

U.S. Department of Labor

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Issue Date: 12 November 2008

CASE NO.: 2008-LDA-00174

OWCP NO.: 02-166525

IN THE MATTER OF

R.D.,

Claimant

v.

**DYNCORP TECHNICAL SERVICES,
Employer**

and

**CONTINENTAL CASUALTY COMPANY,
Carrier**

APPEARANCES:

GARY B. PITTS, ESQ.

On behalf of the Claimant

MICHAEL W. THOMAS, ESQ.

On behalf of the Employer

BEFORE: LARRY W. PRICE

Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., as extended by the Defense Base Act, 42 U.S.C. § 1651, et seq., brought by Claimant against Dyncorp Technical Services (Employer) and Continental Casualty Company (Carrier).

The issues raised by the Parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Houston, Texas, on August 14, 2008. All Parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit (JX) 1
2. Claimant's Exhibits (CX) 1 – 19
3. Employer's Exhibits (EX) 1 – 17¹

The parties stipulated to the following issues:

1. Jurisdiction
2. Employer/employee relationship at the time of incident
3. Proper and timely controversion
4. Informal conference held

The following issues remain disputed:

1. Classification of injury as an occupational disease or traumatic injury
2. Temporary total disability
3. Temporary partial disability
4. Lost earning capacity and compensation rate
5. Average weekly wage at the time of injury
6. Timeliness of notice and filing of claim
7. Attorney's fees and expenses

SUMMARY

Claimant worked as a police advisor for Employer in Baghdad, Iraq from February 2004 to February 2005, training Iraqi police officers and assisting in the development and implementation of training programs. Claimant lived and worked in a war zone, and was

¹ Employer's exhibits 18 – 22 were marked for identification but the record was left open with the intent that they would be admitted into evidence when and if submitted. None were submitted. Claimant submitted a wage statement for Fred's Discount Store post hearing. It is admitted as CX 20.

exposed to the brutalities of war on a daily basis. Claimant eventually began to suffer psychologically. His problems continued after leaving Iraq and caused difficulty for him both at home and at the work place, ultimately leading to his resignation as a police officer with the Vicksburg Police Department on May 26, 2007. It was at this time that Claimant first contacted Employer and sought professional help. Claimant was diagnosed with post traumatic stress disorder (PTSD) and now seeks compensation for his psychiatric injury. Employer does not dispute that Claimant suffers from PTSD as a result of his work in Iraq. (Er. Brief at p. 2).

CREDIBILITY FINDINGS

The Court has considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, the Court has taken into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record. See, e.g., Frady v. Tenn. Valley Auth., 1992-ERA-19 at 4 (Sec’y Oct. 23, 1995) (citing Dobrowolsky v. Califano, 606 F.2d 403, 409-10 (3d Cir. 1979)); Ind. Metal Prods. v. Nat’l Labor Relations Bd., 442 F.2d 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness’s testimony but may choose to believe only certain portions of the testimony. See Altomose Constr. Co. v. Nat’l Labor Relations Bd., 514 F.2d 8, 15 n.5 (3d Cir. 1975).

The credibility findings are based upon a review of the entire testimonial record and associated exhibits with regard for the reasonableness of the testimony in light of all record evidence and the demeanor of the witnesses. Probative weight has been given to the testimony of all witnesses found to be credible. The Court found Claimant to be credible.

FINDINGS OF FACT

Claimant was born on September 27, 1967. In 1992 Claimant began working for the Vicksburg Police Department. During his tenure with the Vicksburg Police Department, Claimant was a patrolman from 1992 to 1995, a narcotics investigator from 1995 to 1997, a sergeant from 1997 to 1999, a crime scene investigator from 1999 to 2000, a crime scene division commander from 2000 to 2003, and an assistant division commander in the patrol division from 2003 until his employment with Employer in 2004. [Tr. p. 14-15].

