



Issue Date: 16 January 2009

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In the Matter of:

G.G.W.<sup>1</sup>  
Claimant

Case No.: 2008 LDA 241  
OWCP No: 02-148574

v.

CSA, LTD./  
INSURANCE CO. OF THE STATE OF PENN.  
Employer/Insurer

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS  
Party in Interest

Appearances: Mr. Barry R. Lerner, Attorney  
For the Claimant

Mr. John L. Schouest, Attorney  
For the Employer

Before: Richard T. Stansell-Gamm  
Administrative Law Judge

**DECISION AND ORDER –  
DENIAL OF TEMPORARY TOTAL DISABILITY COMPENSATION,  
AWARD OF TEMPORARY PARTIAL DISABILITY COMPENSATION, AND  
AWARD OF MEDICAL BENEFITS**

This case involves a claim filed by Mr. G.G.W. for disability compensation and medical benefits under Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 to 950, as amended ("Act"), and as extended by the Defense Base Act, 42 U.S.C. § 1651, and the War Hazards Compensation Act, 42 U.S.C. § 1701, for injuries Mr. W. allegedly suffered while an employee of CSA, LTD. ("CSA").

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<sup>1</sup>Chief Administrative Law Judge John Vittone has directed that I substitute initials for the name of the Claimant and family members. Any comments or concerns regarding this mandated practice should be directed to Chief Administrative Law Judge John Vittone, 800 K Street, Suite 400N, Washington, D.C. 20001.

On April 28, 2008, through counsel, Mr. W. filed a disability compensation and medical treatment claim for injuries he suffered during an assault by a co-worker in Kuwait. The District Director forwarded the claim to the Office of Administrative Law Judges on May 1, 2008. Pursuant to revised Notice of Hearing, dated August 6, 2008 (ALJ II),<sup>2</sup> I conducted a hearing on August 12, 2008 in Rockford, Illinois with Mr. W., Mr. Lerner, and Mr. Schouest.

### **Evidentiary Discussion**

At the August 12, 2008 hearing, I kept the record open for 30 days for two reasons. First, I provided Claimant's counsel an opportunity to present a response to Dr. Griffith's medical record review, EX 19.<sup>3</sup> To date, I have received no additional evidence regarding this matter.

Second, I gave both parties an opportunity to present prehearing correspondence concerning whether the parties had previously stipulated to causation.<sup>4</sup> Again, I received no further evidence from Claimant's counsel. However, in mid-October 2008, along with his closing brief, Employer's counsel submitted several pre-hearing documents regarding proposed stipulations of fact, marked as EX 20. Although as noted by Claimant's counsel in his closing brief, no additional documentation was submitted within the provided 30 day time period regarding this issue, I will nevertheless admit EX 20 into evidence since Claimant's counsel has not raised any subsequent specific objection to the additional documentation.

Accordingly, my decision in this case is based on the hearing testimony and the following documents: CX 1 to CX 6, EX 1, EX 2, EX 4-13, and EX 16-20.

### **Issues**

1. Whether during a work-related assault on May 1, 2006 Mr. W. suffered a mental injury or aggravated a pre-existing mental condition.
2. If Mr. W. suffered a work-related injury, the extent and nature of any associated disability.
3. Disability compensation.
4. Medical treatment.

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<sup>2</sup>The following notations appear in this decision to identify specific evidence and other documents: ALJ – Administrative Law Judge exhibit, CX – Claimant exhibit, EX – Employer exhibit, and TR – Transcript of hearing.

<sup>3</sup>TR, p. 33.

<sup>4</sup>TR, p. 33-34.

## Parties' Positions

### Claimant<sup>5</sup>

Mr. W. has established a *prima facie* of a compensable work related injury which has not been rebutted.

Specifically, on May 1, 2006 while working for the Employer in Kuwait, Mr. W. was assaulted by a co-worker, knocked to the floor, struck his head, and suffered a deep thigh bruise. Believing his safety was at risk and concerned that he would not get any support from the Employer, Mr. W. reported the assault to the military police.

Subsequently, Mr. W.'s immediate supervisor advised Mr. W. that going to the military police was not the proper way to handle the situation. Mr. W. was then directed to speak with the manager. The manager indicated that Mr. W.'s police report made CSA look bad. Even though Mr. W. had been a successful employee prior to the assault, the manager reassigned him to a different location and advised that he needed to be watched and given additional supervision.

Due to the assault and the Employer's failure to support him, including the change in duty location and increased supervision, Mr. W.'s stress level increased and he experienced bouts of anxiety, nausea, and gastrointestinal problems. Mr. W. received medical treatment and medication for the anxiety and stress related symptoms. Even though Mr. W. had agreed to remain in Kuwait for another year before the assault, he decided to leave Kuwait in August 2006 because he could no longer tolerate the work environment due to stress. Believing that he wouldn't receive the Employer's support, Mr. W. used carpal tunnel syndrome as the reason for his departure. Subsequent medical evaluations confirmed Mr. W.'s carpal tunnel and need for treatment.

Prior to his employment in Kuwait, Mr. W. was under medical care for depression. However, the condition was under control with medication. Upon his return to the United States, Mr. W. obtained additional medical treatment and medication for his stress through his own health insurance. Believing the Employer would pay for additional treatment, Mr. W. also sought psychiatric care which he later stopped because he believed the treatment was successful.

Since Mr. W.'s aggravated, pre-existing psychiatric condition precludes his return to employment with CSA, Mr. W. is entitled to disability compensation. At the time of the assault, Mr. W. was working 6 to 7 days a week, 12 hours a day. Consequently, the appropriate average weekly wage should be determined under Section 10(c) of the Act. Based on Mr. W.'s CSA earnings for 2005 and 2006, Mr. W.'s pre-injury average weekly wage was \$1,468.61.

Because the Employer did not present suitable alternative employment, Mr. W.'s actual post-injury wages establish his residual wage earning capacity. In January 2007, Mr. W. started his own pest control business and his average weekly wage for 2007 was \$224.73. Through 2008, Mr. W. has earned \$312.50 a week.

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<sup>5</sup>TR p. 10-16 and Closing Brief (October 15, 2008).

Since Mr. W. suffered a psychiatric injury in conjunction with a compensable physical injury or an aggravation of a pre-existing psychiatric condition from the May 1, 2006 assault, Mr. W. seeks “total, temporary” disability compensation from August 1, 2006 through December 31, 2007 and “temporary partial” disability compensation from January 1, 2008 and continuing. He also seeks medical treatment benefits, interest, and attorney fees.

#### Employer<sup>6</sup>

Mr. W. did not suffer a work related, compensable injury on May 1, 2006.

For numerous reasons, Mr. W. failed to invoke the causation presumption under Section 20(a). First, considering Mr. W.’s long history of psychological problems dating back to 2002 before his CSA employment and the consistency of his treatment for those problems and his sick leave records both before and after the May 1, 2006 incident, his subjective allegations of increased psychological problems are not credible. Second, on May 1, 2006, after a co-worker struck Mr. W. in the chest and caused him to fall backwards, Mr. W. only complain about his low back. Third, contrary to his assertion, Mr. W. actually returned to the United States in August 2006 for surgical treatment of his carpal tunnel problems. Fourth, Mr. W.’s alleged psychological symptoms did not interfere with his ability to perform his work. Mr. W. continued his pest control work in Kuwait until he departed in mid-August 2006 and then in the fall of 2006, he started his own pest control business. Fifth, after, not before, the May 1, 2006 incident, Mr. W. signed a re-employment agreement with CSA through August 2007. He also received a commendable evaluation for his work. Sixth, after receiving a medical leave extension, Mr. W. voluntarily resigned from his employment in Kuwait with CSA in November 2006.

Even if Section 20(a) is invoked, Dr. Griffith’s reasoned medical opinion is sufficient to rebut the causation presumption and the preponderance of the evidence demonstrates that Mr. W. did not suffer a compensable injury. The May 1, 2006 incident was of insufficient severity to have caused post-traumatic stress disorder (“PTSD”) and neither aggravated nor accelerated Mr. W.’s pre-existing condition. Mr. W.’s renewed psychological problems arose long after he departed Kuwait and were related to other life changes unassociated with his CSA employment.

Considering Mr. W.’s employment situation on May 1, 2006, the average weekly wage for any disability compensation should be determined under Section 10(c). Based on Mr. W.’s CSA earnings in the year before the incident, the appropriate average weekly wage is \$1,335.68. Additionally, Mr. W.’s pest control business establishes suitable alternative employment and a residual weekly earning capacity of \$312.50.

