U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

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Case Nos.: **2008-LDA-00214**
2008-LDA-00215

OWCP Nos.: **02-149668**
02-144245

In the Matter of:

T. B.,
Claimant,
v.
SERVICE EMPLOYERS INTERNATIONAL,
KBR GOVERNMENT OPERATIONS /
INSURANCE CO. OF THE STATE OF PENN.
c/o AMERICAN INTL UNDERWRITERS
Employer / Carrier,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party In Interest.

Appearances: Gary Pitts, Esq.
For the Claimant

Benjamin P. Gates, Esq.
For the Employer/Carrier

Before: Richard K. Malamphy
Administrative Law Judge

DECISION AND ORDER

This proceeding involves consolidated claims for benefits filed under the Defense Base Act ("the Act"), 42 U.S.C. § 1651, et seq. (2000), an extension of the Longshore and Harbor Workers' Compensation Act ("the Longshore Act"), as amended, 33 U.S.C. § 901, et seq. (2000). A formal hearing was held in Wichita, Kansas on March 17, 2009, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Longshore Act and the applicable regulations. At the hearing, the following exhibits were admitted without objection: Claimant's exhibits ("CX") CX 1 through CX 20 and Employer's exhibits ("EX") EX 1 through EX 37. Transcript ("TR") at 11. Employer's exhibits 26 through 36 were marked as "pending receipt" and were never submitted to the Court.

At the end of the hearing, the parties requested that the record remain open for the submission of further medical evidence. TR at 101-102. On May 26, 2009, the Claimant submitted V.A. medical records which were labeled CX 21. On June 5, 2009, the Claimant submitted additional V.A. medical

records which were labeled CX 22. The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

The Claimant and the Employer have stipulated to the following:

1. The Defense Base Act applies to this claim;

2. An Employer/Employee relationship existed between Claimant and SEI at the time of the injury;

3. The injury occurred on December 1, 2005 in a zone of special danger;

4. The Employer was notified of the injury on December 1, 2005;

5. The Employer filed a Notice of Controversion on September 21, 2006;

6. An Informal Conference was held on January 29, 2008.

Joint Stipulations of the parties. The Claimant later clarifies that the injury and notice to the Employer occurred on December 2, 2005. TR at 26.

ISSUES

1. What is the nature and extent of Claimant's injuries?

2. What is the average weekly wage?

3. Whether the Claimant is entitled to medical benefits under Section 7 of the Act.

STATEMENT OF THE CASE

I. Claimant's Testimony

The Claimant is married, but has been separated for approximately a year and a half. TR at 39, 51. He also has four children, two of which are under the age of eighteen. TR at 39. He lives in Winfield, Kansas, with his daughter who is attending college. TR at 40.

After finishing high school, the Claimant served for the United States Navy for a little over two years. TR at 13. When he came home, he studied political science at a community college for a year and a half. TR at 13-14. He then moved to Wichita, Kansas and completed driving school for eighteen wheel trucks. TR at 14. From 1980 to 1985 he drove a truck throughout the United States. TR at 14. In 1987 he began working for Boeing Aircraft in Wichita. TR at 15.

The Claimant testified that in 1993 he was injured while working at Boeing. TR at 17. He was lifting a 200 pound engine when it slipped and he injured his right and middle back trying to catch it. TR at 17-18. The accident also caused what the Claimant described as "nerve problems" in his right shoulder. TR at 20. He went through eleven months of rehabilitation for his right side, middle back, right shoulder and right arm. TR at 18, 20.

In 1993, he was laid off from Boeing and in 1994 he returned to driving a truck when his rehab ended. TR at 19. In 1996 he returned to Boeing without any work restrictions:

> [I]n '96 they had a recall in Boeing and I got my job back. I had to go through medical and prove that I was able to do the job when I got hurt in '93.

TR at 19; EX 13.35. In February of 2002 he was laid off because of Boeing's post-9-11 cutbacks. TR at 15. For the next few years, the Claimant drove a truck hauling various goods. TR at 15.

The Claimant heard about the opportunity to drive trucks in Iraq when he was driving cargo to Houston, Texas. TR at 16. Before being hired, he was given extensive pre-employment physicals, including a hearing exam. TR at 17, 21. He testified that from 1996 to 2005 he did not have any problems with his neck. TR at 20-21. He also noted that he did not have significant problems with dizziness, light-headedness, or hearing loss before leaving for Iraq. TR at 21. He had never seen a psychologist or psychiatrist, been diagnosed with depression or taken medication for a psychological disorder. TR at 22. He testified that he was fairly healthy, but that he was probably a little overweight and had high blood pressure. TR at 22.

He left for Iraq on June 12, 2005. TR at 19; EX 9.1. He was stationed in Anaconda, one of the largest American bases in Iraq. TR at 22. His job was to haul jet fuel to the helicopter sites. TR at 23. He was an "outside the wire" driver, meaning that his convoy drove outside the perimeter of the base where they could potentially be attacked. TR at 23. His convoy was attacked constantly. TR at 24. The attacks varied in severity from people throwing stones that would break the windshield to road-side bombs. TR at 24. The Anaconda camp was also frequently under mortar fire during the day and night. TR at 24-25. While driving outside of the camp, the drivers were required to wear a helmet and a Kevlar vest with armored plates that weighed forty-five pounds. TR at 25.

On December 2, 2005, the Claimant was driving the fourteenth truck in a twenty truck convoy. TR at 26-27. He was hauling another truck on a flatbed truck. Around 11:30 p.m., the convoy was outside of Baghdad when "all hell broke loose, the bomb went off." TR at 28. The IED caused the windshield, mirrors and sun roof on the truck to break, but the mylar inside of the windshield kept it together. TR at 28; see CX1. His truck was still operational, so after slowing for a minute to clear the sand and other particles from his eyes he was able to drive the truck to safety by following the taillights of the truck in front of him. TR at 28-30. During the attack, a piece of shrapnel hit and left a two-inch gash on the side of his helmet. TR at 30.

The Claimant testified that he keep quiet about his medical complaints to the management because he was in financial trouble and wanted to stay in Iraq, but he did mention his problems to coworkers. TR at 40-41; see CX2; CX3. He also knew that if he left Iraq early he would have to pay taxes on the amount that he had made thus far, but if he stayed it would be tax free. TR at 42-43. So it was his goal to make it to the point where he would not have to pay taxes. TR at 43. His daughter had also just started college and needed his support. TR at 43.

Following the incident, the Claimant also went to a medic to complain of ringing in his ears and headaches. TR at 31-32. His neck problems started after the bombing but got worse as he continued working:

> As time went on, January into February it got worse. I knew that, but it wasn't to the point where I fell down and died. In March I tried to get

> help, wouldn't touch it, so I said, when I get back in a few months, end of contract, I'll go get professional help.

TR at 85. His convoy had lost a contract to deliver ice, so for the last 6 months he was in Iraq, he did not have to make deliveries as often and he would rest when they had time off. TR at 85. He testified that he was unable to do some of the drills at the camp, his vest bothered him, and he was having neck problems. TR at 41. Since the accident he has had some blood drainage from his left ear and neck problems. TR at 32. A doctor at the V.A. hospital has recommended that he undergo neuropsychological exams, including tests for brain injuries and hearing loss and to determine whether he has broken bones inside his ear drums that are causing his ear bleeds. TR at 44.

When he came home at the end of his contract on June 6, 2006, he had a return ticket and intended to go back once he received medical attention. TR at 33, 54. He testified that he intended to work in Iraq for three years. TR at 54. He talked to the Employer about his medical problems and told them that he wanted to have an MRI taken of his neck. TR at 33. He was put on emergency medical leave and told to use his own medical insurance, but the company did pay for him to have an MRI. TR at 33.

The Claimant had an MRI taken on August 2, 2006 that showed he had disc problems at three levels in his neck. TR at 34. The Claimant testified that he was unaware of any problems with his neck before going to Iraq:

> Q: All right. If you had a degenerative problem in your neck because of aging before you went to Iraq, were you aware of it?
> A: No, sir.
> Q: Were you having any problems with the neck?
> A: No, no.
> Q: All right. So have the – if you have a degenerative problem that was aggravated from the bomb explosion, those problems occurred since the bomb explosion, is that accurate?
> A: I'd say that's true.

TR at 82. Dr. Grundmeyer recommended two or three sessions of physical therapy a week for eight to eleven weeks, but his insurance company stopped communicating with him. TR at 34. The Claimant testified that his doctor was against giving him a work release, but he requested one because he was having problems financially and could not afford the physical therapy or time off. TR at 34-35.

He has also seen Dr. Johnson, a psychiatrist, who believes that he would benefit from group sessions. TR at 45. The Claimant has had problems with concentration, anxiety, and irritability since the incident. TR at 46-47. He is only able to sleep a couple of hours at a time. TR at 48. He also has constant dizziness and light-headedness. TR at 46. He does not believe that his blood pressure is the cause of his balance issues because his blood pressure is under control. TR at 47.

The Claimant passed a Department of Transportation physical on August 14, 2006. TR at 64. He testified that he requested a work release from Dr. Grundmeyer:

> Q: Okay. Whenever you got back I understand you were seeking treatment for your medical issues. Did you happen to go back to work?

> A: I had no choice, Mr. Gates. After six weeks of trying to communicate with KBR in Houston, Texas, I got nothing. I asked my attorney to check on it; he got nothing.
>
> I had to get a work release from Dr. Grundmeyer to feed my family. And that's why I got the work release because I had asked these people in Houston for some kind of money to help support my family while I got these conditions taken care of and if could [sic] return to Iraq for a second tour. … So I had no choice but to get a work release from Dr. Grundmeyer and find another job, and that's exactly what I did, and I did it, and I did it with pain and I still have pain, sir.

EX 13.32. He was then able to find work in Tulsa, Oklahoma driving a flatbed truck for eight weeks in September and October 2006 for Mountain Truck Lines. TR at 35. He earned approximately $650 a week. TR at 35. He had to quit because the driving hurt him and it was difficult for him to move the 150-pound tarps that the company used to protect their loads: "If you can't do the job, well, you can go elsewhere, and that's what I eventually did." TR at 36; EX 13.33. In December 2006, he made one trip to Seattle and back for Pro Drivers. TR at 61.