Claimant was hired by Employer to train Iraqi police officers in Baghdad, Iraq. [Tr. p. 17]. Once in Iraq, Claimant also assisted in the development and implementation of training programs and served as a Vehicle Fleet Manager, keeping vehicles operational in a difficult environment. [CX 2, p. 1].

Claimant testified that he was exposed to a number of rocket and mortar attacks, as well as the sound of gunfire and explosions daily. [Tr. p. 20, 22]. During the year Claimant was in Iraq, there were about fifteen Iraqi police officers killed a day. [Tr. p. 18]. A fair number of Claimant’s coworkers were killed as a result of insurgent attacks. [Tr. p. 20; EX 10, p. 47]. Claimant also saw “a lot of death” associated with living and working in a war zone. [EX 10, p. 54].

Claimant recounted specific events he attributed to his psychological injury. One of the more psychologically damaging events for Claimant happened one night in August or September of 2004. [Tr. p. 23; EX 10, p. 50]. Claimant and other employees were playing tennis when a rocket from an attack exploded twenty-five to forty yards from the tennis courts. [EX 10, p. 50]. Children living around the compound were outside playing at the time of the explosion. After the attack, several of the men in Claimant's group brought the injured children inside the compound to be treated. Claimant testified that watching the children die in front of him was the most traumatic thing he witnessed while in Iraq. [Tr. p. 23-25; EX 10, p. 51]. It was after this incident that Claimant's nightmares began. [EX 10, p. 57].

Another incident related by Claimant happened around March of 2004. Claimant was sitting in his room at a hotel he was staying in when a car bomb exploded a block and a half away, knocking Claimant off his chair and across the room. [Tr. p. 21; EX 10, p. 51-52]. The bomb leveled a five-story hotel full of people, leaving bodies "everywhere." [Tr. p. 25, EX 10, p. 54]. In another incident, Claimant watched as military personnel shot and killed a man running straight toward Claimant's vehicle in a "suicide vest." Claimant stated the worst part about that particular event was having to drive past the man after he had been shot. [EX 10, p. 53].

Claimant often had trouble sleeping due to the sound of gunfire. The scariest night in Iraq for Claimant was the night the Iraqis won the qualification game to get into the 2004 Olympics. The people of Baghdad celebrated by shooting guns into the air. Not knowing it was "happy fire," Claimant said the sound of an entire city shooting guns was the "scariest night . . . [he] had as far as pure fear" [Tr. p. 26].

Claimant began having nightmares after witnessing the deaths of the children involved in the rocket attack. [EX 10, p. 57]. The events of that night have been one of the two recurrent nightmares Claimant has. [Tr. p. 26]. The other recurrent nightmare is one where Claimant is trying to help someone without success. [Tr. p. 26]. Although Claimant is still having nightmares, therapy has helped control their frequency. [Tr. p. 28].

When Claimant return to the United States in February of 2005, he went back to work for the Vicksburg Police Department. He testified to problems he had readjusting with his family at home and with his coworkers and others at the work place. [Tr. p. 27]. Claimant contributes his experience in Iraq with leaving him "hyper-aware" and irritable. [Tr. p. 27, 29]. He testified that he often overreacts when dealing with people, whether suspects or coworkers, a problem that did not exist prior to working in Iraq. [Tr. p. 29-30]. Claimant's troubles eventually forced him to resign while working the nightshift on May 26, 2007. At this time, Claimant called Employer's help line and sought professional help. [Tr. p. 34]. Claimant stated that he did not immediately seek professional help when he returned to the United States out of fear that such help would result in negative publicity and cause harm to his career. [Tr. p. 34-35]. In addition, although Claimant knew some of his problems were related to his work in Iraq, he did not realize the extent of his problems until he began therapy. [Tr. p. 30, 34, 40].