Any disability compensation liability ceased in July 2006 when Mr. W.’s alleged psychological problems no longer interfered with his ability to work as a pest control specialist. Mr. W.’s failure to return to CSA employment in Kuwait was due to his voluntary resignation in November 2006 rather than his inability to return to his usual employment in pest control. Additionally, since Mr. W. ceased treatment for psychological problems in January 2008, those issues have been completely resolved.

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<sup>6</sup>TR p. 6-8, 17, 25, and 26, and Closing Brief (October 15, 2008).

Since Mr. W. did not suffer a compensable injury, he also is not entitled to medical treatment benefits under Section 7 of the Act.

Finally, since permanency of Mr. W.'s condition was raised at the hearing, a remand to the District Director may be warranted to enable the Employer to assert relief under Section 8(f).

### **Summary of Evidence**

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues.

#### Testimony of Mr. G.G.W. (TR p. 35-118)

[Direct examination] After completing correspondence training and obtaining a state license for chemical application, Mr. W. applied for a pest control specialist job with CSA in Kuwait, supporting the U.S. Army. After a brief application and interview process, CSA hired Mr. W. and he proceeded to Kuwait in August 2004. The company did not require a pre-deployment physical, medical record review, or medical clearance.

Mr. W. was initially assigned to Camp Doha in Kuwait and was responsible for pest control operations under the supervision of a branch manager. After three months, Mr. W. was transferred to a remote site and had little supervision. At the new location, Mr. W. supervised up to four other employees. He worked six to seven days a week, 12 hours a day.

In August 2004, before his deployment, Mr. W. was being treated for depression by Dr. DeRosales. His depression was being controlled with medication. When he deployed, Dr. DeRosales gave him a 90 day supply of medicine. He continued to receive medication from the International Clinic in Kuwait. With his medication, Mr. W. was able to perform all the requirements of his job with CSA and received commendations on occasion.

After one year, Mr. W. started a new contract with CSA, working in the same remote location. With the new contract, Mr. W. gained training responsibilities.

On May 1, 2006, in the early morning, Mr. W. drove to another site to have his vehicle serviced. When he returned later in the day to pick up his vehicle, Mr. W. went to the Environmental Service Department office. At that time, a co-worker, Mr. Casey Wester, who was 6'2" tall, was at a computer and Mr. W.'s supervisor, Mr. Martin Hussey, was also in the room.

In a "light-hearted manner," Mr. W. commented that Mr. Wester was still working on the report Mr. W. had seen him doing that morning. Suddenly, Mr. Wester jumped up, pushed his chair back, and struck Mr. W. in the chest with his fists. Mr. W. was knocked back over two desks and landed on the ground, striking his back and head. Shocked and angry, Mr. W. got up and asked Mr. Wester why he struck him. Mr. Wester yelled that the report was none of his business. Mr. Hussey then got in between Mr. Wester and Mr. W.

Mr. W. left the office to cool off. Other than a deep bruise on his thigh, Mr. W. did not suffer any physical injury that required immediate treatment. While outside the office, Mr. W. overheard Mr. Hussey tell Mr. Wester that fighting was not allowed in the camp, he needed to cool down, and they would make it go away. Due to the supervisor's remarks, Mr. W. concluded CSA supervision would be inadequate to handle the situation. Becoming concerned for his safety, he decided to go to the military police for support. As a result, Mr. W. went to the military police and filed a report, EX 5, within the hour.

A short time later, a branch manger called Mr. W. and told him that the police report was not the way to handle the incident and that he had to report to the District Manager, Mr. Randy Wright, the next morning.

Prior to the meeting, Mr. W. wrote a statement. When he arrived in Mr. Wright's office, Mr. Hussey was already there and proceeded to read his statement of the events which was very different from Mr. W.'s version. Mr. W. expressed his disagreement and handed Mr. Wright his statement. Mr. Wright indicated that Mr. W.'s police report made CSA look bad, especially since the company was in Kuwait to support the U.S. Army. Mr. W. replied that CSA shouldn't have employees who assault other workers.

A week later, Mr. W. was transferred to a new job location and placed under more supervision. He was told CSA believed the assault had been his fault because he provoked Mr. Wester. Mr. Wester's contract ended two weeks later and he intended to leave. Although the U.S. Army barred Mr. Wester from their facilities, CSA permitted him to stay and work the final two weeks.

About May 1, 2006, Mr. W. received an employee evaluation. His performance was rated exceptional and CSA offered him another contract with a retention bonus. At that time, Mr. W. intended to remain in Kuwait for another year.

Mr. W. developed carpal tunnel which affected his ability to sleep due to numbness and tingling. He saw a doctor in Kuwait for the problem which was eventually diagnosed as severe. Mr. W. was able to continue with his job despite the carpal tunnel problem.

Due to the shock of the assault and the company's response, including their lack of support and punishment for reporting the assault, Mr. W.'s stress level increased. He also did not understand the need for increased supervision since his employee evaluations had been excellent. As a result of his increased stress and anxiety, Mr. W. developed stomach problems, including persistent diarrhea and nausea. From May through July 2006, Mr. W. took a total of three weeks of sick leave because he was unable to work while he had gastrointestinal problems.

Every time he took sick leave, he had to report to a CSA nurse. While on sick leave, Mr. W.'s pay was initially reduced by 50% and then gradually moved down to 30%. Mr. W. received medication to calm his anxiety and physical symptoms. His depression medication was also increased. The health care providers concluded his symptoms were caused by heightened stress and anxiety.

By the end of July 2006, Mr. W. was able to work most days without symptoms. He continued his medication. However, Mr. W. was counseled by a chaplain and an Army psychologist that he should get out of his situation. Consequently, Mr. W. used his carpal tunnel problem to get out of Kuwait and return to the United States. At that time, Mr. W. hoped to get away, have the carpal tunnel surgery, and then return to Kuwait in August with a new contract.

Mr. W. did not tell CSA about his psychological problems because he had received “absolutely zero support” from the company about the assault.

Mr. W. returned to Rockford, Illinois, on August 13, 2006 and had carpal tunnel surgery, which was covered by his medical insurance.

Mr. W. also returned to Dr. DeRosales, a general practitioner. He used his medical insurance which requires a co-payment from him. Dr. DeRosales continued Mr. W.’s depression medication. Dr. DeRosales referred Mr. W. to Dr. McArdle. However, did not see her for a while until CSA agreed to pay her fees. The sessions with Dr. McArdle helped Mr. W. and he stopped seeing her in January 2008 because he was “feeling better.”

In January 2007, Mr. W. started his own pest control company. However, since in the beginning the company was not a full time job, Mr. W. also worked for the county animal services department from January 11, 2007 to June 12, 2007. By the middle of June 2007, the pest control company had become a full time job. For his 2007 taxes, Mr. W. reported an income of about \$15,000 for his work with the county. However, due to start-up costs, Mr. W. reported about a \$4,000 loss for his business, which reduced his income for 2007 to \$11,686, representing an average weekly wage of \$224.73. For 2008, based on gross receipts through August, Mr. W. estimates his average weekly wage is \$312.50.

Over the course of a week in mid-September 2006, Mr. W. had carpal tunnel surgery on both hands. Although he was functioning with the carpal tunnel, the surgery provided an opportunity for Mr. W. to get away from his situation in Kuwait and fix a problem that would eventually need attention. After his return, Mr. W. worked with a CSA nurse to take a medical leave of absence. He also used some personal leave and received some compensation from CSA. His last check arrived around November 2006.

Mr. W. does not believe that he is psychologically capable of returning to his work with CSA in Kuwait. He explained, “I just wouldn’t work with people like that. I would never work (in) a situation where somebody can get attacked at work and have absolutely no support. I just wouldn’t do that. I couldn’t do that.”

Before Mr. W. had gone to Kuwait, Dr. DeRosales diagnosed mild depression and he didn’t suffer any stomach problems. However, after the attack, he had “very, very severe” stomach cramps which he hadn’t experienced before. At present, Mr. W. does not have any stomach problems and no longer takes medication for that problem. His stomach problems stopped around January 2008, following his treatment with Dr. McArdle.

[Cross examination] Mr. W. has a degree in law enforcement and he previously worked in private security. When he went overseas to work for CSA, Mr. W. was a certified pest control specialist.

Although surprised by his decision, Dr. DeRosales did not have any reservations about Mr. W. going to Kuwait. At that time, Mr. W. was taking anti-anxiety/depression medicine. Presently, he continues to take that type of medication.

From his arrival in Kuwait in August 4, 2004 to the May 1, 2006 assault, Mr. W. did not experience any increase in depression, psychological stress or anxiety while working for CSA.

Mr. W. did not supervise or work with Mr. Wester. Mr. W.'s supervisor and Mr. Wright didn't dispute that an assault occurred. The disagreement between Mr. W. and these supervisors was whether Mr. W. provoked the assault.