On January 3, 2007, Dr. Zimmerman found that the Claimant was at maximum medical improvement, but could not return to work overseas and had a 25-pound weight limitation. TR at 36. The Claimant feels that the limitation would be hard to stick to in trucking. TR at 26. His doctor also told him that he should not be a truck driver anymore if he needed to load or unload cargo. TR at 37. The Claimant testified that driving a truck stateside is lighter duty than driving a truck in Iraq:

> Q: Okay. For example, you don't have to wear this bulletproof vest with lead plates and a helmet back here, do you?
> A: Yes, sir.
> Q: And when you're working as a truck driver in the war zone, isn't it true that if your load shifts on the road while you're out there you've got to get up and grapple and put it back into place or crawl under the truck and secure it? I mean, you've got to do things there that you don't have to do here, is that fair?
> A: I'd say -- yeah, with a few things I'd say probably yes.
> Q: Okay. Is it possible, for example, to drive a truck here and not have to be involved in loading and unloading the truck?
> A: Right…

TR at 80. Truck drivers in the United States do have to strap down their load before leaving. TR at 83. If the Claimant was driving a load of fuel, he would not have to load or unload the truck. TR at 83.

In January 2007, he worked for Rubbermaid in Winfield, Kansas, using a forklift. TR at 37. He was only able to work for Rubbermaid for approximately four weeks because it hurt his neck when he needed to turn around to drive backwards. TR at 37-28. From February 2007 until October 2008, he was employed by Price Trucking shuttling trailers. TR at 37. In October 2008 he was laid off. TR at 38. While working for Price, he was making approximately $600 per week. TR at 38. He has been looking for work within his restrictions, but at the time of the hearing he was still unemployed. TR at 39.

During an evaluation at Miracle Ear, the Claimant was informed that he had a 60% hearing loss in his left ear and a 50% loss in his right ear. TR at 31. He was told that he needs hearing aids for both ears,

but he was not able to afford it so he purchased an inexpensive device that helps him hear the TV or people that are close to him. TR at 31. The Claimant has hearing testing scheduled after the hearing. TR at 76.

At the hearing, the Claimant mentioned that his neck was stiff and he could not sleep with a pillow anymore. TR at 41-42. He agreed that he had neck problems since the explosion: "It gradually came on. You know, I mean, I look back on it and I'm stubborn, I knew what I had to do. I had to finish, so…" TR at 42. The Claimant passed a Department of Transportation physical in March of 2008, but he testified that the exam was not very thorough. TR at 63-64.

During a deposition on February 4, 2009, Employer's counsel asked the Claimant if he would be able to get a job driving a truck that did not require him to move heavy tarps or cargo. EX 13.37. The Claimant responded:

> You know, I can do the job, but I couldn't do it without pain. And to be honest with you, the time I've had off, I'm looking at jobs other than driving. All I can tell you is long periods of sitting, those neck muscles just spasms up and the only was [sic] to relief [sic] them is to pull over and lay flat or get out of the unit and walk around. That's the only two ways that those things go down.
>
> …Admitted, I could make the best money driving a truck, but with the pain that I'm in I don't think it's worth it. I don't think it's worth it, sir. I soak a lot. I have thermal pads that I use. I go through six or eight muscle tubes a month and that seems to do the job.
>
> Since I haven't been driving, I haven't been in near the pain, sir. So, I don't really want to go back drive a truck to have that pain if I can find something out there.

EX 13.37-38.

II. Claimant's Wife's Testimony

The Claimant's wife has known him for at least thirty-three years. TR at 89. She testified that the Claimant's psychological condition changed when he came back from his employment in Iraq:

> Q: Well, since we haven't lived with him, been around him for 33 years, what was he like before he went to Iraq that's different since he got back?
> A: Before he was more laid back, easygoing, more involved with the family, and now he's totally different and I would say our separation is probably the result of his experience there.
> Q: Okay. How is he different, if at all, in regard to let's say irritability since he came back as compared to before?
> A: To me he seems almost paranoid, nervous, he's easily confused, gets upset easily.
> …
> Q: Does he seem depressed from your lay point of view?
> A: Very much so.
> Q: Was he like that before?

> A: No.

TR at 90-91. She later described that:

> He just seemed untrusting. I used the word paranoid. I mean, he was jumpy. I mean, I don't know. He's just always on edge, just to put it in one descriptive word. I suppose coming from those, a war situation where you have enemy -- I imagine you would be a little jumpy, always looking over his back kind of thing, just --

TR at 96. Since his return he has also had problems sleeping: "He would wake up some nights and just yell like he was being attacked or something, I guess. I don't know how to explain it. He'd just -- a couple instances that I can think of that he woke up screaming." TR at 97.

She also testified that he did not complain of neck pain before he went to Iraq. TR at 91. She noted that the Claimant has said that his neck is now uncomfortable. TR at 92. She explained that the Claimant's military background "taught him to muster and endure. You just carry on, regardless of the circumstances." TR at 92. She stated that the Claimant's hearing loss has been "very obvious" since he returned: "You just have to repeat everything all the time." TR at 91. The Claimant did not have complaints of light-headedness before going to Iraq, but he now mentions experiencing light-headedness. TR at 93.

III. Statements from Claimant's Co-Workers

Three of the Claimant's co-workers from his time in Iraq wrote descriptions of their observations of the Claimant. Rodney Burns wrote: "I was a co-worker with him for KBR. I am aware of the I.E.D. incident involving him back in early December 2005. He has been complaining of ears ringing and neck problems every [day] since." CX 2.

Frank Smith wrote:

> [The Claimant] went through KBR Orientation with me June 2005 and we were based at Anaconda together both TTM drivers for KBR. We worked closely together. When volunteers were called for on base yard work Tommy and I were together.
>
> After he hit IED in December of 05 I noticed him have problems with his shoulder and had to repeat things when we were talking and I hadn't had to prior to the IED attack.
>
> One time he was trying to pickup his back pack and I had to help him. He had mentioned his shoulder had been giving him a lot of trouble. I didn't know how much until he couldn't pick up his back pack.
>
> I asked him where he was in pain at and he told me his neck and upper shoulder.

CX 3.

Marcus Talley wrote:

> I have known [the Claimant] since 2005. I was not on the convoy that resulted in his injuries. I heard about the I.E.D. while I was still in camp. The damage done was reported and photographed in Camp Cooke (C-5, Taji). [The Claimant] saw the medic when he returned to Anaconda. He complained of a headache, ringing in the ears, and a sore neck. K.B.R. and the military will have documentation referring to the incident. I have seen pictures of the two damaged trucks. All the glass was destroyed in both trucks. Any incident that could destroy all the glass in two trucks would have to be an explosion. Any explosion that did not come from a member of the escort unit would be an improvised explosive devise. That is the definition of an I.E.D.

CX 19.

IV. Accident Report

An incident report was filed on December 2, 2005. EX 11. The description stated:

> On 01 December 2005 at approximately 2305 hrs a KBR Heavy Truck Driver was on a mission on MSR Tampa north of Taji when an IED exploded near by. No injuries were reported to operations at that time. Upon arrival to Anaconda on 02 December [2005] at approximately 1210 hrs the individual visited the KBR medics complaining of ringing in his left ear and headache for this [sic] symptoms he was prescribed Motrin but he refused to take it.

EX 11.2. Under injury details, the medic noted that the Claimant had traumatic hearing loss and tinnitus to the left ear secondary to the IED explosion. Id. The medic also noted that the Claimant was achy on the left side of his body. The Claimant refused Motrin because he had some at home. EX 11.3. The Claimant reported to the clinic again on December 3 and noted that he was feeling better and was "[j]ust a little sore, but that is to be expected." Id. He agreed to take the prescribed Motrin. Id.

V. Medical Treatment

Previous Injuries

The Claimant visited Dr. Mervin McCormac, a chiropractor on October 10, 1991 for pain in his middle back, neck and right shoulder. EX 19.9-10, 12. The pain was the result of an incident at Boeing on October 9, 1991. EX 19.12. On November 7, 1991, Dr. McCormac noted that his objective findings "revealed muscle spasms in the traps and para spinal muscles with apparent myofacial fixations and myofacial pain. Radiographic study reveale[d] an avulsion fracture on the spinous process of T-1." EX 19.122.

Following the accident at Boeing on January 28, 1993, the Claimant began seeing Dr. McCormac for treatment of the pain in the center of his back, both shoulder blades, and lower neck to right shoulder. EX 19.7. The Claimant also noted that he was having headaches and trouble sleeping. EX 19.8. Dr. McCormac concluded that the Claimant's pain might be an exacerbation of the injury from October 1991. EX 19.78.

A March 17, 1993 MRI of the Claimant's spine showed early degenerative changes at the C5-6 vertebrae with mild spondylosis and disc bulge. EX 22.8. On May 11, 1993, Dr. Lawrence R. Blaty

wrote that the Claimant did not feel that physical therapy was giving him any significant benefit. EX 22.20. An examination of the Claimant showed symmetry between the left and right scapula, with increased prominences of the right scapula. Id. There was also mild winging with forward pushing and the presence of several trigger points and tenderness throughout the scapular area. Id. The Claimant returned on June 15, 1993 for a follow-up appointment. EX 22.94. Dr. Balty noted that the Claimant had demonstrated deficits in his right upper extremity strength, including on lifting in the light physical demand category, during a functional capacity evaluation. Id. Examination showed no clinical findings to suggest impingement or any tenderness in the rotator cuff and he showed good mobility of the shoulder. Id. The Claimant did have tenderness and pain in the upper scapular border. Id.

On August 5, 1993, the Claimant was evaluated by Dr. James R. Hay, a pain management consultant. EX 19.70. The Claimant stated that he felt a pulling, painful sensation in his neck and shoulder after a work-related incident. Id. An MRI on March 17, 1993 showed a "C5-6 posterior osteophyte with spondylsis and disc bulge and degenerative disc also noted at this level." EX 19.72. Dr. Hay diagnosed myofacial pain primary or secondary to exacerbation of discogenic type disease. Id. On August 26, 1993, Dr. Blaty released the Claimant from treatment and placed the following restrictions on him: duties within the light to medium physical demand category with no more than 40 lbs of level lifting on an occasional basis or 20 lbs overhead lifting, occasional overhead reaching, and occasional climbing activities. EX 22.113. Dr. Blaty determined that the Claimant had a permanent partial impairment of 6% to his whole body for the "T1 bony involvement and soft tissue strain of the shoulder, resulting in functional deficits." Id.