On July 16, 2007, Claimant sought psychiatric treatment from Dr. Philip L. Scurria for his severe nightmares, increased startled response, flashbacks, and other post traumatic stress disorder (PTSD) symptoms. [CX 3, p. 1; EX 15]. Dr. Scurria opined that the PTSD symptoms Claimant was experiencing were directly related to his experiences as a security personnel in Baghdad, Iraq.² [CX 3, p. 12].

On recommendation by Dr. Scurria, Claimant underwent psychological evaluation with Dr. Angela J. Koestler on April 23, 2008. [CX 16, p.1]. Dr. Koestler opined that Claimant appeared to have experienced symptoms of PTSD related to his work assignment. [CX 16, p. 4]. Dr. Koestler's diagnostic impression of Claimant was that of PTSD. [CX 16, p. 4].

On May 20, 2008, Claimant saw Employer's psychiatric expert, Dr. James W. Irby, Jr. [EX 13, p. 98]. Dr. Irby's findings were consistent with the findings of Dr. Scurria. Specifically, Dr. Irby opined that Claimant suffered from delayed onset chronic PTSD. Dr. Irby found that Claimant began experiencing mild symptoms of psychiatric injury "prior to leaving Iraq and more significant symptoms upon returning to his duties as a police officer." Dr. Irby noted that Claimant sustained psychiatric injury as a result of his employment with Employer, however, he also found Claimant's employment experiences with the Vicksburg Police Department contributed to his irritability, frustration, and anxiety. In addition, Dr. Irby found Claimant gradually became aware of the link between his psychiatric symptoms and employment with the Employer after he resigned from the Vicksburg Police Department and contacted Employer's help line on May 26, 2007. Dr. Irby also found that Claimant is unable to return to his usual and customary work as a police officer. [EX 13, p. 105-106].

After resigning from the Vicksburg Police Department on May 26, 2007, Claimant found employment with Fred's Discount Store on June 16, 2007. [Tr. p. 38].

DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Banks v. Chi. Grain Trimmers Ass'n, 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d). The APA specifies the proponent of the rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

Classification of Injury

² Dr. Scurria's documents state Claimant was in Afghanistan, however, he was in Baghdad, Iraq, as noted in this Decision and Order.

The classification of the claimed disability as an occupational disease or traumatic injury is crucial to the determination of Claimant's average weekly wage, as well as whether notice of the injury and filing of the claim were timely. Although there have been no explicit decisions on whether or not PTSD is traumatic or occupational in nature under the Act, there are cases dealing with the classification of similar psychological impairments.³ In addition, state courts have dealt directly with the issue of classifying PTSD as a traumatic injury or occupational disease with regard to state workers' compensation statutes. See Brunell v. Wildwood Crest Police Dep't, 822 A.2d 576, 588 (N.J. 2003) (holding that PTSD can be either an accidental injury or an occupational disease, depending on the facts). Under the facts of this case, I find that Claimant's PTSD is more similar to an occupational disease, and as such, the occupational disease provisions of the Act should apply in evaluating this claim. My reasoning is as follows.

I first note that it was not one "traumatic" event that caused Claimant's PTSD but the continued exposure to the brutalities of war. For example, Dr. Scurria opined that Claimant's PTSD is "directly related to his experiences as a security personnel . . ." (CX 3, p.12) and does not relate the PTSD to a particular event.

While the Act does not define an occupational disease, "[t]he generally accepted definition . . . is 'any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally.'" Gencarelle v. Gen. Dynamics Corp., 892 F.2d 173, 176 (2d Cir. 1989) (quoting 1B A. Larson, The Law of Workmen's Comp. § 41.00, at 7-353 (1987 & Supp. 1988)); see also LeBlanc v. Cooper/T. Smith Stevedoring, Inc., 130 F.3d 157, 160 (5th Cir. 1997). From this definition, three elements exist that must be satisfied before a finding that an employee suffers from an occupational disease: (1) the employee must suffer from a "disease," (2) "hazardous conditions" of employment must be the cause of the disease, and (3) the hazardous conditions must be "peculiar to" the employee's employment rather than to other employment generally. Gencarelle, 892 F.2d at 176-77.