During his periods of sick leave from May 1, 2006 to August 13, 2006, Mr. W. received his regular pay at reduced levels. Sometimes, he received nothing. At other times, Mr. W. received 25% to 50% of his base wages.

In the fall of 2006, Mr. W. e-mailed his voluntary resignation to CSA. He didn't seek to go back overseas. Instead, he started his own pest control company.

[ALJ examination] As pest control specialist in Kuwait, Mr. W. kept snakes, scorpions, cockroaches, ants, and rodents under control. He functioned as a working supervisor at the remote job site and his depression was under control with medication. Mr. W. was able to function throughout the day with feelings of anxiety. When his anxiety was not under control, Mr. W. experienced increased heart rate and was unable to sleep.

Mr. W. developed carpal tunnel in 2001.

Both the suddenness of the assault and management's absence of support upset Mr. W. He was able to work through those issues with Dr. McArdle. After the medication calmed down his physical symptoms, Mr. W. was able to work in Kuwait. However, he didn't like the situation. As result, even though he signed another contract for an additional year of employment, Mr. W. departed Kuwait in August 2006 when the term of his current contract expired. Upon his departure, Mr. W. didn't inform CSA that he wouldn't return because "I want to be able to come back and work in a supportive environment at some point in the future" after he'd hopefully resolved his problems.

Mr. W. resigned in November 2006 because he wasn't healthy enough to return to Kuwait. After working with a therapist, Mr. W. has concluded that he would never chose to return to Kuwait. Mr. W. does not believe that he has been told that he is mentally unable to return to Kuwait. Rather, he's been advised that he shouldn't go back to that situation if he wanted to continue to live a healthy life.

In January 2008, Mr. W. stopped seeing Dr. McArdle because he resolved his problems and his depression was back to the level before going overseas.

While he was experiencing stomach problems in Kuwait after the assault, the medical personnel did not find any physical or organic cause for his ailments.

Mr. W. believes that he started seeing Dr. McArdle in the fall of 2006. He had about 15 sessions with her.

[Redirect examination] During the assault, Mr. W. suffered bruising to his low back and hip and not his thigh. EX 11 shows that he received medical treatment in Kuwait on May 8, May 13, May 15, May 25, June 7, and June 14. Those visits were associated with his physical problems after the assault.

[Recross examination] Mr. W. doesn't know why Dr. DeRosales' August 2006 treatment note which discusses his carpal tunnel doesn't mention his psychological problems.

In June 2007, due to working two jobs and an inter-personal relationship problem, Mr. W. experienced increased anxiety. That's probably when Dr. DeRosales referred Mr. W. to Dr. McArdle.

[Redirect examination] Mr. W. went to Dr. DeRosales in August 2006 to obtain a surgical referral for his carpal tunnel.

Tax Records  
(CX 4)

For 2006, Mr. W. reported foreign earned income of \$54,346.

For 2007, Mr. W. reported a business loss of \$3,498. His wages were \$11,686.

Prescription Medication  
(CX 5)

On February 12, 2008 and April 14, 2008, Mr. W. paid \$405.21 for Cymbalta, prescribed by Dr. DeRosales.

Personnel Record  
(EX 1, EX 2, and EX 4)

In his resume, Mr. W. indicated that he received a BS degree in law enforcement and accomplished significant work towards a masters degree. In 1999, he worked as an investigator and security supervisor. From 2000 to 2003, Mr. W. was a case manager and counselor in an emergency shelter and centers providing support for the mentally ill and family services. In 2003, Mr. W. became an enrollment advisor for a business college.

On June 23, 2004, CSA offered Mr. W. employment as a Pest Management Specialist in Kuwait for one year at the hourly rate of \$17.56, 48 hours a week.

On May 15, 2006, Mr. W. received his annual performance appraisal with an overall rating of commendable. Mr. W. was rated competent in job knowledge, interpersonal relationship, and judgment. He received a commendable rating in remaining categories, including productivity, quality of work, reliability, customer service, and communications. Mr. W.'s supervisor recommended that Mr. W. remember to use his chain of command.

On June 19, 2006, Mr. W. signed an employment contract agreeing to work for Combat Support Associates ("CSA") in Kuwait from August 9, 2006 to August 8, 2007 for an hourly rate of \$18.45 as a Pest Management Specialist. Mr. W. was expected to work a minimum of 48 hours, plus assigned overtime. Mr. W. was entitled to 6 days of sick leave at full pay and then the pay was reduced 25% for each additional 6 day period. Periods of leave without pay must be approved by the Employer. CSA was providing services under a U.S. Government contract for the U.S. Army.

Mr. W. departed Kuwait on August 13, 2006.

By November 2005, Mr. W. was receiving only 50% pay for 10 hours of sick leave. However, when he took 27 hours of sick leave in pay period for March 3, 2006, he was back to 100% pay, based on \$18.45 an hour. He continued to receive 100% pay for 8 hours of sick leave in the March 31, 2006 pay period. However, in the April 28, 2006 pay period, apparently after taking 25 hours of sick leave at 100% pay, he then dropped to 75% pay for another 13 hours of sick leave. Finally, in the two week pay period of May 12, 2006, Mr. W. was charged 25 hours of sick leave and received 75% pay for those hours.<sup>7</sup>

From August 7, 2004 to June 24, 2005, Mr. W. earned a total of \$60,639.56.

From payroll date May 13, 2005 to payroll date May 12, 2006, Mr. W. earned \$69,455.73

Mr. W.'s Sworn Police Statement  
(EX 5 and EX 18)

On May 1, 2006, at 5:56 pm, Mr. W. reported an assault to the military police. Mr. W. indicated that on the same day at 4:45 pm, he was in the CSA pest management office with Mr. Casey Wester and Mr. Martin Hussey. Mr. W. told Mr. Wester that he shouldn't spend so much time on a weekly report and asked him why he was still working on it. In response, Mr. Wester got up quickly from his chair, crossed the room and struck Mr. W. in the chest with both closed fists. Mr. W. fell back onto a desk and then the floor. While Mr. Wester was shouting and coming forward, Mr. Hussey held him away from Mr. W. Mr. W. went to the command center to report the incident and he was directed to the military police. Mr. W. indicated that he did not need medical attention.

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<sup>7</sup>The bi-weekly pay records submitted by the Employer end with this pay period.

Military Police Report  
(EX 18)

Upon consideration of statements of Mr. W. and Mr. Hussey, the military police determined the complaint of simple assault was “founded.” Mr. Wester was released to his supervisor and a letter of disbarment was to be initiated.

Notice of Injury  
(EX 7)

On May 8, 2006, Mr. W. filed a Notice of Injury, indicating that during an assault by a co-worker he fell and suffered a softball size bruise on his hip and lower back.

Employer’s Report of Injury  
(EX 8)

In a May 9, 2006 Report of Injury, the Employer listed Mr. W.’s yearly wages as \$46,051.00.

Employer’s Supplement Report  
(EX 11)

In a July 8, 2006 Supplement Report, the Employer indicated Mr. W. received medical treatment on May 8, May 13, May 15, May 25, June 7, and June 14, 2006.

Mr. W.’s “Order of Events” Summary  
(EX 12)

Mr. W. reported that he missed the following work hours because he was ill:

May 10, 2006	-	10
May 11, 2006	-	8
May 13, 2006	-	6
May 14, 2006	-	10
May 15, 2006	-	9
May 24, 2006	-	2
May 27, 2006	-	10
June 27, 2006	-	8
June 28, 2006	-	8
June 30, 2006	-	10
July 2, 2006	-	10
July 26, 2006	-	8

Dr. Roselia B. DeRosales  
(EX 13 and EX 16)

From November 2000 to January 2008, Dr. DeRosales, MD, treated Mr. W. for various ailments. In March 2002, Mr. W. presented with an anxiety episode associated with work and an interpersonal relationship. Dr. DeRosales prescribed Paxil. In June 2002, Mr. W. reported that the Paxil helped him cope with stress and anxiety.

In December 2002, Mr. W. complained about tingling and numbness in both hands for the past year, which was worsening. Dr. DeRosales diagnosed possible carpal tunnel. A subsequent nerve conduction test in October 2003 confirmed bilateral carpal tunnel.

In June 2003, in light of side effects associated with Paxil, Dr. DeRosales switched Mr. W. to Lexapro. In October 2003, Mr. W. reported that he had stopped taking the Lexapro. On June 29, 2004, as Mr. W. was anticipating going to Kuwait for work, Dr. DeRosales noted that he had done well being off anti-depressants and he was “doing really, really well.”