On August 22, 1993, the Claimant presented to Dr. Mark Romereim with complaints of "dizziness for approximately several weeks prior to arrival. Its onset was gradual." EX 22.107. Dr. Romereim noted that the Claimant's neck was supple and not tender. Id. He also wrote that the Claimant's cranial and cerebellar functions were normal and sensory and motor functions were intact. Id. He diagnosed the Claimant with anemia vertigo hyperventilation anxiety reaction hypertension. Id.

Dr. Ernest R. Schlachter examined the Claimant for his 1991 and 1993 injuries. EX 19.84. He noted that the Claimant was out of work for approximately eight weeks following the 1991 injury to his neck and right shoulder. Id. He noted that prior to the second injury in 1993 the Claimant was continuing to have pain in his neck and stabling pains in his right shoulder and between his shoulder blades on the right side. Id. "He states, in the repeat injury his pain became more severe and he had to give up activities, such as hunting, shooting right handed and now shoots only left handed. He no longer can bowl or ski because of the increased pain he is having following the second injury." Id. The Claimant reported that his pain is more severe when he does repetitive pushing or pulling movements with his right arm, he looks overhead or sits in one position for a period of time. EX 19.85. An MRI showed early degenerative changes at the C5-6 vertebrae and disc bulge. Id. Dr. Schlachter set the following impairment rating: "He should be on permanent limitations of no repetitive pushing or pulling with the right arm. No repetitive lifting more than twenty pounds with the right arm. No single lifts more than thirty pounds with the right arm. No work above the horizontal with the right arm." EX 19.86.

The Claimant was evaluated by Dr. Hay on June 18, 1994. EX 22.118. The doctor noted tenderness to palpation of the right trapezius, the suprascapular and right Rhomboid regions, but there were no spasms in the Rhomboid muscles. Id. Dr. Hay found that the Claimant continued to have muscular pain. Id. Dr. Hay examined the Claimant again on October 10, 1994. EX 22.121. The Claimant continued to have trigger point tenderness in the trapezius and rhomboid muscular groups. EX 22.122.

On April 24, 1998, Dr. McCormac wrote a note that the Claimant was treated for low back pain and muscle spasms from April 20 through April 24, 1998. EX 19.45. He stated that the Claimant could return to work without complication. Id.

In 2000, the Claimant stopped taking his blood pressure medication in order to reduce his dosage or switch medications. EX 22.139. On June 2, 2000, he reported feeling dizzy while at work, but that dizziness had resolved by the time EMS had arrived. Id. The note states that the Claimant had a possible medication adjustment reaction and hypertension complications secondary to temporary blood pressure fluctuations with dizziness. Id. In July 2002, the Claimant reported that he had insomnia for years and has only been getting a couple hours of sleep a night. EX 15.5.

V.A. Medical Records Before Going to Iraq

The Claimant's medical records from before June 2005 are significant for the following:

- 10/5-8/2002: Claimant has had pain in his right elbow for the last month. The elbow had previously been fractured and was treated with pins. Exam of the elbow revealed a mild effusion, but no fractures. EX 17.104-108.
- 1/27/2005: Depression screening was negative. The Claimant reported that he had not been feeling down, depressed or hopeless. His chief complaint is left foot pain. The Claimant has a history of gout which previously presented itself in the right foot; at this time it presented in the left foot. EX 17.98-101.

V.A. Medical Records After Return From Iraq

Claimant presented on June 22, 2006 with complaints of fatigue, weakness, and lightheadedness that started in October 2004. EX 17.94. The report stated that the symptoms started while he was in Iraq. Id. There were no complaints of headaches or focal weakness. Id. "He said he has some aches and pains, but no daily joint pain or muscle pain." Id. Dr. Muhfuza Hussain noted that "[i]t could be chronic fatigue syndrome, but the patient's main problem is [he] can not focusing [sic] things straight, so I think he needs to be evaluated by Metal Health Clinic." Id. A depression screening was positive and a consult was set up. EX 17.97. The Claimant was also given pre-treatment information for PTSD and was scheduled for an evaluation. Id. The Claimant reported that he had nightmares about his time in Iraq, had to try hard not to think about Iraq, and went out of his way to avoid situations that reminded him of it. EX 17.95. He also felt like he was easily startled and felt detached from others. Id.

On July 3, 2006, Dr. Shirley Alexander, a staff psychiatrist, conducted an initial mental health evaluation of the Claimant. CX 18.17. He was referred because he was "[u]nable to focus, since [he] came back from Iraq (6/9/06)." Id. He reported episodes of anxious feelings that occurred daily, but he was unclear what brought them on. Id. He denied being depressed or easily irritated. CX 18.18. He stated that he was having problems sleeping and that his motivation was lower than normal. Id. He has been experiencing spells of lightheadedness which he described as feeling like he "can't clear the cobwebs." Id. He still enjoyed his hobbies and is not disturbed by news about Iraq. Id. He admitted that he occasionally has nightmares that include dreams about the IED going off. Id. He has a slight startle response, but no avoidance behaviors and he is not fearful. Id.

Dr. Alexander concluded that the Claimant did not suffer from a psychological impairment at that time. CX 18.24.

On July 14, 2006, the Claimant was seen by Dr. Shadi Shahouri for upper back muscle pain and stiffness between the shoulder blades. EX 17.81. The Claimant denied pain in the mid or lower back. Id.

He reported that the symptoms started while he was in Iraq. Id. Dr. Shahouri found muscle spasms over the shoulder blade and neck area with no evidence of underlying active connective tissue disease. EX 17.82. The Claimant was advised to take over-the-counter Advil for his pain. Id.

On August 4, 2006, Dr. Mahfuza Hussain wrote a note acknowledging that the Claimant had his hearing tested at Miracle-Ear and it showed "severe profound hearing loss." EX 17.76-77. The Claimant had also had an MRI which Dr. Grundmeyer interpreted as showing mild disc bulge and severe muscle spasm. EX 17.77. Dr. Hussain noted that the Claimant did not mention the IED incident when he first saw the doctor on June 22, 2006. Id.

During a visit on November 15, 2007, Dr. Hussain noted that the Claimant had separated from his wife in March 2007 and was feeling disinterested and irritable and suffering from insomnia. EX 17.68-69. Dr. Hussain referred the Claimant to the Mental Health Clinic. EX 17.69. During the PTSD screening the Claimant reported that he was not having nightmares about Iraq or having to avoid situations that reminded him of his experiences there, but he was easily startled and felt detached from others. EX 17.72. The Claimant was found to be negative for PTSD symptoms. Id. A depression screening indicated that the Claimant was moderately depressed. EX 17.71. A follow-up depression screening on September 17, 2008 was negative for depression. EX 17.66-67.

On October 27, 2008, Dr. Robert Johnson conducted an intake interview to determine whether the Claimant suffered from Post-Traumatic Stress Disorder. CX 18.8. The Claimant made a request for the evaluation at the recommendation of his attorney. Id. The Claimant grew up in a military family and joined the Navy after finishing high school. The Claimant reported that he had been separated from his wife for eighteen months. Id. He stated that his experiences in Iraq might have affected the relationship, but there were other factors that lead to the separation. Id. He disclosed that he was a truck driver in Iraq from June 2005 to June 2006 and was "exposed to mortar fire, small arms fire, rocks thrown by villagers, and one IED explosion, 'a 150 pound bomb about 30 years away.'" Id. The Claimant was unemployed at the time of the interview. Id.

The Claimant reported that following the IED explosion, he has

> experienced lightheadedness, dizziness/balance problems, neck pain and stiffness, ringing/drainage/hearing loss (approximately 57% loss) in his ears; a "stopped up" sensation in his head, and difficulties with concentration. Began having some of these problems after the explosion but felt that he needed to "stick it out" because of financial situation and remain in Iraq until his time commitment was over.

CX 18.10.

The Claimant described stressful events that occurred while he was working in Iraq:

> States that in addition to the trauma of the IED explosion, he faced chronic sense of vulnerability and anxiety due to the frequent interactions/close proximity of Iraqi villagers that were hateful toward Americans. Notes that when convoys were stopped, felt very vulnerable and helpless, was not allowed to carry a firearm but carried two boot knives and a machete. Frequently experienced fear when traveling past structures like overpasses or high banks of land on the roadsides that were associated with IEDs or ambushes. Reports that at the time of the IED explosion, he was 14th in line in the convoy, was told later that it

> was likely there was an ambush set up waiting for his truck to be disabled and block the remainder of the convoy, however he was able to keep his vehicle rolling which prevented the ambush from happening.

CX 18.10-11. The Claimant said that he would think about his experiences in Iraq, but they were not characterized as intrusive. CX 18.11. He stated that he did not have nightmares about Iraq, but would have "odd" dreams associated with Iraq two or three times a month. Id. He denied having flashbacks or any significant psychological distress associated with thoughts of experiences in Iraq. Id. The Claimant was anxious and irritable while discussing his time in Iraq, the company he worked for and his current problems with insurance coverage. Id. He reported little interest in doing activities other than working and watching TV and that he has lost interest in being around others. Id. He mentioned that he only gets about an hour and a half of sleep a night due to the pain/discomfort in his neck and arm. Id. He stated that he has problems with concentration and memory and has difficulty focusing. Id. He felt that his concentration problems had been ongoing since the IED explosion. Id. He was

> unsure how Iraq experience [had] affected him emotionally and interpersonally, [noted] that there [had] been other factors such as being laid off from Boeing that may continue to contribute to some of his emotional issues. [Tended] to focus more on physical/cognitive problems that have existed since his time in Iraq, such as pain, hearing los, and difficulties concentrating.

CX 18.12.