Under the first element, the term "disease" has been "interpreted to include any 'serious derangement of health' or 'disordered state of an organism or organ.'" Gencarelle, 892 F.2d at 176 (quoting Larson, supra, § 41.42, at 7-408). Claimant's PTSD meets this first requirement, as it is a disease that presents a serious derangement of mental health. PTSD was recognized as a mental disorder after the Vietnam War in order to give credence to the symptoms that plagued many soldiers who had been subject to the atrocities of war. Brunell v. Wildwood Crest Police Dep't, 822 A.2d 576, 585 (N.J. 2003). In 1980, it was added to the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). Brunell, 822 A.2d at 585. Discussing the diagnostic features of PTSD, the DSM-IV states:

The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor

³ See Keenan v. Gen. Dynamics Corp., 2000-LHC-00349 (ALJ 2001) (finding that Gulf War Syndrome is more similar to an occupational disease). There is one recent administrative law judge decision awarding compensation benefits to a claimant diagnosed with PTSD as a result of his work experience in Iraq, however, that decision did not classify the psychological injury as a traumatic injury or occupational disease. H.T. v. Serv. Employers Int'l, Inc., 2006-LDA-00090 (ALJ 2007).

involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 424 (4th ed. 1994).

In addition, the "disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning." DSM-IV at 424.

Thus, Claimant's PTSD is a type of "disease" that may qualify as an occupational disease. In addition, it is undisputed that Claimant suffered from this disease, as supported by the expert opinion evidence.

Traditionally, the "hazardous conditions" of employment that must cause the disease "have been of an external, environmental nature such as asbestos, coal dust, or radiation." Gencarelle, 892 F.2d at 176. The Fifth Circuit has concluded that "[c]ourts have limited the class of occupational diseases to include only those diseases contracted through exposure to dangerous substances." LeBlanc, 130 F.3d at 160 (citing Gencarelle, 892 F.2d at 176; Bath Iron Works Corp. v. Director, OWCP, 506 U.S. 153, 160-61 (1993) (distinguishing occupational hearing loss from traditional occupational diseases such as asbestos)). Under this line of reasoning, it could be argued that PTSD would not qualify as an occupational disease since it is not contracted through exposure to dangerous substances. This Court, however, does not agree with such a limited view of what qualifies as "hazardous conditions" for purposes of an occupational disease. Although asbestos, coal dust, and radiation are used as examples of external hazardous conditions, the second requirement should not be read to limit such external conditions to "substances" alone. For example, carpal tunnel syndrome has been held to be an occupational disease despite the fact that there is no exposure to a dangerous substance. See Bunge Corp. v. Carlisle, 227 F.3d 934, 939 (7th Cir. 2000).

In this case, Claimant's PTSD meets the second requirement for a finding that the injury is an occupational disease. Claimant lived and worked in a war zone. While in Iraq, Claimant was exposed to explosions and gunfire daily and witnessed the deaths of others. The conditions and environment placed Claimant's life under a constant threat of attack. There is little doubt that the conditions and experiences Claimant testified to qualify as external conditions directly causing his PTSD.

The third element, that the hazardous conditions be "peculiar to" the employee's employment, requires that the employee "be exposed to hazards greater than those involved in ordinary living, and the disease must arise from one of these." Gencarelle, 892 F.2d at 177 (quoting Grain Handling Co. v. Sweeney, 102 F.2d 464, 465 (2d Cir. 1939)). The Second Circuit continued: "The relevant comparison is between the hazardous conditions at the claimant's workplace and the corresponding conditions—or background risks—of employment generally. The hazardous activity need not be exclusive to one's employment; it need only be

sufficiently distinct from hazardous conditions associated with other types of employment.” Gencarelle, 892 F.2d at 177 (internal citations omitted).