On March 14, 2005, during a return visit from Kuwait, Mr. W. reported that he had been depressed for some time. Dr. DeRosales noted that he was going through an anxious period in his life, working for the Department of Defense and traveling back and forth between Kuwait and the United States. In anticipation of his return visit, Mr. W. had stopped his anti-depression medication and reported that his depression had returned. Dr. DeRosales opined that Mr. W. did not appear overly depressed and she considered him stable.

On August 22, 2006, Mr. W. presented with a history of depression. He was scheduled for carpal tunnel surgery and taking Lexapro. Dr. DeRosales diagnosed bilateral carpal tunnel and depression treated with Lexapro. She also observed that Mr. W. “has been good otherwise.”

On June 30, 2007, Dr. Rosales noted Mr. W.’s history of depression and continued use of Lexapro.

On November 14, 2007, Mr. W. presented to discuss possible PTSD. Mr. W. had been assaulted in “May 2007” and was being counseled by Dr. McArdle. Mr. W. was struggling with abdominal discomfort, diarrhea, and nausea. He was taking Cymbalta as an anti-depressant. Dr. DeRosales expressed an intention to discuss his case with Dr. McArdle. She diagnosed irritable bowel syndrome.

On January 14, 2008, Dr. DeRosales reported that Mr. W. was seeing progress with medication and counseling although he was going through another relationship problem. Dr. DeRosales diagnosed depression and PTSD.

In a January 17, 2008 statement, Dr. DeRosales indicated that Mr. W. had a history of depression and “possible” PTSD that apparently started in “May 2007” in Kuwait. She recalled that Mr. W. presented in November 2007 with “nonspecific symptoms” of abdominal discomfort, diarrhea, nausea, and increasing stress. Mr. W. was taking Cymbalta and had been referred to Dr. McArdle, a psychologist, for counseling. He was seeing some progress.

Dr. Renee A. McArdle  
(CX 6, EX 12, and EX 17)

Through November 30, 2007, Mr. W. had five office visits with Dr. McArdle on July 17, July 31, November 14, November 20, and November 30, 2007. She also saw Mr. W. on January 8, January 22, March 4, and March 18, 2008.

In identical statements, dated December 11, 2007 and March 27, 2008, Dr. McArdle, Psy.D., indicated that Mr. W. came to her for therapy on July 17, 2007. According to Dr. McArdle, Mr. W. was violently attacked by a co-worker in a “totally unprovoked” assault. Although the assault was witnessed by a supervisor, he did nothing to protect Mr. W. Mr. W. was instructed to cover-up the incident and no action was taken against the perpetrator. Additionally, Mr. W. received no help from the company. As a result, he suffered stress symptoms that required medical and psychiatric help. Although mentally and physically disabled, Mr. W. continued to work through August 12, 2006. At that time, due to “a worsening of physical and psychological symptoms stemming from the work-related incident,” Mr. W. was no longer able to work, needed time off, and returned to the United States. Dr. McArdle diagnosed generalized anxiety disorder, excessive anxiety and worry, lasting more than six months. Mr. W.’s “anxiety, worry, and physical symptoms caused significant distress and impairment” in multiple areas of functioning including “occupational.”

As of March 25, 2008, Mr. W.’s balance for Dr. McArdle’s treatments was \$2640.00.

Dr. John D. Griffith  
(EX 19)

On August 8, 2008, Dr. Griffith, MD and university associate professor of psychiatry, reviewed the records in Mr. W.’s case. For several reasons, Dr. Griffith disagreed with a diagnosis of PTSD. First, the “brief fight with a fellow employee in Kuwait” was not a “war-related ‘trauma’.” Second, the stress in Mr. W.’s case does not “meet the intensity required for a PTSD.” A PTSD diagnosis is reserved for severe out of the ordinary stressors of a degree that causes major, long lasting psychic trauma. Third, the type of stress Mr. W. experienced in that assault is common, even among children and teenagers. Mr. W. had no basis to claim stress because he was not in a position to punish his attacker, who was arrested and disbarred. Similarly, he can’t claim to be stressed because his employer chose to resolve the incident in peaceful manner. Fourth, although Mr. W. had a history of depression, that history predated his tour to Kuwait and the medical providers in Mr. W.’s case did not provide sufficient justification for their diagnosis of PTSD and did not rule out other possible psychological diagnoses, such as symptom magnification. Fifth, an eminent medical expert in PTSD has found little connection between PTSD and an inability to work.

For these reasons, Dr. Griffith concluded Mr. W. does not have PTSD. Dr. Griffith also opined that Mr. W.’s described stress associated with the assault was not a cause for work disability.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Stipulations of Fact<sup>8</sup>

At the hearing, the parties stipulated to the following facts: at the time of the May 1, 2006 incident, an employer-employee relationship existed between the parties. On May 1, 2006, Mr. W. was struck and assaulted in the course of, and during, his employment with the Employer. (TR p. 8, 9, and 19)

### Issue #1 – Work Related Injury<sup>9</sup>

The first, and principal, issue in this case is whether Mr. W. suffered a work related injury on May 1, 2006. In determining whether there is a causal relationship between Mr. W.'s claimed psychological and physical problems and the May 1, 2006 altercation in Kuwait, I am guided by several adjudication principles and must make several determinations involving the *prima facie* case of entitlement, a presumption under Section 20(a) of the Act, substantial contrary evidence, and the Claimant's ultimate burden of proof. In making these determinations, I am entitled to assess the credibility of the witnesses, to weigh the evidence and draw inferences from it; and, I am not bound by the opinion or theory of any particular medical expert. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968), *reh. denied*, 391 U.S. 929 (1969).

#### Prima Facie Case

The fundamental initial step in the disability claim process is the establishment of a *prima facie* case of entitlement, which consists of two elements. First, a claimant has the burden of establishing that he sustained a harm or pain. During this consideration, no presumption exists. *See Devine v. Atlantic Container Lines, G.I.E.*, 25 BRBS 15 (1990). Instead, a claimant must prove the existence of some bodily malfunction or harm through the preponderance of the evidence. Second, the claimant must show that an accident or incident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). The establishment of this preliminary *prima facie* case of entitlement is significant because it then in turn invokes a presumption under Section 20 (a) of the Act. *See U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley)*, 455 U.S. 608 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455 (D.C. Cir 1980).

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<sup>8</sup>Upon review of the signed stipulations of fact by the parties, CX 1, and the pre-hearing correspondence regarding the proposed stipulations of fact and the draft version of the stipulations, EX 20, I conclude the Employer did not stipulate that Mr. W. actually suffered a compensable injury. The unsigned, draft stipulations indicated that "the Claimant . . . is compensable [sic]," EX 20. However, the signed stipulations, CX 1, contain conditional language to the effect that "if the Claimant was injured as a result of the assault, then those injuries, if any, are compensable (emphasis added)."

<sup>9</sup>In the absence of a stipulation of a compensable injury as previously noted, the Employer is not precluded from contesting causation in this claim.

## Injury

Under the Act, 33 U.S.C. § 902(2), a compensable “injury” is defined as an accidental injury arising out of and in the course of employment. The courts and Benefits Review Board (“BRB” or “Board”) have provided substance and boundaries to this definition through numerous interpretations.

Injury means some physical harm in that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F. 2d 152 (2d Cir. 1991). Credible complaints of subjective symptoms and pain may be sufficient to establish such physical harm. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981). A psychological impairment can be an injury under the Act. *Director, OWCP v. Potomac Elec. Power Co. (Brannon)*, 607 F. 2d 1378 (D.C. Cir. 1979); *see also, Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255 (1984) (depression due to a work-related disability), and *Spence v. ARA Food Serv.*, 13 BRBS 635 (1980) (headaches from a work-related incident are compensable). Even the claimant’s credible complaints of subjective symptoms and pain can be sufficient to demonstrate the requisite harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff’d sub. nom. Sylvester v. Director, OWCP*, 681 F. 2d 359 (5th Cir. 1982).

A work-related aggravation of a pre-existing condition is also an injury under the Act. *Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989). To be a compensable injury under the Act, the employment-related injury need not be the sole cause, or primary factor, in a disability. If an employment-related injury contributes to, combines with, or aggravates a pre-existing or underlying condition, the entire disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Kooley v. Marine Indus. N. W.*, 22 BRBS 142 (1989). Thus, the term “injury” includes aggravation of a pre-existing, non-work-related condition or the combination of work- and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

Under the “aggravation rule,” the relative contribution of the accident and prior disease are not weighed. *Independent Stevedore Co. v. O’Leary*, 357 F.2d 812, 815 (9th Cir. 1966). The aggravation rule or doctrine does not require that the employment injury interact with the underlying condition itself to produce some worsening of the underlying condition. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991). If an employee is incapacitated from earning wages by an employment injury which accelerates a condition which would ultimately have become incapacitating in any event, the employee is nevertheless considered to be incapacitated by the employment injury and the resulting disability is compensable under the Act. *Id.* Although an injury may not be the medical cause of the pre-existing non-work-related condition, if the injury brings on symptoms earlier than would be expected, the injury is considered the proximate cause. *Id.* (citing a determination by the Arizona Supreme Court). To hasten disability is to cause it. *Id.* at 814-15.