Dr. Johnson concluded that the Claimant "does not appear to meet the full criteria for Posttraumatic Stress Disorder at the present time." CX 18.13. While the Claimant did report a number of situations in which his life was in danger, "his descriptions of re-experiencing the events and avoidance of stimuli associated with the events do not appear to meet the level of severity required for diagnosis." Id. Dr. Johnson also questioned whether the Claimant's symptoms were connected to a psychological impairment or are related to his physical condition. Id. His brain injury may have caused his concentration problems and his sleep problems are associated with kidney problems and neck pain. CX 18.13-14. Dr. Johnson diagnosed the Claimant with an unspecified depressive disorder which may have a reciprocal relationship to his health problems. CX 18.13, 15.

Dr. Dilawer Abbas, a neurologist, conducted an examination of the Claimant April 3, 2009. CX 21.21. The Claimant presented with the chief complaint of frequent headaches since the incident in December of 2005. Id. The headaches occur approximately 3-4 times a week in the frontal area and were described as dull usually without associated nausea. CX 21.21-22. The Claimant also reported dizziness and lightheadedness and poor sleep pattern. CX 21.22. His medical history is significant for hypertension, generalized anxiety disorder, arthritis, degenerative disk disease, and benign prostatic hypertrophy. Id.

An examination of the head and neck was normal with no masses or areas of tenderness. CX 21.22. The Claimant's visual fields were intact and facial sensation was normal. Id. His hearing was very slightly diminished bilaterally, more so on the right than on the left. Id. The Claimant reported that he has been having memory problems, but testing was normal. Id.

Dr. Abbas's impression included:

1. Traumatic brain injury (TBI) with persistent headaches, dizziness, ringing in ears, and hearing problems but no definite objective memory problems.
2. Major depression contributing some to his headaches.
3. Insomnia possibly related to depression.
4. Rule out other causes.

CX 21.22. On April 8, 2009, it was noted that the Claimant was placed on the TBI registry and that the TBI team would become his primary care physicians. CX 21.18.

On April 6, 2009, the Claimant was seen by Lizette Moore for an initial physical therapy visit. CX 21.18. The Claimant reported that his neck pain began in December 2005 and he had not had neck pain prior to the IED incident. Id. He reported constant stiffness and pain in his neck, occasional episodes of tingling in all fingers of the left hand, increased pain with muscle spasms in his neck after prolonged sitting, and decreased pain while laying down or getting up and walking around. CX 21.18-19. The Claimant was given a set of stretches to do at home for his neck and a TENS unit. CX 21.19.

A CT scan of the Claimant's head was taken on April 13, 2009 by Dr. H. David Clifton. CX 21.1. The clinical history stated that the Claimant had a five year history of headaches that were getting worse. Id. Dr. Clifton interpreted the scan as normal with no hemorrhage, subdural hematoma, significant atrophy, or lesions. Id.

On April 12, 2009, Dr. Sean Knaak supervised an optometry consult of the Claimant conducted by Stephen Eisenbarth, an optometry student. CX 21.9. Dr. Knaak agreed with Mr. Eisenbarth's finding of a traumatic brain injury without ocular involvement. CX 21.12.

On May 6, 2009, Ralph Conrad, a licenses speech pathologist, conducted a speech pathology consult with the Claimant. CX 22.1. The Claimant reported approximately two headaches per week, light sensitivity, mild-moderate hearing loss, issues with balance, dizziness, trouble sleeping with nightmares, difficulty concentrating, depression, and anxiety. CX 22.2. The Claimant stated: "I do not think it is severe. I am a basketball fanatic; 40 years ago I could remember anything about the sport. Sometimes I can not recall info I should know. Once in a while I forget how to get somewhere." Id.

After extensive testing, Mr. Conrad concluded that the Claimant had severe memory impairment with decreased recall skills for visual and auditory material. CX 22.5. The tests also indicated possible decrease in attention skills and a moderate language impairment. Id. Mr. Conrad recommended "services and education to facilitate functional gains with memory, attention, cognition, and language skills through therapy exercises and tasks, and through home exercise." Id. The Claimant's first speech therapy session was conducted on May 21, 2009 and the Claimant exhibited good cooperation and motivation. CX 22.1. The progress note indicated that the Claimant was diagnosed with memory loss, other specified nonpsychotic mental disorders following organic brain damage, and aphasia. Id.

Miracle-Ear

The Claimant was evaluated by Sandy Shutt, a licensed hearing consultant, on July 21, 2006. CX 4.1. The audiogram produced the following results:

Frequency	Right Ear	Left Ear
250 Hz	60	70
500 Hz	60	70
1000 Hz	60	70
2000 Hz	65	70
3000 Hz	60	75
4000 Hz	60	80
6000 Hz	65	90
8000 Hz	60	75

The evaluation showed "severe" hearing loss in both ears, with greater loss in the left ear. Id. During testing, Ms. Shutt wrote that the Claimant should seek further testing to determine the cause of his dizziness and bleeding. Id. Ms. Shutt noted that the Claimant required amplification to hear conversation at average speech volume. Id. She noted that "excellent speech discrimination score is an indication that his hearing loss is fairly recent. Id. A long term hearing loss will usually result in deterioration in understanding even when speech is amplified because of auditory deprivation." Id. The evaluation also revealed "a possibility of some conductive loss in [the Claimant's] hearing." Id. She recommended a medical examination to determine the cause of the air-bone gaps in both ears. Id. The conductive loss could "be caused by a build up of fluid in the middle ear or trauma can cause a disarticulation of the ossicular chain. … Even if the air-bone gaps are corrected, [the Claimant] still has a loss of hearing from nerve damage that will require the fitting of hearing aids." Id.

Abay Neuroscience Center

Dr. Raymond W. Grundmeyer conducted a neurosurgical consultation of the Claimant on August 2, 2006. CX 4.5. The Claimant's chief complaints were neck and shoulder pain. Id. Dr. Grundmeyer noted that the Claimant was injured on December 2, 2005 when a roadside bomb went off. Id. The Claimant reported that his symptoms have worsened over the last six weeks. Id. The Claimant complained of right-sided neck pain, which included the right shoulder and midback, and occasional left-sided symptoms.[1] Id. The Claimant's worst pain is in his neck and he reported difficulty sleeping. Id. The Claimant's past medical history was significant for hypertension, depression, headache, kidney stones, right elbow surgery, and hernia repair. Id.

An MRI of the Claimant's cervical spine revealed a "minimal narrowing of the intervertebral disc spaces at the levels of C4-5 and C5-6" with "no nerve root compression evident." CX 4.6-7. The MRI did not show a herniated disc. Id. Dr. Grundmeyer stated that the Claimant's symptoms are likely related to muscle strain and spasms. Id. He gave the Claimant a prescription for physical therapy two to three times a week for six to eight weeks. Id. He also gave prescriptions for Ultram and Medrol Dosepak and recommended over-the-counter ibuprofen. Id. The doctor recommended that the Claimant remain out of work until the completion of the physical therapy and a follow-up with a physician for further restrictions. CX 4.9.

[1] During the Claimant's deposition on February 4, 2009, he testified that he informed Dr. Grundmeyer that the pain was on the left side of his body. EX 13.29-30. "Not only pain in the neck, but spasm at the base of the shoulder on the left side. That's basically where my weakness comes is from the left side; it's the base of the neck, the shoulders involved. The more I use the shoulder, the more spasms I get, the more pain I get."

Edward D. Zimmerman, M.D.

Dr. Zimmerman evaluated the Claimant on January 3, 2007. CX 4.10. The doctor noted that the Claimant "started having pain throughout the cervical spine and developed muscle spasms in the neck and upper thoracic area" around the time of the December 2, 2005 incident:

> The patient noticed over the next few weeks that his neck and shoulders continued to get increasingly more painful and by the time he came off of that job and was back here in the US, he was having a lot of muscle spasm throughout the cervical spine, left worse than right. The patient has tried to work since then as a truck driver but finds he can only drive no more than two hours until the neck pain becomes almost too severe. ... While in Iraq he found that the helmet and vest that he wore for protection would significantly exacerbate his symptoms.

Id. The incident also caused significant hearing loss due to the explosion. Id. The Claimant's medical history was significant for hypertension, kidney stones, right elbow surgery, and left hernia surgery. CX 4.11.

Dr. Zimmerman's observations of the Claimant's musculoskeletal system showed a 30% decreased flexion of the cervical spine from a neutral position. CX 4.11. Extension from a neutral position was normal. Id. Lateral rotation was normal from the left and substantially decreased on the right. Id. Dr. Zimmerman also noted:

> Palpation of the paraspinous muscles does reveal asymmetry along the left side of the cervical spine from C3 through T1 with muscle spasm and point tenderness to palpation. The patient has pain on abduction of the left arm as well as reaching overhead. Behind the back reach with the left arm he is decreased secondary to pain.

Id. An MRI revealed mild disc bulging at C4-C5 and C5-C6. Id.

Dr. Zimmerman concluded that the neck and shoulder pain were secondary to the Claimant's injury in Iraq and that he had a category II 5%-8% impairment of the whole person due to muscle guarding and spasm and asymmetrical loss of range of motion. CX 4.11. He determined that the Claimant had reached maximum medical improvement and "[i]t is unlikely he will be able to perform his usual job of the driving due to the amount of sitting involved as well as the manual labor involved as part of his job." CX 4.11-12; EX 15. The doctor set permanent restrictions of no sitting for more than two hours, no reaching above his shoulder, no operating a motor vehicle for more than two hours, and no lifting of over twenty-five pounds. CX 4.13. He wrote "no prolonged sitting or driving without frequent breaks." Id.

Winfield Chiropractic & Rehab

At an appointment on March 4, 2008, the Claimant reported constant moderately severe pain in his right lower back and his neck and mild to moderate frequent lightheadedness. EX 21.1. The examiner wrote:

> A check of the 5th thoracic vertebra showed a right posterior rotation fixation. There is a posterior rotation of L4 on the right. There is a posterior internal fixation of the right illum present. Palpation of the

> muscles revealed a slight amount of decreased muscle tension in the cervical paraspinal muscles, upper thoracic muscles, mid thoracic muscles, lower thoracic muscles and lumbar paraspinal muscles. A very strong degree of pain and discomfort at the occiput to C1 on the left, the right illium on the right, and C4 to C5 and L4 to L5 bilaterally was indicated on palpation examination of the spinal segments. In the overlying tissues there was a tissue temperature elevation at C1 to C2, T1 to T4, and T8 on the right.