It is this third requirement that keeps the Court from a definitive ruling that PTSD, under any fact scenario, is an occupational disease. Although PTSD has not been classified as a traumatic injury or occupational disease, the Board has held that a psychological impairment, under certain circumstances, is not an occupational disease. Moss v. Norfolk Shipbuilding & Dry Dock Corp., 10 BRBS 428, 430 (1979). The facts of that case, however, differ significantly from those here. In Moss, the claimant alleged his psychological impairment was the result of work stress associated with mandatory overtime. Moss, 10 BRBS at 429. Assuming his disability met the first two elements of an occupational disease, the claimant’s activities could not be said to be “peculiar to” his employment. Many occupations today may require an employee to work overtime at some point or another. As such, it cannot be said to be “peculiar to” the claimant’s employment. The same is not true for cases like the one presently before the Court. Cases falling under the Defense Base Act, such as this one, will more often than not meet the third element required for finding an injury is an occupational disease.

Under the facts of this case, the hazardous conditions Claimant was exposed to while working in a war zone are far more dangerous than any conditions Claimant was exposed to while working as a police officer in Vicksburg, Mississippi. The dangers present in Iraq, such as daily explosions and gunfire, are not common in other workplaces, no matter what the job. Although Claimant was exposed to dangerous conditions as a police officer, the hazardous conditions associated with working in a war zone can easily be said to be “peculiar to” Claimant’s employment. Furthermore, Claimant’s PTSD was the direct result of working in these uncommon hazardous conditions.

In addition to meeting the above requirements, Claimant’s PTSD parallels the two specific characteristics of an occupational disease: “(1) an inherent hazard from continued exposure to conditions of a particular employment and (2) a gradual, rather than sudden onset.” Bunge Corp. v. Carlisle, 227 F.3d 934, 938-39 (7th Cir. 2000) (citing 1B A. Larson, Workman’s Comp. Law, § 41.31 (1992)). Here, both Drs. Scurria and Koestler attributed Claimant’s PTSD symptoms with his experiences while employed in Iraq. In addition, Dr. Irby opined Claimant suffered from delayed onset chronic PTSD. PTSD is specified as “chronic” when the symptoms last three months or longer. DSM-IV at 425. PTSD is specified as being “with delayed onset” if at least six months have passed between the traumatic event and the onset of symptoms. DSM-IV at 425. Thus, Claimant’s PTSD resembles the two characteristics of an occupational disease.

For all the reasons articulated above, I find that Claimant’s PTSD is an occupational disease.

Section 12 Timely Notice and Section 13 Timely Filing

Section 12(a) of the Act requires notice of the injury be given within thirty days after the injury or within thirty days after the employee “is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury . . . and the employment . . .” 33 U.S.C. § 912(a). However, notice of injury in a case

involving an occupational disease which does not immediately result in disability must “be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the . . . disability.” 33 U.S.C. § 912(a); see also Lewis v. Todd Pac. Shipyards Corp., 30 BRBS 154, 156 (1996).

Section 13(a) of the Act requires a claimant to file a claim for compensation within one year of the injury. 33 U.S.C. § 913(a). The time for filing such a claim does not begin to run until the claimant “is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.” 33 U.S.C. § 913(a). The statute of limitations period is extended, however, for cases involving occupational diseases. When the disability is due to an occupational disease, a claim for compensation is considered timely if filed within two years after the “claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the . . . disability” 33 U.S.C. § 913(b)(2); see also Lewis, 30 BRBS at 156.

Therefore, in occupational disease cases “the filing period does not begin to run under Sections 12 and 13 until claimant is actually disabled” Lewis, 30 BRBS at 156. Section 20(b) of the Act “provides claimant with a presumption, applicable to both Sections 12 and 13, placing the burden of proof on employer to produce substantial evidence that the claim was not timely filed or notice timely given.” Lewis, 30 BRBS at 156 (citing Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989)); see also E.M. v. Dyncorp Int’l, BRB No. 09-0208 (2008).