With these principles in mind, I first find Mr. W.’s description of his history of depression, mental reaction to the sudden assault on May 1, 2006, and corresponding adverse physical symptoms in Kuwait to be credible. His testimony in this regard is also corroborated by Dr. DeRosales’ treatment records, the Employer’s Supplemental Report showing six medical

treatments in May and June 2006 in Kuwait, and the Employer's partial pay records showing Mr. W. took numerous hours of sick leave in May 2006. Accordingly, Mr. W. has established that on May 1, 2006, in addition to a bruised hip and low back, he suffered an injury in the form of aggravation of a pre-existing condition of depression through significantly increased stress and anxiety which subsequently caused stomach problems, diarrhea, and nausea.

#### Accident/Incident

In addition to the parties' stipulation of fact, Mr. W.'s credible testimony and his sworn statement, and the military police report establish that on May 1, 2006, in the course of, and during, his employment, Mr. W. was assaulted and struck by a co-worker.<sup>10</sup> Based on the sudden nature of the attack and its force and violence, and given Mr. W.'s pre-existing condition, I find the May 1, 2006 incident could have caused Mr. W.'s increased anxiety and related physical ailments.

#### Presumption Under Section 20(a) of the Act

Having proven that he has suffered mental harm consisting of increased stress and anxiety which lead to gastrointestinal problems, and that he was involved in an incident on May 1, 2006 which could have caused such harm, Mr. W. has established a *prima facie* case that invokes the presumption under Section 20(a) of the Act that his increased anxiety and associated physical problems were caused by the work related incident.

Under Section 20 (a) of the Act, 33 U.S.C. § 920(a), it is presumed, in the absence of substantial evidence to the contrary, that the compensation claim comes within the provisions of the Act. The courts have applied this language to the establishment of a nexus between the employee's injury and employment activities. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075 (D.C. Cir 1976) cert. denied, 429 U.S. 820 (1976). Once the claimant establishes a *prima facie* case, a presumption arises under Section 20(a) that the employee's injury arose out of his or her employment. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985). If the presumption is invoked and the employer fails to respond, then the claimant is entitled to compensation under the Act for an injury arising out of, and in the course of, employment.

#### Substantial Contrary Evidence

Once the claimant establishes a *prima facie* case and invokes the Section 20(a) presumption, the burden of production of evidence shifts to the other party, the employer, to indicate the claimant's condition was not caused or aggravated by the employment. *Brown v. Pacific Dry Dock*, 22 BRBS (1989). To rebut the Section 20(a) presumption, the employer must present substantial evidence (specific and comprehensive medical information) that would support a finding that a connection between the bodily harm and employment or working conditions is absent or has been severed. *Parsons Corp. v. Director OWCP (Gunter)*, 619 F.2d 38 (9th Cir. 1980); and, *Kier v. Bethlehem Steel Corp.*, 16 BRBS 191 (1990) (unequivocal

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<sup>10</sup>I also note that the assault occurred on a military installation in Kuwait while Mr. W. was employed by a contractor providing support services to the U.S. Army which also renders the assault a work related accident under Defense Base Act.

physician testimony that no relationship exists between an injury and a claimant's employment may be sufficient to rebut the presumption). This adjudication stage does not involve a shift in the burden of proof. When there has been a work related accident followed by an injury, the employer need only introduce medical testimony or other evidence contradicting the existence of a causal relationship and need not necessarily prove some other agency of causation to rebut the Section 20(a) presumption. *Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982). At the same time, the presumption is not rebutted merely by suggesting an alternate way that the claimant's injury might have occurred. *Williams v. Chevron, U.S.A.*, 12 BRBS 95 (1980).

To rebut the Section 20(a) causation presumption, the Employer has presented Dr. Griffith's opinion. While Dr. Griffith focused principally on PTSD, I find his analysis and conclusion that Mr. W.'s stressor event was not a basis for a work disability to be sufficient contrary evidence to rebut the Section 20(a) causation presumption in this case.

#### Claimant's Ultimate Burden of Proof

If the employer presents substantial contrary evidence, then the Section 20(a) presumption is overcome and all the evidence in the entire record is weighed in the next, and last, adjudication step - determining whether the claimant has met his or her ultimate burden of proof. See *Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18 (1995) and *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Accordingly, since CSA presented substantial contrary evidence, the Section 20(a) presumption no longer applies and I will consider the entire record to determine whether Mr. W. suffered a work related injury. At this point, Mr. W. bears the ultimate burden of proof to establish the connection between his injury and employment by the preponderance of probative evidence.

At this point, in light of the conflicting evidence and considering its nature, my determination on whether Mr. W. suffered a work related injury involves two periods: a) Mr. W.'s time in Kuwait after the May 1, 2006 assault and b) 2007.

2006

Mr. W. testified that following the May 1, 2006 assault, he suffered increased anxiety and stress that led to physical symptoms including stomach problems, diarrhea, and nausea which caused him to lose multiple days of work in Kuwait. To the contrary, Dr. Griffith opined that Mr. W. did not suffer sufficient stress from the May 1, 2006 assault to cause a work disability.

In assessing the probative value of this conflicting evidence, I find that even though based on his record review Dr. Griffith had a sufficient documentary basis for his conclusion, his opinion has diminished probative value on whether Mr. W. suffered immediate mental and physical harm after the May 1, 2006 assault due to a reasoning shortfall. Specifically, while emphasizing in regards to a diagnosis of PTSD that the type of assault Mr. W. suffered was an event commonly experienced by children and teenagers, Dr. Griffith did not address whether given Mr. W.'s history of medically-controlled depression and anxiety, even this common assault might nevertheless have affected Mr. W. right after the assault more than a person who did not have depression and anxiety issues.

As previously discussed, having determined Mr. W. was a generally credible witness, I find his hearing testimony probative on the issue of whether he suffered increased stress and anxiety with associated physical symptoms while in Kuwait following the May 1, 2006 assault. Prior to the assault, as established by Dr. DeRosales' treatment notes, since 2002, Mr. W. has medicated his depression and anxiety problem such that he did not suffer physical symptoms and as demonstrated by his 2006 performance evaluation was able to be effective as a pest control specialist in Kuwait for the Employer until Mr. Wester assaulted him. Whether or not Mr. Wester was provoked, the suddenness, intensity, and violence of his assault was sufficient to cause bruising to Mr. W.'s low back and hip. The incident was also serious enough in Mr. W.'s mind, and his concern for his safety was sufficiently real, that he filed police report regarding the assault within an hour. The subsequent police report essentially validated the stated violence of assault and led to Mr. Wester's disbarment. Further, regarding Mr. W.'s physical response, in addition to Mr. W.'s sworn testimony about his gastro-intestinal problems which caused him to miss work, the Employer's records document six visits by Mr. W. to medical treatment facilities in Kuwait in May and June 2006 and Mr. W.'s summary chronicles nearly 99 hours of sick leave from May 10 to July 26, 2006.

Accordingly, considering the diminished probative value of Dr. Griffith's opinion on the immediate mental and physical consequences to Mr. W. after the assault, I find that Mr. W. has established through the preponderance of the probative evidence that on May 1, 2006 due to Mr. Wester's assault he suffered an aggravation of his depression and anxiety issues which led to physical symptoms that caused him to miss work in Kuwait.

## 2007

In November 2007, Mr. W. presented to Dr. DeRosales with "renewed" physical symptoms of abdominal discomfort, diarrhea, and nausea. Dr. McArdle also noted in December 2007 that Mr. W.'s posttraumatic symptoms had caused significant distress and impairment. In light of this medical evidence and since I've concluded Mr. W. suffered an aggravation of his long-standing problem with anxiety and depression after the May 1, 2006 assault, I turn to consider whether Mr. W. has proven that in 2007 he suffered additional aggravation of his pre-existing condition attributable to PTSD.

In considering the evidence on whether Mr. W. suffered a work related injury in 2007, I again find Mr. W.'s testimony that he suffered physical problems due to increased stress and anxiety in the summer and fall of 2007 to be credible and also supported by Dr. DeRosales' November 2007 treatment record. However, since Mr. W. apparently did not experience any adverse physical symptoms associated with assault related increased stress from the end of July 2006 till nearly a year later in the summer of 2007, and he testified that in summer of 2007, due to working two jobs and having a significant interpersonal relationship problem, he experienced increased stress which probably led to Dr. DeRosales' referral to Dr. McArdle, establishment of a causation link between his summer 2007 physical problems and the May 1, 2006 assault requires more than his belief that a connection exists in the form of PTSD. Instead, this causation determination will have to be established by probative medical opinion.