Id.

The Claimant continued to report similar symptoms on May 12 and June 26, 2008 visits. EX 21.1-2.

DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144, 147 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g, 990 F.2d 730 (3d Cir. 1993).

In arriving at a decision in this matter, it is well settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metro. Stevedore Co., 31 BRBS 98, 101 (1997), aff'd, 169 F.3d 615, 33 BRBS 1 (CRT) (9th Cir. 1999); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91, 24 BRBS 46, 48 (CRT) (5th Cir. 1988); Atl. Mar., Inc. & Hartford Accident & Indem. Co. v. Bruce, 661 F.2d 898, 900, 14 BRBS 63 (CRT) (5th Cir. 1981); Bank v. Chicago Grain Trimmers Ass'n, 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

I. Causation and Section 20(a)

The Claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. U.S. Indus. v. Director, OWCP, 455 U.S. 608, 616 (1982); Kelaita v. Triple A Mach. Shop, 13 BRBS 326, 330 (1981). Once the Claimant establishes these two elements of his *prima facie* case, Section 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita, 13 BRBS 326; Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). The presumption is a procedural device and is not a substitute for substantive evidence of the injury that the claimant must present. Universal Mar. Corp. v. Moore, 126 F.3d 256, 262 (4th Cir. 1997) (citing U.S. Indus., 455 U.S. at 614 n.7). In order to rebut the presumption, Employer must produce specific and comprehensive evidence that Claimant's condition was not caused, aggravated, or contributed to by the work accident. Brown v. Jacksonville Shipyards, Inc., 893 F.2d 294, 297, 23 BRBS 22, 24 (CRT) (11th Cir. 1990); Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075,1082, 4 BRBS 466, 477 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976). If the presumption is rebutted, it falls out of the case and claimant must establish a causal relationship based on the record as a whole. Universal Mar. Corp., 126 F.3d at 262 (citing Del Vecchio v. Bowers, 296 U.S. 280, 286 (1935)).

In U.S. Industries, the US Supreme Court noted that for the Section 20(a) presumption, the Claimant must at least allege an injury that arises out of and in the course of employment. U.S. Indus., 455 U.S. at 415. The injury need not be traceable to a definite time or event, but can occur gradually over a period of time. See Pittman v. Jeffboat, Inc., 18 BRBS 212 (1986).

In order to establish the "arising out of" prong of a *prima facie* case, the claimant need not introduce affirmative medical evidence that the working conditions in fact caused his harm. See U.S. Indus., 455 U.S. at 608, 14 BRBS at 631. Instead, the claimant need only show that working conditions existed which could have caused his harm. Id. at 616. An administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom., Sylvester v. Director, OWCP, 681 F.3d 359 (5th Cir. 1982) (holding that a claimant's credible subjective complaints can be sufficient to establish harm); Calbeck v. Strachan Shipping Co., 306 F.2d 693 (5th Cir. 1962), cert. denied, 372 U.S. 954 (1963); Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962).

A. Neck and Shoulder Injury

The Claimant injured his middle back, neck, and right shoulder on October 9, 1991 while moving a 100 pound motor for Boeing. EX 19.9-10, 12. The injury caused the Claimant to be out of work for approximately six weeks while he received physical therapy and other conservative treatment. TR 19.59. He was allowed to return to work in November of 1991 with temporary restrictions of no lifting greater than 15 to 20 pounds for a month, and then no lifting greater than 40 pounds for the following month. Id.

The Claimant reinjured his back and lower neck to the right shoulder on January 28, 1993 when he was lifting 15 to 20 pound metal bond boxes. EX 19.59; EX 19.7. The Claimant described the injury as including "nerve problems" in his right shoulder. TR at 20. Dr. McCormac concluded that the pain was likely an exacerbation of the October 1991 injury. EX 19.78. On March 17, 1993, an MRI of the Claimant's spine showed degenerative changes in the C5-C6 vertebrae and disk bulge. EX 22.8. On August 26, 1993, Dr. Blaty determined that the Claimant had a permanent partial disability impairment of 6% to his whole body and released the Claimant back to work with work restrictions. The Claimant was out of work from February 3, 1993 to September 3, 1993 and underwent eleven months of rehab. EX 19.59; TR at 18, 20.

The last record in evidence that mentions that the Claimant had pain in his neck and right shoulder from the 1993 exacerbation was an evaluation on June 18, 1994 by Dr. Hay. EX 22.118. The Claimant testified that when he returned to Boeing in 1996, he worked without restrictions. TR at 19. He noted that from 1996 until 2005, he did not have problems with his neck. TR at 20-21.

On December 2, 2005, the Claimant was driving a truck for the Employer in Iraq when his truck was hit by a road-side bomb. TR at 26-28. During the accident, a piece of shrapnel hit and left a two-inch gash on the side of his helmet. TR at 30. He testified that his neck problems started following the bombing, but got worse with time. TR at 85. He stated that he decided to wait until his contract was over to go home and get professional help because he wanted to earn more money and avoid the tax consequences of going home early. Id.

About a month after returning from Iraq in July of 2006, the Claimant was seen by Dr. Shadi Shahouri for upper back muscle pain and stiffness between the shoulder blades. EX 17.81. Dr. Shahouri noted muscle spasms in the shoulder blade and neck area. EX 17.82. On August 2, 2006, Dr. Grundmeyer conducted a neurosurgical exam of the Claimant for his neck and shoulder complaints. EX 4.5. An MRI showed "minimal narrowing of the intervertebral disc spaces at the levels of C4-5 and C5-6." CX 4.6-7. During an evaluation by Dr. Zimmerman on January 3, 2007, the Claimant reported that

he was having muscle spasms throughout his cervical spine that were worse on left side. CX 4.10. Dr. Zimmerman noted a 30% decreased flexion of the cervical spine from a neutral position and a mild disc bulge at C4-C5 and C5-C6. CX 4.11. Dr. Zimmerman attributed the Claimant's neck and shoulder pain to his injury in Iraq, determined that he had reached maximum medical improvement, and opined that it was unlikely that he would be able to continue his usual job of truck driving. CX 4.11-12.

The Employer argues that the Claimant's testimony should be discredited because he failed to inform his post-2005 treating physicians about his 1991 and 1993 neck and shoulder injuries. However, since there is no evidence that the Claimant's prior injuries were symptomatic from 1996 to 2005, I do not find his non-disclosure significant enough to discredit his testimony or the opinions of doctor's who based their opinions on the Claimant's self-reporting. The Claimant's wife also testified that the Claimant was not experiencing neck pain before going to Iraq. TR at 91.

Section 2(2) of the Act defines injury as an "[a]ccidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury…" A work-related aggravation of a pre-existing condition is an "injury" under Section 2(2). Gardner v. Bath Iron Works Corp., 11 BRBS 556, 565 (1979). Under the aggravation rule, where a work-related injury worsens or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the work-related injury alone, the entire resulting disability is compensable. See Strachan Shipping Co. v. Nash, 782 F.2d 513, 515, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc); Johnson v. Ingalls Shipbuilding Div., Litton Sys., Inc., 22 BRBS 160, 162 (1989). Therefore, treatment for the aggravated injury is compensable even though it is due only in part to the work-related accident. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257 (1984).

Under the aggravation rule, if a claimant's work played any role in the manifestation of his current symptoms, then the non-work-relatedness of the condition is irrelevant and the entire resulting disability is compensable. See e.g., Cairns v. Matson Terminals, 21 BRBS 252 (1988). I find that the Claimant has satisfied the requirements for the Section 20(a) presumption by showing that he suffered an aggravation of his previous neck and shoulder injuries as a result of the incident in 2005 that occurred while he was working for the Employer. There is no evidence that the Claimant was suffering from neck or shoulder pain in the almost ten year period leading up to his employment in Iraq. Furthermore, the previous treatment records did not indicate an injury to the C4-C5 vertebra, and the evidence from the 2005 accident indicates an injury to that disc. Therefore, the Claimant has shown that the 2005 incident has added too and worsened his previous neck and shoulder injuries.

Once the presumption is invoked, Section 20(a) places the burden on the employer to come forward with substantial countervailing evidence to rebut the presumption that the injury was caused by the claimant's employment. Swinton, 554 F.2d at 1081. Where aggravation or contribution to a pre-existing condition is alleged, the employer must establish that a claimant's condition was not caused or aggravated by his employment. Cairns, 21 BRBS 252. The Employer has presented no evidence to rebut the presumption; therefore, the Claimant has shown that his neck and shoulder injuries are casually related to the 2005 incident.

B. Traumatic Brain Injury

The Employer contends that it was not given timely notice of Claimant's traumatic brain injury injury, and therefore the claim is time-barred by Section 12 of the Act. 33 U.S.C. § 912. Section 12 of the Act provides that notice of a compensable injury must be given to employer within 30 days after claimant is aware or should have been aware of the relationship between the injury and his employment. 33 U.S.C. § 912(a). In the instant case, the Claimant gave the Employer timely notice of the injury to his

neck and shoulders, hearing loss, dizziness and PTSD symptoms, which he alleged arose out of and in the course of his employment. See 33 U.S.C. §§ 902(2), 912(a); CX 5. At the hearing, Claimant's counsel clarified that "[the Claimant] has had dizziness problems, light-headedness, headaches. … He's been diagnosed with depression by the V.A. since then, possible brain injury." TR at 6. The record was held open for 90 days to allow the parities to supplement the medical evidence in this case. TR at 102. The Employer was given sufficient notice to enable him to investigate the circumstances surrounding Claimant's accidental injury, see Jackson v. Ingalls Shipbuilding Division, Litton Systems Inc., 15 BRBS 299 (1983) (Miller, dissenting), and Claimant was not required to give separate notice of his traumatic brain injury as it did not arise from a separate accident. See Dangerfield v. Todd Pacific Shipyards Corp., 22 BRBS 104 (1989); Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94 (1988). Accordingly, Employer's argument on this issue is rejected.