Pursuant to Section 12 and 13, I find the date Claimant knew or should have known he suffered from a psychological injury or PTSD related to his work in Iraq that impaired his earning capacity was May 26, 2007. Claimant testified that although he knew there was a relationship between his injury and his employment in Iraq, he did not know the extent of his injury until he resigned from the Vicksburg Police Department on May 26, 2007 and sought medical help. However, even if Claimant should have known of the relationship between his injury and his employment in Iraq prior to this date, he did not know that his injury would lead to eventual disability. The Act exists to compensate a claimant for loss of earning power, and a claimant is not to be penalized for not reporting an injury or filing a claim he reasonably did not believe would impair his earning power. See Bath Iron Works Corp. v. Galen, 605 F.2d 583, 586 (1st Cir. 1979). Due to his PTSD, Claimant can no longer work as a police officer, either abroad or at home, and as a result he has been restricted to work earning much less than he did with the Vicksburg Police Department. Claimant first notified Employer of his injury on May 26, 2007 and subsequently filed his claim on August 9, 2007. Therefore, the notice and claim were timely filed under Sections 12 and 13.

Nature and Extent of Disability

After establishing an injury, the burden of proving the nature and extent of the disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1985). Under the Act, the term “disability” “means incapacity because of injury to earn wages which the

employee was receiving at the time of injury in the same or any other employment” 33 U.S.C. § 902(10). Thus, a claimant must have an economic loss coupled with a physical or psychological impairment in order to receive an award for disability. Keenan v. Gen. Dynamics Corp., 2000-LHC-00349, 31 (ALJ 2001) (citing Sproull v. Stevedoring Servs. of Am., 25 BRBS 100, 110 (1991)).

The Act “distinguishes disabilities binarily with respect to both their duration (permanent or temporary) and their degree (partial or total).” Pool Co. v. Cooper, 274 F.3d 173, 175 n.2 (5th Cir. 2001). The date of maximum medical improvement (MMI) is the traditional method of determining whether a disability is permanent or temporary and it is primarily a medical determination. Keenan, 2000-LHC-00349, at 32. A claimant is considered temporarily disabled until he attains MMI. Cooper, 274 F.3d at 175 n.2. In the present case, Claimant is still receiving treatment for his PTSD and hopes to one day work as a police officer again. [Tr. p. 35-36]. In addition, Dr. Irby stated that Claimant has not yet reached MMI. [EX 13, p. 106]. I find Claimant’s disability is temporary in nature.

The extent of a claimant’s disability, however, is primarily an economic concept and the availability of suitable alternative employment is used to distinguish partial from total disability. Cooper, 274 F.3d at 175 n.2. “Total disability is a complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment.” Keenan, at 32. Total disability “becomes partial on the earliest date that the employer establishes suitable alternative employment.” Keenan, at 32. Here, the evidence is sufficient to establish total disability and loss of wage-earning capacity beginning on May 26, 2007. It was on this date that Claimant resigned from the Vicksburg Police Department and became incapable of earning his pre-injury wages. Claimant’s disability became partial on June 16, 2007, the date he became employed by Fred’s Discount Store. [Tr. p. 52]. Claimant’s wage-earning capacity since June 16, 2007 is \$439.67 a week.⁴ [Tr. p. 53].

A claimant who is temporarily totally disabled has the right to compensation in the form of two-thirds of his average weekly wage for the period of his disability. Cooper, 274 F.3d at 175 n.2; see also 33 U.S.C. § 908(b). In a case involving temporary partial disability resulting in a “decrease of earning capacity, the compensation shall be two-thirds of the difference between the injured employee’s average weekly wage before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability.” Moore v. J.F. Shea Constr. Co., 13 BRBS 370, 372 (1981); see also 33 U.S.C. § 908(e). “[T]he wage-earning capacity of an injured employee in cases arising under Section 8(e) shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity.” Moore, 13 BRBS at 372; see also 33 U.S.C. § 908(h).