According to Mr. W. in the summer of 2007, his stress-related physical symptoms returned and he sought treatment from Dr. DeRosales and was counseled by Dr. McArdle. Mr. W.'s principal concern in seeking medical and counseling assistance in the summer and fall of 2007 was whether he was suffering PTSD due to the May 1, 2006 assault. Dr. DeRosales diagnosed PTSD and Dr. McArdle opined Mr. W. was experiencing posttraumatic symptoms. Dr. Griffith disagreed and concluded Mr. W. did not have PTSD. Due to this conflict of medical opinion, I must assess the probative value of the diverse medical opinions in terms of documentation, reasoning, and treating physician status.

Regarding the first probative value consideration, documentation, a physician's medical opinion is likely to be more comprehensive and probative if it is based on extensive objective medical documentation such as radiographic tests and physical examinations. *Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985). In other words, a doctor who considers an array of medical documentation that is both long (involving comprehensive testing) and deep (includes both the most recent medical information and past medical tests) is in a better position to present a more probative assessment than the physician who bases a diagnosis on a test or two and one encounter.

The second factor affecting relative probative value, reasoning, involves an evaluation of the connections a physician makes based on the documentation before him or her. A doctor's reasoning that is both supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Additionally, to be considered well reasoned, the physician's conclusion must be stated without equivocation or vagueness. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

Third, an administrative law judge may place greater probative weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting doctor. *Pietrunti v. Director, OWCP* 11 F.3d 1035 (2d Cir. 1997).

With these principles in mind, I conclude that although Dr. DeRosales was well positioned as Mr. W.'s treating physician, her diagnosis of PTSD has diminished probative value due to a document issue, and insufficient and equivocal reasoning. Although Dr. DeRosales saw Mr. W. in August 2006 shortly after his return from Kuwait, in her November 14, 2007 treatment note regarding Mr. W.'s concern about PTSD, Dr. DeRosales states the assault occurred in "May 2007." Consequently, in evaluating the possibility of PTSD, Dr. DeRosales apparently did not consider that the assault occurred 18 months before her evaluation rather than 6 months. Next, in her January 14, 2008 treatment note, without explanation, Dr. DeRosales includes PTSD as a diagnosis. The absence of any explanation for this determination is significant for two reasons. First, in the same treatment note, Dr. DeRosales indicated that Mr. W. was going through another relationship problem. Even though she had previously treated Mr. W. in 2002 for stress associated with an interpersonal relationship issue, Dr. DeRosales simply diagnosed PTSD in January 2008 without discussing whether the current relationship issue might also explain Mr. W.'s present disorders. Second, in November 2007 when Mr. W. first presented with his concerns about PTSD, Dr. DeRosales diagnosed irritable bowel syndrome. When she then diagnosed PTSD instead in January 2008, Dr. DeRosales did not address factors that led her to

change her diagnosis from irritable bowel syndrome to PTSD. Finally, Dr. DeRosales' January 17, 2008 diagnosis of "possible" PTSD is equivocal.

Having counseled Mr. W. over several sessions, Dr. McArdle was also well positioned to provide a probative assessment on whether Mr. W. was struggling with posttraumatic symptoms. However, her opinion loses probative value for the multiple documentation issues and incomplete reasoning. In terms of documentation, like Dr. DeRosales, Dr. McArdle believed the assault on Mr. W. in Kuwait occurred in May 2007, just a few months before her first session with Mr. W. in July 2007. Dr. McArdle also had a misunderstanding of some of the circumstances associated with the assault and Mr. W.'s situation in Kuwait. Specifically, in discussing the mental impact of the assault on Mr. W., Dr. McArdle states that the supervisor did nothing to protect Mr. W. Yet, in his sworn police statement, Mr. W. indicated that after the sudden assault Mr. Hussey actually stepped in between Mr. Wester and Mr. W. and held Mr. Wester back from Mr. W. In stating that nothing happened to the perpetrator, Dr. McArdle did not discuss that Mr. Wester was actually charged by the military police for simple assault and disbarment action was initiated. Finally, and most significant, in presenting her reasons for diagnosing PTSD, Dr. McArdle did not explain how she isolated the assault in Kuwait and PTSD as the causes of Mr. W.'s current physical symptoms from the other two new stress factors in his life at the time, working two jobs and dealing with a relationship issue.

Based on a review of the record, Dr. Griffith had a sufficient documentary basis for his opinion. Noting the commonality of Mr. W.'s assault, the absence of a war-related trauma, and the lack of the requisite severe trauma necessary to cause major, long lasting psychic damage, Dr. Griffith reasonably concluded that Mr. W. does not have PTSD.

In summary, due to documentation and reasoning shortfalls, the conclusions of Dr. DeRosales and Dr. McArdle that Mr. W. had PTSD in 2007 have diminished probative value. The remaining medical opinion by Dr. Griffith is documented, reasoned, and probative. Accordingly, Mr. W. is unable to prove by the preponderance of the probative medical opinion that his 2007 physical symptoms are due to PTSD or represent an injury associated with the May 1, 2006 assault.

## **Issue # 2 – Extent and Nature of Disability**

Since Mr. W. has proven that he suffered a work related injury in Kuwait due to the May 1, 2006 assault, the Employer is liable for the disability associated with Mr. W.'s physical problems following the assault. Under the Act, a claimant's inability to work due to a work related injury is addressed in terms of the extent of the disability (total or partial) and the nature of the disability (permanent or temporary). In a claim for disability compensation, the claimant has the burden of proving, through the preponderance of the evidence, both the nature and extent of disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985).

### Extent

The question of the extent (or quality) of a disability, total or partial, is an economic as well as a medical concept. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). The

Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (D.C. Cir. 1988). Total disability occurs if a claimant is not able to adequately return to his or her pre-injury, regular, full-time employment. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984). A disability compensation award requires a causal connection between the claimant's physical injury and his or her inability to obtain work. The claimant must show an economic loss coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Servs. Of America*, 25 BRBS 100, 110 (1991). Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage-earning capacity. Additionally, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, as previously discussed, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachen Shipping v. Nash*, 782 F.2d 531 (5<sup>th</sup> Cir. 1986). Finally, the extent of disability due to an aggravation of a pre-existing condition starts with a showing that a claimant was not able to return to his regular or usual employment due to the work related injury. *SEACO and Signal Mutual Indemnity Assoc., Ltd. v. Bess*, 120 F.3d 262 (4th Cir. 1997) (unpub.); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988).

Since Mr. W. has established that he suffered an aggravation of a pre-existing mental condition due to the May 1, 2006 assault which led to disabling physical conditions, I must determine whether he suffered any economic loss in terms of wage earning capacity associated with that aggravation. In this regard, I note that I have already determined Mr. W. failed to prove by the preponderance of the evidence that he suffered a work related injury in 2007 arising out of the May 1, 2006 assault. As a result, my focus turns to his loss of wage earning capacity in the months immediately following the assault.

Mr. W. has claimed a partial loss of pay associated with his extensive amount of sick leave that he had to take at reduced pay rates due to the physical incapacity that arose after the May 1, 2006 assault. Additionally, according to Mr. W., due to health problems arising from the assault, he was no longer able to work for CSA, had to depart Kuwait on August 13, 2006, and was unable to return to his work as a pest control specialist in Kuwait; that is, his economic disability associated with his May 1, 2006 injury became total at the time of his departure from Kuwait.

#### Partial Disability

On May 1, 2006, Mr. W. suffered an aggravation of his pre-existing anxiety/depression condition that had been under control by medication. This work related aggravation manifested as physical symptoms of stomach aches, diarrhea, and nausea which interfered with Mr. W.'s ability to work full time, caused him to seek medical treatment, and led to a significant amount of sick leave at reduced pay. Based on these circumstances, since Mr. W suffered some loss of income the extent of his disability was partial through its duration.

In determining the duration of Mr. W.'s partial disability, I initially note that Mr. W. indicates he first took sick leave due to the assault related physical ailments on May 10, 2006.