Following the 1993 accident at Boeing on January 29th, the Claimant reported to Dr. McCormac that he was having headaches and trouble sleeping. EX 19.8. On August 22, 1993, the Claimant complained of dizziness to Dr. Romerein. EX 22.107. He found that Claimant's cranial and cerebellar functions were normal and sensory and motor functions were intact. Id. He determined that the dizziness was related to anemia and hypertension. Id. The Claimant again reported dizziness in 2000 when he was attempting to readjust his blood pressure medication. EX 22.139. It was noted that the Claimant experienced dizziness at work, but it had resolved by the time EMS arrived. Id. The treating physician determined that the dizziness was likely linked to a possible medication adjustment reaction and temporary blood pressure fluctuations. Id.

The Claimant testified that he did not have *significant* problems with dizziness or light-headedness prior to the 2005 incident. TR at 21. The Claimant's wife also testified that he was not having complaints of light-headedness prior to going to Iraq. TR at 93. However, the Claimant explained that now he experiences constant dizziness and light-headedness and he has balance issues. TR at 46. He stated that his blood pressure is not the cause of his balance issues because it is under control:

> Q: All right. And, let's see just a second, what kind of problems have you had with dizziness or light-headedness since the bomb?
> A: That hasn't gone away. That's constant. It's been there since the bomb.
> Q: Now, how is that different? You said you'd had some high blood pressure problems before the bomb. How is that different?
> A: Well, the only thing I can really tell is when I get up. If I get up real quick, sometimes my balance is off and I know that's not blood pressure. My blood pressure is fine. As a matter of fact, I take the smallest amount that you need for blood pressure now.

TR at 46-47. He reported that since the accident he has had some blood drainage from his left ear and the V.A. hospital recommended that he undergo neuropsychological examination. TR at 32, 44.

On June 22, 2006, the Claimant saw Dr. Hussain for complaints of fatigue, weakness, and lightheadedness which started while he was in Iraq.[2] EX 17.94. The Claimant also reported problems focusing. Id. On July 3, 2006, the Claimant told Dr. Alexander that he was experiencing spells of lightheadedness which he described as feeling like he could not "clear the cobwebs." CX 18.18. During a psychological evaluation, the Claimant reported to Dr. Johnson that he had experienced lightheadedness, dizziness/balance problems, ringing in his ears, drainage from his ears, a "stopped up"

[2] The doctor originally wrote that the symptoms started in October 2004. But two sentences later he writes "[s]ymptoms started while he was in Iraq." EX 17.94.

sensation in his head, and difficulties concentrating since the IED explosion. CX 18.10. Dr. Johnson determined that his concentration problems might be connected to a brain injury. CX 18.13.

The Claimant was seen by Dr. Abbas, a neurologist, on April 3, 2009. CX 21.21. The Claimant noted that he had frequent headaches since the incident in December 2005. Id. He also reported dizziness and lightheadedness. CX 21.22. Dr. Abbas diagnosed a traumatic brain injury with persistent headaches, dizziness, ringing in the ears, and hearing problems, but no definite objective memory problems. Id. A CT scan of the Claimant's head on April 13, 2009 was interpreted by Dr. Clifton as normal with no hemorrhage, subdural hematoma, significant atrophy, or lesions. CX 21.1. The Claimant informed Dr. Clifton that he had a five year history of headaches that were getting worse. Id.

The Claimant was seen by Mr. Conrad, a speech pathologist, on May 6, 2009. CX 22.1. The Claimant reported frequent headaches, light sensitivity, mild-moderate hearing loss, issues with balance, dizziness, and difficulty concentrating. CX 22.2. After performing testing, Mr. Conrad determined that the Claimant had severe memory impairment with decreased recall skills for visual and auditory material. CX 22.5.

The Employer argues that the Claimant's complaints of dizziness and headaches are pre-existing. I find that complaints of dizziness in 1993 related to anemia and in 2000 related to incorrect dosage of blood pressure medication are insufficient to show that the Claimant's dizziness is a pre-existing condition. The Claimant indicated that he had at least a five year history of headaches, which would indicate that he was having headaches prior to the 2005 incident. However, I find that the Claimant has shown that he has sustained a physical harm in the form of a diagnosed traumatic brain injury with symptoms of headache, dizziness, light-headedness, ringing in his ears, and memory/concentration problems. Furthermore, being struck in the head by shrapnel following an IED attack constitutes an accident which could have caused such a harm. See TR at 30.

The Employer has only shown that the Claimant's headaches are not solely the result of the 2005 incident. No evidence has been produced to indicate that the traumatic brain injury was not caused by the IED explosion. Therefore, the presumption has not been rebutted.

C. Hearing Loss

After his truck was hit by an IED, the Claimant went to a medic to report his injuries. EX 11. The Claimant reported ringing in his left ear and the medic noted that the Claimant had traumatic hearing loss and tinnitus to the left ear secondary to the IED explosion. EX 11.2. The Claimant's co-workers wrote that the Claimant had problems with his hearing following the accident. Rodney Burns wrote that the Claimant had ringing in his ears after the incident. CX 2. Frank Smith stated that he had to repeat things when talking to the Claimant after the accident and he "hadn't had to prior to the IED attack." CX 3. The Claimant's wife testified that his hearing loss has been "very obvious" to his family and she has to repeat everything when talking to him. TR at 91.

When the Claimant returned from Iraq, his hearing was tested at Miracle Ear. TR at 31; CX 4.1. The hearing technician found that the Claimant had severe hearing loss in both ears, which was greater in the left ear than the right ear, and that the hearing loss was fairly recent. CX 4.1. Ms. Shutt found that the Claimant's hearing loss was caused by nerve damage and some conductive loss. CX 4.1. I take judicial notice of the American Medical Association's Guides to the Evaluation of Permanent Impairment (6th ed. 2008) (hereinafter Guides). In determining the level of hearing loss, the Guides require that each ear be tested with a pure tone audiometer and that the hearing levels at 500, 1000, 2000, and 3000 Hz be recorded. The four hearing levels for each ear are added separately, resulting in a sum for each ear. The

Guides provide a chart from which binaural hearing impairment can be calculated using the sums for each ear. Guides at 249-253. Under the guidelines, the audiogram shows a 56.9% binaural hearing loss.[3]

The Employer argues that the "adverse inference rule" should apply in this case since the Claimant did not submit an audiogram performed after the formal hearing. The rule states that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." Cioffi v. Bethlehem Steel Corp., 15 BRBS 201 (1982) (citing Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939)). However, the adverse inference rule applies when the evidence is in one party's possession and cannot be obtained form another source. The Claimant completed a medical release form by which the Employer could have requested additional records, including any completed audiograms, from the V.A. hospital that controls the records. Therefore, I will not draw an adverse inference against the Claimant's hearing loss claim.

The Employer also alleges that the most recent Department of Transportation examination indicates that the Claimant does not have hearing loss. Exhibit A to the Employer's post-hearing brief. Under the hearing section, the examination check sheet asks the examiner to "[r]ecord the distance from individual at which forced whispered voice can first be heard." Id. The examiner noted that the Claimant could hear the whisper from "> 5 feet" per ear. Id. I do not find that this examination rises to the level of substantial evidence since the record lacks an explanation of how the test was conducted. It is unclear what the sheet means by a "forced whisper" (i.e., no decibel level is provided). The DOT examination fails to meet the standards in the Regulations:

> In determining the loss of hearing under the Act, the evaluators shall use the criteria for measuring and calculating hearing impairment as published and modified from time-to-time by the American Medical Association in the Guides to the Evaluation of Permanent Impairment, using the most currently revised edition of this publication.

20 C.F.R. § 702.441(d).

The Claimant has satisfied the Section 20(a) presumption by demonstrating that he sustained a physical harm (binaural hearing loss) and that an accident occurred (the IED explosion) which could have caused the harm. Based on the evidence discussed above, I find that the Employer has not produced substantial countervailing evidence to rebut the Claimant's *prima facie* case. As such, the Claimant has the benefit of invoking the Section 20(a) presumption. Hence, his hearing loss is shown to have arisen out of and in the course of his employment, and, as such, is compensable under the Act.

D. Psychological Impairment

The Claimant testified that since the 2005 incident, he has had problems with concentration, anxiety, and irritability. TR at 46-47. The Claimant's wife testified that he has been "totally different" since his return from Iraq. TR at 90. She explained that pre-Iraq he was "more laid back, easygoing, [and] more involved with the family" and now "he seems paranoid, nervous, he's easily confused, gets upset easily." TR at 90-91. She added that he is jumpy and "always on edge." TR at 96. She also noted that he has woken up screaming on a couple of occasions. TR at 97.

On June 22, 2006, the Claimant was evaluated by Dr. Hussain for possible depression and/or post-traumatic stress disorder. EX 17.94. The Claimant reported having trouble focusing, having

[3] 60 + 60 + 65 + 60 = 245 for the right ear and 70 + 70 +70 + 75 = 285 for the left ear. Using Table 11.2, these values result in a binaural impairment rating of 56.9%. Guides at 252-53.

nightmares about Iraq, being easily started, and feeling detached from others. EX 17.94-95. Dr. Hussain noted possible fatigue syndrome and that a depression screening was positive. EX 17.97.

Dr. Alexander, a psychiatrist, conducted a mental health evaluation of the Claimant on July 3, 2006. CX 18.17. Dr. Alexander noted that the Claimant was having trouble focusing, episodes of anxious feelings, and lower motivation than normal. CX 18.18. He reported occasional nightmares about the explosion and a slight startle response, but no avoidance behaviors or fearfulness. Id. The Claimant denied being depressed or easily irritated. Id. Dr. Alexander determined that the Claimant did not suffer from a psychological impairment. CX 18.24.

At a November 15, 2007 evaluation by Dr. Hussain, the Claimant noted that he had separated from his wife, he was feeling disinterested and irritable, and he was suffering from insomnia. EX 17.68-69. He denied having nightmares or avoiding certain situations. Ex 17.72. Dr. Hussain found the Claimant to be negative for PTSD symptoms and positive for moderate depression. EX 17.71-72. A follow-up depression screening on September 17, 2008 was negative for depression. EX 17.66-67.

