Dr. Whyman offered no examples of cases in which he had to develop a medical opinion about a person who had died and therefore could not be examined and for whom there was no treatment history and thus no treating professional who could provide information and no treatment records. Dr. Whyman also admitted that he has not kept up with the literature in the area for the last ten to fifteen years. Tr. 339.

ending it, to blessing the relationship and supporting it financially, to ending their relationship as part of reconstructing his family, to acknowledging the relationship again. He might have given Sara a zip drive with a picture of himself captioned, "I did exist and loved you," all in the past tense, but a week later he was choking Jamie, throwing him out, and taking Sara back. Wade's bizarre dismantling of household appliances scarcely reflects deliberation, nor does his writing five separate suicide notes. None of this is consistent with negotiation, contemplation, deliberation, intentional decision-making, and an exercise of will.

Third, Dr. Whyman testified that Wade's suicide was foreseeable as a result of developmental factors together with his living experiences irrespective of his job with SEII. It was a matter of time, given Wade's earlier development and the stressors of financial problems, his marriage, and having an adolescent daughter. But the notion of inevitability or even strong predictability is inconsistent with a deliberated, intended act of will; inevitability and actions reflecting willful intent are difficult to reconcile.

Finally, as I mentioned above, Dr. Whyman's analysis lacks an adequate link to objective scientific sources or, alternatively, an explicated basis in his experience as a psychiatrist. *See Daubert II, supra*, 43 F.3d at 1319. Dr. Seaman, on the other hand, cites objective evidence consistent with his conclusions.

Having considered the evidence as a whole, I conclude that Wade sustained a series of diametrically opposing, powerful impulses during his last weeks. These culminated in an irresistible suicidal impulse. Wade's suicide was not a willful, intended act within the meaning of section 3(c).

### III. Compensation Rate.

Decedent's average weekly wage at the time of death on July 15, 2006 was \$2,024.24. At that time, Claimant had one minor dependent child, Sara. Claimant was thus entitled to 66 2/3 percent of decedent's average weekly wage, or \$1,349.49. *See* 33 U.S.C. §909(b). That amount, however, is limited to twice the national average weekly wage, which at the time was \$536.82. *See* 33 U.S.C. §§ 909(e)(1), 906(b)(1). The compensation Employer/Carrier owed Claimant as of the time of Wade's death therefore was limited to \$1,073.64 per week. The amount is subject to annual increases. *See* 33 U.S.C. §910(f). Beginning on Sara's 18<sup>th</sup> birthday on June 11, 2008, Claimant no longer was entitled to compensation related to a minor dependent child. As of that date, she became entitled to weekly compensation of fifty percent of decedent's average weekly wage (or \$1,012.12), increased by the annual adjustments, and limited by section 6(b)(1). *See* 33 U.S.C. §909(e)(1). Claimant will continue to be entitled to these payments unless and until, she remarries or dies; if she remarries, she is entitled to a lump sum payment equal to two years' compensation as of the date of the re-marriage. *See* 33 U.S.C. §909(b).

## Conclusion and Order

For the foregoing reasons, I find that Employer/Carrier is liable under the Act for compensation for Wade Dill's death. The conditions of employment that SEII imposed and events that Wade experienced during and as a result of employment at SEII aggravated his mental condition and led to his suicide. The suicide was occasioned by an irresistible impulse and was not the result of Wade's willful intent. Accordingly,

1. Employer/Carrier will pay Claimant funeral expenses of \$3,000, together with interest from July 15, 2006. *See* 33 U.S.C. §909(a).
2. Employer/Carrier will pay Claimant compensation beginning July 15, 2006 at the statutory maximum then in effect of \$1,073.64, together with interest. The amount Employer/Carrier will pay must be adjusted at October 1, 2007 as provided in section 10(f) of the Act. Employer/Carrier will continue payments on this schedule through July 10, 2008. *See* 33 U.S.C. §909(b), 910(f).
3. As of July 11, 2008, Employer/Carrier will continue paying Claimant weekly compensation but at a rate reduced to \$1,012.12 plus whatever adjustments would accrue starting October 1, 2007, had she been paid at that rate at that time and adjusted as of October 1 of each succeeding year, together with interest. *See* 33 U.S.C. §909(b); 910(f).
4. Employer/Carrier will continue paying Claimant the amounts described in the preceding paragraph (3) (with annual adjustments at October 1 of each succeeding year) until and unless Claimant remarries or dies. If Claimant remarries, Employer/Carrier will complete its compensation obligation with a single, lump sum payment equal to two years' compensation calculated at the then-applicable rate. 33 U.S.C. §909(b). All other provisions of this Order notwithstanding, Employer/Carrier's obligation to pay compensation shall terminate upon Claimant's death.<sup>36</sup>
5. The District Director will perform all calculations necessary to carry out this Order.
6. Employer/Carrier will pay Claimant's reasonable attorney's fees incurred to Steven M. Birnbaum, Esq., and Dennis F. Nalick, Esq. 33 U.S.C. §928. Mr. Birnbaum filed a fee petition dated August 17, 2009. Within 21 days, Employer/Carrier will meet and confer with each of the two attorneys in an effort to resolve the fees amicably. If there is a voluntary resolution, those involved will submit a stipulated fee petition for review and approval within 30 days of the date of this Order. If Employer/Carrier and Mr. Birnbaum do not resolve the fee within 30 days, Employer/Carrier will file any objections or opposition to Mr. Birnbaum's fee petition within an additional 15 days. If Employer/Carrier and Mr. Nalick do not resolve the fees, Mr. Nalick may file a fee petition in the ordinary course; Employer/Carrier will file any objections or opposition within 15 days of Mr. Nalick's service of his petition. Any disputed fee petition will be accompanied by evidence of the prevailing market rates for comparable legal services in

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<sup>36</sup> Claimant is advised to consult with an attorney or tax advisor concerning the tax status of death benefits and other benefits she receives under the Longshore and Harbor Workers' Compensation Act, as expanded by the Defense Base Act. Certain tax exemptions may apply.

the San Francisco Bay Area, together with a memorandum of points and authorities in support of the petition.

7. This Order will be served on all parties and counsel and all other persons required by regulation. In addition, the Order will be served on Claimant's former counsel, Steven M. Birnbaum, Esq., and Dennis F. Nalick, Esq.

SO ORDERED.

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STEVEN B. BERLIN  
Administrative Law Judge