He also stated that he last took sick leave due the assault related physical problems on July 26, 2006. The evidentiary record also shows Mr. W. received medical treatment on several occasions from May 8, 2006 to June 14, 2006. Mr. W. further testified that by the end of July 2006, the physical problems due to his increased stress and anxiety caused by the May 1, 2006 assault were resolved and he was able to work full time from then to mid-August 2006 when he departed. Accordingly, since Mr. W. returned to work full time with CSA after July 26, 2006, I find the duration of Mr. W. partial disability attributable to the May 1, 2006 assault was from May 10, 2006 through July 26, 2006

#### Total Disability

On the issue of whether Mr. W. suffered a work related injury due to the May 1, 2006 assault, I found his testimony sufficiently credible and corroborated to met his burden of proof on the issues of injury and causation. However, due to other actions taken by Mr. W. during the period from May to August 2006 and other circumstantial evidence, I find his testimony regarding an inability to continue to work for CSA due to the mental and physical consequences of the May 1, 2006 assault and the Employer's reactions to the incident has diminished probative value and is insufficient to prove total disability.

Contrary to Mr. W.'s recollection at the hearing, on June 19, 2006, more than six weeks after the assault, a few days after his last medical treatment, and several weeks after he had been re-assigned and become well aware of the Employer's reaction to the assault and his police report, Mr. W. signed an agreement to extend his employment with CSA for another year through August 2007. Consistent with this re-employment agreement, rather than immediately resigning from CSA upon his return to the United States, Mr. W. applied for extended medical leave with the Employer and testified that he hoped to return to Kuwait.

Although Mr. W. stated that he used his carpal tunnel problem as an excuse to leave Kuwait for a break, he also acknowledged that his carpal tunnel was diagnosed as very serious and needed attention which provides another explanation for his decision to return to the United States separate and apart from the consequences of the May 1, 2006 assault. Further, the actual timing of his departure was not linked to any physical problems or completely intolerable work conditions. Instead, Mr. W. selected August 13, 2006 because that was the end date of his current contract with CSA.

When Mr. W. visited Dr. DeRosales concerning his pending carpal tunnel operation shortly after his return from Kuwait in August 2006, the physician made no reference to the aggravated mental condition. While as Mr. W. points out this visit was related to his pending wrist surgery, Dr. DeRosales specifically noted in her August 22, 2006 treatment record Mr. W.'s history of depression, his current medication for the problem, and her assessment that he had "been good otherwise." Based on those observations, the absence of any reference to an aggravation of Mr. W.'s medicated depression from a recent assault or Mr. W.'s inability to return to work with CSA is notable.

In a December 2007 statement, Dr. McArdle stated that Mr. W. had to return to the United States due to worsening mental and physical conditions. However, in making that

statement, Dr. McArdle did not discuss the underlying basis for her opinion. In the absence of any stated documentation, I can only assume she based her conclusion on Mr. W.'s statements. However, as discussed above, several aspects about his departure from Kuwait are inconsistent with the declaration that Mr. W. was no longer able to remain in Kuwait to work. In particular, Dr. McArdle didn't address that Mr. W.'s physical symptoms had resolved by the end of July 2006 and the re-employment contract he signed in mid-June 2006.

Mr. W. testified that by November 2006 when he voluntarily resigned his job with CSA, and just one month before he started his own pest control company, he no longer held out any hope of having the ability to work for CSA. As a partial explanation, Mr. W. indicated that with the help of a therapist, he concluded working in Kuwait was not healthy for him. However, neither Dr. DeRosales nor Dr. McArdle's treatment notes record any discussion regarding Mr. W.'s inability to return to Kuwait until the fall of 2007, a year after he voluntarily resigned his job in Kuwait with CSA.

Finally, Mr. W. testified that he couldn't return to work with CSA because he "wouldn't work with people like that." Mr. W.'s dislike of CSA and his apparent disappointment with CSA's reaction to the May 1, 2006 assault are an insufficient basis to establish a wage loss disability under the Act.

Based on these consideration, I conclude that Mr. W. has failed to prove by a preponderance of the probative evidence that he was forced to leave his employment with CSA in Kuwait on August 13, 2006 and unable to return due to the consequences of the May 1, 2006 assault. Accordingly, Mr. W.'s claim for total disability must be denied.

#### Nature

The nature (or character) of a disability may be either temporary or permanent. Although the consequences of a work related injury may require long term medical treatment, an injured employee reaches maximum medical improvement ("MMI") when his condition has stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978). In other words, the nature of the worker's injured condition becomes permanent and the worker has reached maximum medical improvement when the individual has received the maximum benefit of medical treatment such that his condition will not improve. *Trask*, 17 BRBS at 60. The date on which a claimant has received the maximum benefit of treatment is primarily a medical determination. *Id.* Any disability suffered by a claimant prior to MMI is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). If a claimant has any residual disability after reaching MMI, then the nature of the disability is permanent.

Although Mr. W. received occasional medical treatment for his stress related physical symptoms in Kuwait through June 14, 2008, no physician has addressed when Mr. W.'s disabling physical complications may have reached MMI. Consequently, in the absence of any medical opinion regarding MMI and since I have determined Mr. W.'s disabling work related injury did not continue beyond July 26, 2006, I find Mr. W.'s impairment was temporary in nature until its full resolution near the end of July 2006.

### Issue # 3 – Disability Compensation

As compensation for temporary partial disability from May 10, 2006 through July 26, 2006, under Section 8(e), 33 U.S.C. § 908(e), Mr. W. receives 2/3 of the difference between his pre-injury average weekly wage and his wage earning capacity after the injury in the same or similar employment during the continuance of the disability, up five years. Under Section 8(h), 33 U.S.C. § 908(h), post-injury wage earning capacity may be based on actual earnings if those wages fairly and reasonably represent wage earning capacity.

#### Average Weekly Wage

Section 10 of the Act, 33 U.S.C. § 910, sets out three alternative methods for determining average weekly wage. Section 10(a) applies if the claimant worked in similar employment on either a five or six day a week schedule for a full year prior to his injury.<sup>11</sup> In situations where the claimant is injured before completing a full year in his job, Section 10(b) is used by considering the wages of similarly situated employees who worked substantially a full year preceding the date of the injury. Section 10(c) is the catch-all provision which is utilized in cases where Sections 10(a) and (b) are inapplicable.

Section 10(c), specifically states in part:

such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee. . . shall reasonably represent the annual earning capacity of the employee.

Since Mr. W. worked six and seven days a week, Section 10(a) is inapplicable. *See Zimmerman v. Service Employers International, Inc.*, BRB No. 05-0580 (Feb. 21, 2006) (unpub.). Likewise, because Mr. W. worked for more than a year with CSA before the May 1, 2006 assault, I am also unable to apply Section 10(b). Consequently, the appropriate provision for determining Mr. W.'s pre-injury average weekly wage is Section 10(c). *See Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176 (9th Cir. 1976), *aff'g and remanding in part*, 1 BRBS 159 (1974).

According to the BRB, the purpose of Section 10(c) “is to arrive at a sum which reasonably represents the claimant’s annual earnings at the time of his injury.” *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). That is, I must make a fair and accurate assessment of Mr. W.’s earnings capacity – the amount he would have had the potential and opportunity of earning absent his May 1, 2006 injury. *Jackson v. Potomac Tempories, Inc.*, 12 BRBS 410, 413 (1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 757 (7th Cir. 1979). While I have

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<sup>11</sup>Under Section 10(a), for a 5 day a week worker, the average daily wage is multiplied by 260 and divided by 52 to obtain the average weekly wage. For a 6 day a week worker, the multiplication figure is 300.

considerable discretion, my determination must be based on substantial evidence in the record. *Matthews v. Mid-States Stevedoring, Corp.*, 11 BRBS 509, 513 (1979).

By combining Mr. W.'s earnings with CSA in 2006 which covered 32 weeks with his average weekly earnings in 2005 for 20 weeks, Claimant's counsel asserts that the appropriate average weekly wage is \$1,468.61. In contrast, based on Mr. W.'s CSA earnings in the 52 weeks before the May 1, 2006 assault, EX 2 and EX 4, Employer's counsel presents \$1,335.68 as the applicable average weekly wage.

Since Claimant's counsel used all of Mr. W.'s earnings with CSA in 2006, his average weekly wage calculation includes income Mr. W. earned for several months after the May 1, 2006 assault. On the other hand, Employer's counsel principally focused on Mr. W.'s wages in the year before he was assault, which I consider the more appropriate measure of Mr. W.'s average weekly wage at the time of his injury. Accordingly, the applicable average weekly wage is \$1,335.68.

#### Post-Injury Wage Earning Capacity

To establish his lost earnings, Mr. W. presented a tabulation of 99 hours of sick leave that he took over the course of eleven weeks from May 10 to July 26 2006,<sup>12</sup> and noted that he was paid at varying reduced rates for that sick leave.