During a PTSD screening conducted by Dr. Johnson on October 27, 2008, the Claimant reported un-intrusive thoughts about Iraq and denied having nightmares, flashbacks, or psychological distress when thinking about Iraq. CX 18.11. However, he stated that he was anxious and irritable, had little interest in doing most activities or being around others, and has problems concentrating. Id. The Claimant noted that he was unsure how the experience in Iraq had affected him emotionally and that there were other factors contributing to his emotional state. CX 18.12. Dr. Johnson concluded that the Claimant did not have PTSD, but an unspecified depressive disorder. CX 18.13. He stated that he was unsure whether the symptoms reported by the Claimant were a psychological disorder, or related to his physical condition. Id. He opined that the Claimant's concentration problems might be connected to his brain injury. Id.

The Claimant has failed to establish that he meets the criteria for a diagnosis of PTSD. However, the Claimant has demonstrated that he has a psychological injury in the form of depression. The Claimant and his wife have described that since returning from Iraq, he has been anxious, irritable and easily upset. Furthermore, two of the three doctors, Drs. Hussain and Johnson, who have examined the Claimant for depression, have found that he has at least moderate depression. I find that the Claimant has satisfied the Section 20(a) presumption by demonstrating that he sustained a psychological harm (depression) and that an accident occurred (the IED explosion) which could have caused the harm. I also find that the Employer has not produced substantial countervailing evidence to rebut the Claimant's *prima facie* case.

II. Nature and Extent of Disability

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980). Disability is defined under the Longshore Act as "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2000). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of Am., 25 BRBS 100, 110 (1991).

The permanency of any disability is a medical rather than an economic concept. Trask, 17 BRBS at 61. A permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, 654 (5th Cir. 1968). The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical

improvement (MMI). See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 fn.5 (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989); James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record and is not dependant on economic factors. Louisiana Ins. Guar. Ass'n v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915, 918 (1979).

The mere possibility of a favorable change does not foreclose a finding of permanent disability. Exxon Corp. v. White, 9 BRBS 138, 142 (1978), aff'd, 617 F.2d 292 (5th Cir. 1980); Watson, 400 F.2d at 654 (holding that permanency can be found even if there is a remote or hypothetical possibility that the employee's condition may improve at some future date). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 282, 283 (1984), aff'd, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985). Any disability suffered by Claimant before reaching MMI is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Authority, 16 BRBS 231, 234 (1984). A disability is permanent in nature if Claimant has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644, 648 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840, 842 (1st Cir. 1940); Rinaldi v. Gen. Dynamics Corp., 25 BRBS 128, 131 (1991).

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Tel. Co., 16 BRBS 89, 91-92 (1984); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339, 342-43 (1988); Louisiana Ins. Guar. Ass'n v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100, 103 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

If the claimant is successful in establishing a *prima facie* case of total disability, the burden of proof shifts to employer to establish suitable alternative employment. Trans-State Dredging v. Benefits Review Board, 731 F.2d 199, 203 (4th Cir. 1984); Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 592 F.2d 762, 765 (4th Cir. 1979); Rogers Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 691 (5th Cir. 1986); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). For the job opportunities to be realistic, the employer must establish the precise nature, terms and availability of employment. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. Southern v. Farmer's Export Co., 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In the present matter, nature and extent of disability will be treated concurrently.

A. Neck and Shoulder Injury

After conducting an examination of the Claimant on January 3, 2007, Dr. Zimmerman concluded that the Claimant had reached maximum medical improvement and set work restrictions. CX 4.11-12. Therefore, any remaining disability after January 3, 2007 is permanent in nature. Any disability suffered

by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); GS Control Services v. Director, OWCP, 86 F.3d 438, 443 (5th Cir. 1996).

The Claimant returned from Iraq on June 6, 2006. TR at 33. He testified that he intended to return to Iraq for an additional two years after seeking medical treatment. TR at 33, 54. An MRI taken August 2, 2006 showed disc problems at three levels in his neck and Dr. Grundmeyer recommended that the Claimant not work until he had completed physical therapy. CX 4.6-7. The Claimant never completed physical therapy and returned to work for Mountain Truck Lines in September and October 2006 for approximately $650 per week. TR at 35. However, he was forced to quit when he could not move the 150-pound tarps that the company used to protect their cargo. TR at 36.

In January 2007, Dr. Zimmerman found it was unlikely that the Claimant would be capable of returning to his usual job of truck driver because of the amount of sitting and manual labor involved. CX 4.11-12. Dr. Zimmerman set permanent restrictions of no sitting for more than two hours, no reaching above his shoulder, no operating a motor vehicle for more than two hours, and no lifting of over twenty-five pounds. CX 4.13. Also in January, the Claimant found employment with Rubbermaid using a forklift. He was only at this job for four weeks when he had to quit because of neck pain. TR at 37-38. The Claimant then worked for Price Trucking from February 2007 to October 2008 for approximately $600 per week. TR at 37. Since October 2008, the Claimant has been unemployed. TR at 39. The Claimant testified that he passed a Department of Transportation physical in March 2008. TR at 63-64.

I find that the Claimant has shown that he is unable to return to his employment as a truck driver in Iraq. A claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. Gen. Dynamics Corp., 25 BRBS 128 (1991). Therefore, he is entitled to total disability from the period that he stopped working for the Employer (June 6, 2006) until suitable alternative employment is shown.

In the present case, Employer submitted no evidence of suitable alternative employment for Claimant, Claimant has not undergone a functional capacity evaluation since January 2007 (under which strict limitations were set), and no vocational assessment has been performed. Despite Dr. Grundmeyer's opinion that the Claimant not return to work until after physical therapy, the Claimant did return to work shortly following his employment in Iraq. However, a disability determination turns on the claimant's capacity for work rather than his actual employment status. Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 543 (4th Cir. 1988). The fact that claimant has worked after an injury should not necessarily preclude a finding of total disability. See e.g., Haughton Elevator Co. v. Lewis, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), aff'g, 5 BRBS 62 (1976); Walker v. Pacific Architects & Engineers Inc., 1 BRBS 145, 148 (1974). An injured worker's post-injury wages are not an accurate representation of the worker's actual earning capacity if the worker was able to work only through "extraordinary effort and in spite of excruciating pain." Haughton Elevator Co., 572 F.2d 447; Argonaut Ins. Co. v. Patterson, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988). But see, Adam v. Nicholson Terminal & Dry Dock Corp., 14 BRBS 735, 739-40 (1981) ("A mere showing of the existence of pain may be sufficient to support an award for permanent partial disability, but it is not sufficient to support an award for permanent total disability where claimant continues to or can work [and has not alleged that he suffers either excruciating pain or diminished strength or that he is making an extraordinary effort to work].").

I find that the Claimant's work for Mountain Truck Lines between September and October 2006 and Rubbermaid in January 2007 were insufficient to establish suitable alternative employment because the Claimant was forced to quit both positions due to the level of pain they caused. TR at 35-36, 37-38.

See Dodd v. Crown Central Petroleum Corp., 36 BRBS 85 (2002); Shoemaker v. Schiavone & Sons, Inc., 11 BRBS 33, 37 (1979). Therefore, the Claimant remained totally disabled at that time.

Against the January 2007 advice of Dr. Zimmerman that he not operate a motor vehicle for more than two hours or drive without frequent breaks, the Claimant worked for Price Trucking from February 2007 to October 2008. TR at 37; EX 4.11-12. The Claimant indicated that he was laid off in October 2008. TR at 38. He testified that he has a valid commercial driver's license and could return to truck driving, but not without pain: "All I can tell you is long periods of sitting, those neck muscles just spasms up and the only was [sic] to relief [sic] them is to pull over and lay flat or get out of the unit and walk around." EX 13.37. The Claimant is currently seeking non-truck driving work, but, as of the hearing, had been unable to find something within his restrictions. TR at 39. He admitted that he could make more money as a truck driver, but that "with the pain that I'm in I don't think it's worth it." EX 13.37-38.

An award of total disability concurrent with a period when the claimant is working is the exception, not the rule. Shoemaker v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 141, 145 (1980); Chase v. Bethlehem Steel Corp., 9 BRBS 143 (1978). Therefore, after careful review of the record here, I am of the opinion that the facts in the instant case do not support the award of permanent total disability. The record does not disclose evidence that Claimant's employment as a truck driver for Price Trucking was undertaken in spite of "excruciating" pain or merely through the beneficence of employer. The Claimant's employment for approximately twenty months indicates that he performed his duties satisfactorily. I find that the Claimant was permanently partially disabled during the time that he worked for Price Trucking[4].

The undersigned has acknowledged that the Claimant was able to work as a truck driver for Price without "extraordinary effort." However, the physical requirements of truck driving clearly exceed the restrictions assigned by Dr. Zimmerman.

The record is clear that the Claimant cannot return to his previous work with the Employer. Moreover, truck driving for a firm such as Price exceeds his physical restrictions.

At this point it is the obligation of the Employer to demonstrate suitable alternative employment or work within the Claimant's restrictions. The Employer has not met this requirement. Therefore, the Claimant is entitled to permanent total disability following his work with Price Trucking.

Based on the findings above, the Claimant was temporarily totally disabled from June 7, 2006 (the date of his return from Iraq) to January 3, 2007 (the date Dr. Zimmerman determined he had reached MMI); permanently totally disabled from January 4, 2007 to February 18, 2007 (the date before he began working for Price Trucking); permanently partially disabled throughout his term of employment with Price, from February 19, 2007 to October 24, 2008; and permanently totally disabled from October 25, 2008 to the present and continuing.

B. Traumatic Brain Injury

The Claimant was diagnosed with a traumatic brain injury on April 3, 2009 by Dr. Abbas. CX 21.22. While the Claimant's complaints of lightheadedness, dizziness and headaches are of a lasting duration, the Claimant has not been treated for his brain injury and just began speech therapy on May 21, 2009. I find that, at this time, the Claimant's brain injury is temporary in nature and medical treatment is in order. However, the Claimant has not presented evidence to indicate that the injury is currently

[4] It is unclear from the record the exact date that the Claimant began working for Price Trucking. I find that his start date was February 19, 2007, the date that he completed a road test and certification with the company. EX 24.36.

disabling. Therefore, the Claimant's compensation, at this time, will be based on the neck and shoulder injuries.