Claimant is therefore entitled to temporary total disability compensation from May 26, 2007 to June 16, 2007 based on his average weekly wage of \$628.54, as discussed below. Claimant is also entitled to temporary partial disability compensation from June 16, 2007 to the present and continuing based on a retained wage-earning capacity of \$439.67 a week.

⁴ Claimant was hired by Fred’s Discount Store on June 16, 2007. His wages from Fred’s for 2007 were \$12,498.50. [CX 14, p.1]. \$12,498.50 divided by 199 days comes out to \$62.81 a day. This amount multiplied by seven equals \$439.67 a week.

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for determining an injured employee's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage (AWW). 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing an employee's earning power at the time of the injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137, 139 (1990).

Section 10(a) applies if the injured employee "worked in the employment in which he was working at the time of the injury . . . during substantially the whole of the year immediately preceding his injury" 33 U.S.C. § 910(a). Where Section 10(a) is inapplicable, Section 10(b) applies if the injured employee has not "worked in such employment during substantially the whole of the year . . ." immediately preceding his injury. 33 U.S.C. § 910(b). When Section 10(a) or Section 10(b) cannot "reasonably and fairly be applied," the administrative law judge has broad discretion in determining the AWW under Section 10(c). 33 U.S.C. § 910(c); Sproull v. Stevedoring Servs. of Am., 25 BRBS 100, 105 (1991). The objective is to reach a fair and reasonable approximation of the injured employee's earning capacity at the time of injury. Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986); H.T. v. Serv. Employers Int'l, Inc., 2006-LDA-00090 (ALJ 2007). Earning capacity is "'the amount of earnings the claimant would have the potential and opportunity to earn absent injury.'" Mijangos, 19 BRBS at 20 (quoting Jackson v. Potomac Temporaries, Inc., 12 BRBS 410 (1980)). The Parties agree that Section 10(c) is the proper method for determining Claimant's AWW in this case. [Tr. p. 51].

The calculation of Claimant's AWW is dependent on the time of injury, which is determined by the nature of the injury. For traumatic injury cases, the time of injury is generally evident, whereas with occupational disease cases the time of injury is more obscure. Since the Court has previously determined that under the facts of this case PTSD is an occupational disease, the provisions of Section 10(i) apply. Under this section, the "time of injury" is defined as "the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the . . . disability." 33 U.S.C. § 910(i).

As discussed above, the date Claimant knew or should have known he suffered from a psychological injury or PTSD related to his work in Iraq that impaired his earning capacity was May 26, 2007. Since Claimant's injury is classified as an occupational disease, pursuant to Section 10(i), benefits are to be awarded based on Claimant's May 26, 2007 AWW of \$628.54. In 2006, Claimant's gross earnings for the entire year totaled \$32,684.16. [CX 13, p. 2]. This amount divided by 52 produces an AWW of \$628.54.

ORDER

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

It is hereby ORDERED, JUDGED AND DECREED that:

1. Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from May 26, 2007 until June 16, 2007 based on an AWW of \$628.54.
2. Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from June 16, 2007 to the present and continuing based on an AWW of \$628.54 and a wage-earning capacity of \$439.67 per week.
3. Employer shall pay all medical expenses related to Claimant's psychiatric injuries;
4. Employer shall receive credit for any compensation already paid;
5. Employer shall pay interest on any sums determined due and owing at the rate provided by 28 U.S.C. § 1961.
6. Counsel for Claimant, within twenty days of receipt of this Order, shall submit a fully supported fee application, a copy of which must be sent to all opposing counsel who shall have ten days to respond with objections thereto.

So ORDERED.

A

**LARRY W. PRICE
Administrative Law Judge**