Under his contract, Mr. W. was expected to work at least six days a week, 48 hours a week, at \$18.45 an hour. Each year, Mr. W. was entitled to 6 days, or 48 hours, of sick leave. After the first 6 days of sick leave, Mr. W. would receive another 6 days, or 48 hours, at 75% of his pay rate, representing a 25% loss of pay. For each successive increment of 48 hours of sick leave, Mr. W.'s pay for the sick leave was reduced another 25%.

In the year prior to the assault, Mr. W. took approximately 166 hours of sick leave, for an average of about 3 sick leave hours a week. In the eleven weeks between May 10 and July 26, 2006, Mr. W. took 99 hours of sick leave, representing a weekly average of 9 hours. Since Mr. W.'s average weekly wage calculation included payment for the 3 hours of sick leave he used on average each week before the assault, the actual increase in sick leave each week after the May 1, 2006 assault which might represent a loss of wages due to reduced pay rates is 6 hours. That is, over the course of eleven weeks from May 10 to July 26, 2006, Mr. W. took a total of 66 hours of sick leave beyond his usual amount. If Mr. W. received pay at reduced rates, these 66 sick hours represent a loss of wages.

In the April 28, 2006 two week pay period, Mr. W. was first paid 100% for 25 hours of sick. For the rest of pay period, he dropped to 75% pay for another 13 hours of sick leave, which left 35 hours of sick leave available at 75% of pay. In the next two week pay period, which included May 1, 2006, Mr. W. took another 25 hours of sick leave at 75%, which left 10 sick leave hours available at 75% of pay. Of those 25 sick leave hours in the May 12, 2006 pay

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<sup>12</sup>The Employer provided no payroll records beyond the May 12, 2006 pay period to contest Mr. W.'s sick leave summarization.

period, 18 hours were attributable to the physical symptoms (May 10, 2006 – 10 hours and May 11, 2006 – 8 hours).

Based on the above factors, and to preclude reducing this analysis to fractional calculations, I find Mr. W.’s loss of income associated with his 66 sick hours as follows:

Hours	Loss of Pay	Total
18	25 % (\$4.61 per hour) <sup>13</sup>	\$ 82.98
10	25%	46.10
<u>38</u>	50% (\$9.23 per hour)	<u>350.74</u>
66		\$479.82

Accordingly, for Mr. W.’s eleven weeks of temporary partial disability, his increased use of sick leave represented a weekly loss of \$43.62 (\$479.82/11) in wage earning capacity. As a result, Mr. W.’s weekly post-injury wage earning capacity was \$1,292.06 (\$1,335.68 – 43.62).

#### **Issue # 4 – Medical Treatment**

Under Section 7 (a) of the Act, 33 U.S.C. § 907 (a), if an employee suffers a compensable injury, then the employer is responsible for those reasonable and necessary medical expenses incurred as a result of a work-related injury to the extent the injury may require. *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). The employer’s responsibility is continuing and exists even if a claim for disability compensation is time-barred by Section 12 and Section 13 of the Act, *Strachen Shipping co. v. Hollis*, 460 F.2d 1108 (5th Cir.) *cert. denied*, 409 U.S. 887 (1972), or fails to satisfy the Section 8 requirements for disability compensation, *Ingalls Shipbuilding v. Director, OWCP*, 991 F.2d 163, 166 (5th Cir. 1993). In other words, entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988).

The employer must provide medical treatment for such period as the nature of the injury or the process of recovery may require. In order to hold the employer liable for medical expenses, the treatment must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). If the treatment is unnecessary for the injury, payment may be rejected. *Ballesteros v. Williamette W. Corp.*, 20 BRBS 184, 187 (1988). On the other hand, if an administrative law judge determines a procedure is reasonable and necessary, then he or she may direct an employer to authorize a specific future surgical procedure. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991).

The claimant carries the burden to establish the necessity of medical treatment for, and that medical expenses are related to, a compensable injury. *See generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996) and *Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981). A claimant may establish a *prima facie* case for compensable medical treatment if a qualified physician indicates the treatment is necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255 (1984). At the same time,

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<sup>13</sup>\$18.45 x 0.25

an employee may not receive an award of medical benefits absent evidence of medical expenses incurred in the past or treatment necessary in the future. *Ingalls*, 991 F.2d at 166.

According to Section 7(a) of the Act, 33 U.S.C. § 907(a), an employer shall furnish all reasonable and necessary medical care and other attendant care or treatment, hospitalization, and medication for a work-related injury. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The term “necessary” relates to whether the medical care is appropriate for the injury. The term “reasonable” addresses the actual cost of treatment. *See Pernell*, 11 BRBS at 539; *see* 20 C.F.R. § 702.402.

Due to the May 1, 2006 assault, Mr. W. suffered a compensable injury through the aggravation of a pre-existing condition of depression and anxiety which caused several weeks of physical ailments and associated loss of pay. Consequently, CSA is responsible for all necessary and reasonable medical treatment for both the aggravated mental condition and physical ailments.

Since Mr. W. did not highlight any specific medical expenses or further refine his generalized claim for medical treatment, I will address the readily apparent possible medical treatments associated with Mr. W.’s injury in Kuwait.

First, Mr. W. submitted receipts for \$405 that he paid in 2008 for Cymbalta, an anti-depression medication prescribed by Dr. DeRosales (EX 5). As Dr. DeRosales’ treatment notes indicate and Mr. W. testified, his physician had periodically prescribed anti-depression medication since 2002 to control his depression, well before the May 1, 2006 assault. Based on this medication history, Mr. W.’s continued use of anti-depression medication is clearly connected to his pre-existing condition rather than any aggravation due to the assault. Consequently, CSA is not liable for Mr. W.’s anti-depression medication prescriptions.

Second, on two occasions, November 14, 2007 and January 14, 2008, Dr. DeRosales saw Mr. W. and discussed his depression and concern about PTSD (EX 14). As previously discussed, after the November 2007, Dr. DeRosales diagnosed irritable bowel syndrome, which I have concluded is not related to his May 1, 2006 injury. In the January 2008 visit, Dr. DeRosales essentially reviewed Mr. W.’s progress with medication and diagnosed both depression and PTSD. Again, Mr. W.’s long standing history of depression was not attributable to the assault and I have determined Mr. W. has not established that he actually suffered from PTSD. Consequently, I find the Employer is not liable for the medical expenses associated with Dr. DeRosales’ office visits.

Third, from July 2007 to March 2008, Mr. W. had nine office visits with Dr. McArdle, incurring \$2,640.00 in medical expenses (CX 6). Although Dr. McArdle’s diagnosis of “posttraumatic” physical symptoms has not been established, her summarization of Mr. W.’s therapy does establish that she was helping him work through the persistent psychological issues associated with the May 1, 2006 assault. Although Mr. W. did not prove these psychological issues were sufficient to cause a disabling impairment in 2007, Mr. W. testified the therapy was successful in resolving the psychic and mental consequences of the assault. As a result, I find the Dr. McArdle’s therapy sessions were a reasonable and necessary medical treatment

associated with the May 1, 2006 assault and Mr. W.'s compensable injury. Accordingly, the Employer is liable for the cost of Dr. McArdle's therapy in the amount of \$2,640.

### **ATTORNEY FEE**

Section 28 of the Act, 33 U.S.C. § 928, permits the recoupment of a claimant's attorney's fees and costs in the event of a "successful prosecution." Because I have determined an issue in favor of Mr. W., his counsel is entitled to submit a petition to recoup fees and costs associated with his professional work before the Office of Administrative Law Judges within 30 days of receipt of this Decision and Order. Employer's counsel has 30 days from receipt of such attorney fee petition to respond.

Because Mr. W. was significantly less than fully successful in his claim for disability compensation, both parties must address the application of the analysis set out by the U.S. Supreme Court, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), made applicable to longshoreman claims in *George Hyman Const. Co. v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992).

### **ORDER**

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. The Employer, CSA, LTD., shall pay the Claimant, MR. G.G.W., compensation for **TEMPORARY PARTIAL DISABILITY**, due to the aggravation of a pre-existing condition on May 1, 2006 from May 10, 2006 through July 26, 2006, based on an average weekly wage of \$1,335.68 and a post-injury wage earning capacity of \$1,292.06, such compensation to be computed in accordance with Section 8(e) of the Act, 33 U.S.C. § 908(e).

2. The Employer, CSA, LTD, shall pay interest on each remaining unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. § 1961.

3. The Employer, CSA, LTD, shall furnish the claimant, MR. G.G.W., medical treatment and pay \$2,640.00 in medical costs as required by his injury on May 1, 2006, in accordance with Section 7(a) of the Act, 33 U.S.C. § 907(a).

**SO ORDERED:**

**A**

RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: January 16, 2009  
Washington, D.C.