C. Hearing Loss

The Claimant's hearing loss was first diagnosed by Sandy Shutt on July 21, 2006. CX 4.1 The Claimant testified at the hearing in March 2009 that he continues to use hearing devices that help him hear the television or people that are close to him. TR at 31. His wife also testified that the Claimant's hearing loss continues to be "very obvious" and that she had to "repeat everything all the time." TR at 91. Since the Claimant's disability is of a lasting duration, I find that it is permanent in nature.

The Claimant's Miracle Ear audiogram showed a 56.9% binaural hearing loss. CX 4.3. Therefore, the Claimant is entitled to permanent partial disability for his hearing loss under Section 8(c)(13)(B). The statute entitles him to 113.8 weeks of compensation.

D. Psychological Impairment

During a screening on June 22, 2006, Dr. Hussain found that the Claimant suffered from depression. EX 17.94. While the Claimant's complaints of depression related symptoms are of a lasting duration, the Claimant has not been treated for the psychological impairment. I find that, at this time, the Claimant's psychological condition is temporary in nature and medical treatment is in order. However, the Claimant has not presented evidence to indicate that his depression is currently disabling. Therefore, the Claimant's compensation, at this time, will be based on the neck and shoulder injuries.

III. Average Weekly Wage

Section 10 of the Longshore Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910(a)-(c) (2000), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. Universal Mar. Services Corp. v. Wright, 155 F.3d 311, 327, 33 BRBS 15, 28 (CRT) (4th Cir. 1999); SGS Control Services v. Director, OWCP, 86 F.3d 438, 441 (5th Cir. 1996); Empire United Stevedores v. Gatlin, 936 F.2d 819, 823, 25 BRBS 26, 29 (CRT) (5th Cir. 1991).

Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's average annual wage where an injured employee's work is regular and continuous. Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on Section 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Universal Mar., 33 BRBS at 28; Empire United Stevedore, 936 F.2d at 821.

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker or by 260 days for a 5-day worker in order to determine average annual earnings. Neither section applies to a worker working seven days per week.

In the present case, Claimant typically worked for seven days a week, so neither Section 10(a) or (b) can be used to calculate Claimant's average weekly wage. Therefore, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

Section 10(c) of the Longshore Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c). Unlike Sections 10(a) and 10(b), subsection (c) contains no requirement that the previous earnings considered be within the year immediately preceding the injury. Empire United Stevedores v. Gatlin, 936 F.2d 819, 823, 25 BRBS 26 (CRT) (5th Cir. 1991); Anderson v. Todd Shipyards, 13 BRBS 593, 596 (1981).

The Administrative Law Judge has broad discretion in determining annual earning capacity under Section 10(c). Fox v. West State, Inc., 31 BRBS 118, 123 (1997); Hicks v. Pac. Marine & Supply Co., Ltd., 14 BRBS 549, 565 (1981). While the administrative law judge has significant discretion in determining the appropriate average wage, the wage determination must be based on adequate evidence in the record. See Staftex Staffing v. Director, OWCP, 237 F.3d 404, 406, 34 BRBS 44, 45(CRT) (5th Cir. 2000); Taylor v. Smith & Kelly Co., 14 BBS 489 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Universal Mar., 33 BRBS at 28; Story v. Navy Exch. Serv. Ctr., 33 BRBS 111, 118 (1999).

Section 10(c) has been applied in several claims involving overseas workers. Administrative law judges have relied on a myriad of approaches in an attempt to deal with the fact that overseas employment is generally temporary in nature and may represent a high and temporary "spike" in wages. See V.S. v. USA Environmental, 41 BRBS 839 (ALJ) (2007); Fern v. Service Employers Int'l, 29 BRBS 820 (ALJ) (2005); Zimmerman v. Service Employers Int'l, Inc., 39 BRBS 166 (ALJ) (2005); Goldbach v. Service Employers Int'l, Inc., 38 BRBS 595 (ALJ) (2004).

In Miranda v. Excavation Construction Inc., the Board held that a worker's average wage should be based on his earnings for the eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury. Miranda v. Excavation Constr. Inc., 13 BRBS 882, 886 (1981).

However, the Fifth Circuit has held that the amount earned by the employee at the time of his or her injury is a factor to be considered in determining the average weekly wage, but it is not the overriding factor. Hall v. Consol. Employment Sys., 139 F.3d 1025, 1032 (5th Cir. 1998) (quoting Empire United Stevedores, 936 F.2d at 822).

In Proffit v. Service Employers International, the employer claimed that relying on only the wages received in Iraq unreasonably focused on employment that was temporary in nature and failed to represent the claimant's actual wage-earning capacity. Proffitt v. Serv. Employers Int'l, Inc., 40 BRBS 41, 45 (2006). The Board stated, "We reject this contention. Use of only the wages claimant earned from

employer appropriately reflects the increase in pay claimant received when he commenced working for employer in Iraq, … which the administrative law judge found represented a 322 percent increase over his salary in the United States." Id. The Board found that looking only at the wages that the Claimant received in Iraq fully compensated the claimant for the earnings he lost due to his injury. Id. It noted that, "while claimant's employment in Iraq was not necessarily intended to be long-term, claimant's injury cost him the ability and opportunity to earn higher wages for at least the rest of his contract term." Id. See also, K.S. v. Service Employees International Inc., BRB No. 08-0583 (March 13, 2009) (rejecting the "blended approach" and requiring the ALJ to rely solely on contract wages in determining the average weekly wage).

I find the Board's reasoning in Proffit to be persuasive and I will calculate Claimant's average weekly wage on the basis of his actual earnings with Employer in Iraq. The Employer contends that the Claimant earned $80,833.41 from June 12, 2005 to June 7, 2006 (51.714 weeks). EX 16.4. While the Claimant notes that he did not work for certain periods during the year he was in Iraq due to kidney stones, it is unclear from the record how many days that the Claimant missed. Therefore, I will divide $80,833.41 by 51.714 weeks, which yields an average weekly wage of $1,563.09. This results in a compensation rate of $1,042.58.

IV. Loss of Wage-Earning Capacity

If Claimant has suffered any definitive loss of wage-earning capacity due to his permanent partial disability associated with the aggravated injury that occurred on December 2, 2005, he may be entitled to compensation for permanent partial disability under Section 8(c). When calculating the permanent partial compensation to be awarded, because the Claimant's injuries are of the unscheduled type, Section 8(c)(21) governs and states as follows:

> Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

33 U.S.C. § 908(c)(21) (2000).

Guidance for determining the wage-earning capacity of an injured employee under Section 8(c)(21) is found in Section 8(h) of the Longshore Act. Under Section 8(h):

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section…shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. § 908(h) (2000). The party that contends that the claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative wage-earning capacity. Grage v. J.M. Martinac Shipbuilding, 21 BRBS 66, 69 (1988), aff'd, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990).

In this case, no convincing evidence was presented to show that Claimant's actual earnings should not be used. The Claimant's employment records from Price Trucking show that he earned $52,846.07 from March 10, 2007 to October 24, 2008, or approximately 84.7 weeks. EX 24.49. Based on his salary, he can expect to make $624.00 a week, which is less than his pre-injury average weekly wage of $1,563.09. Since Claimant has suffered a definitive loss of wage-earning capacity due to his permanent disability associated with his December 2, 2005 aggravated injury, he is entitled to compensation for permanent partial disability under Section 8(c)(21).

When calculating the Claimant's benefits, his post-injury wage-earning capacity must be adjusted downward in order to account for inflation using the percentage change in the national average weekly wage. See Quan v. Marine Power & Equip. Co., 30 BRBS 124, 127 (1996). Before adjusting downward for inflation, Claimant's wage-earning capacity of his last employment in October 2008 was determined to be $624.00 per week. Based on the national average weekly wage, the Claimant's post-injury wage-earning capacity in 2005 dollars (the year of Claimant's injury) is $544.24.[5] When the Claimant's post-injury wage-earning capacity, after being adjusted downward, is subtracted from his pre-injury average weekly wage of $1,563.09, and then multiplied by two-thirds, the Claimant's weekly compensation rate equals $679.57.[6]

V. Medical Expenses

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require. 33 U.S.C. § 907(a) (2000).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atl. Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g, 12 BRBS 65 (1980). In the instance of multiple injuries, the employer at the time of the aggravating injury assumes liability for all subsequent related medical expenses and compensation. Colburn v. Gen. Dynamics Corp., 21 BRBS 219 (1988). An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining

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[5] $523.58 (National Average Weekly Wage in December 2005, the time of Claimant's injury) ÷ $600.31 (National Average Weekly Wage as of October 2008, the time of Claimant's last employment) = 0.8721827. 0.8721827 x $624.00 = $544.24.

[6] $1,563.09 (Claimant's pre-injury average weekly wage) - $544.24 (Claimant's post-injury adjusted average weekly wage-earning capacity) = $1,018.85. $1,018.85 x 2/3 = $679.57.

treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; see also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982) (per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Bros. Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983).

The Court further finds that SEI is responsible for all past, present and future reasonable medical expenses necessary to care for the Claimant's neck and shoulder injury, traumatic brain injury, hearing loss, and psychological impairment.

ORDER

1. SEI shall pay the Claimant the following compensation for his neck and shoulder injuries:

    a. Temporary total disability compensation at a rate of $1,042.58 from June 7, 2006 to January 3, 2007;

    b. Permanent total disability compensation at a rate of $1,042.58 from January 4, 2007 to February 18, 2007; and

    c. Permanent partial disability compensation at a rate of $679.57 from February 19, 2007 to October 24, 2008.

    d. Permanent total disability compensation at a rate of $1,042.58 from October 25, 2008 to the present and continuing.

2. SEI shall pay the Claimant permanent partial disability under Section 8(c)(13) for hearing loss for 113.8 weeks at a rate of $1,042.58.

3. SEI is entitled to a credit for any compensation already paid to the Claimant.

4. All monetary computations made pursuant to this Decision and Order are subject to verification by the District Director. No penalty shall be assessed against the Employer until it has had notice of the amount to be paid.

5. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

6. SEI shall pay Claimant for all reasonable and necessary past and future medical expenses that are the result of Claimant's employment-related injuries and conditions.

7. Claimant's attorney shall have thirty (30) days to file his attorney fee petition and the Employer's counsel shall have twenty (20) days, after receipt of that petition, to file objections thereto.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ahk

Newport News, Virginia