

**U.S. Department of Labor**

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**Issue Date: 10 June 2011**

**CASE NO.: 2009-LDA-530**

**OWCP NO.: 02-166811**

**IN THE MATTER OF**

**THOMAS J. ASEWICZ**  
**Claimant**

**v.**

**L-3 COMMUNICATIONS/TITAN CORPORATION**  
**Employer**

**and**

**INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,**  
**Carrier**

**APPEARANCES:**

Gary Pitts, Esq.  
Joel S. Mills, Esq.,  
On behalf of Claimant

Patricia A. Krebs, Esq.  
Jasmine Gorowara, Esq  
On behalf of Employer/Carrier

Before: Clement J. Kennington  
Administrative Law Judge

## DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, and its extension, the Defense Base Act (DBA), 42 U.S.C. § 1651 *et seq.* (2000) brought by Thomas Asewicz (Claimant) against L-3 Communications, Inc., (Employer) and Insurance Company of the State of Pennsylvania (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on February 22, 2011, in Little Rock, Arkansas

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their respective positions. Claimant testified and introduced the following 22 exhibits which were admitted including Claimant's medical/psychological records, various DOL forms (LS-18s, 203, 207, 280, OWCP-5a), Claimant's employment contracts with Employer and/SEII for Iraq, Claimant's W-2's for 2006 and 2007, photographs of places in Iraq, Stars and Stripes article, funereal services for one of Claimant's linguists killed by enemy, letters of recommendation and commendation for Claimant, rejection letters for position sought by Claimant, Employer responses to request for admissions and answers to interrogatories, memorandum of informal conference, reports of Nick deFilippis, Ph.D. and Dr. Amy Pollard.

Employer introduced 22 exhibits which were admitted, including DOL forms 206 and W-2s for 2006 and 2007, medical reports and or depositions from Drs. Roger Vogelfanger, White Johnson, PhD, and Nick de Filippis, PhD; medical records from BDE Mental Health Clinic, Arkansas Veterans Healthcare System, Arkansas Psychiatric Clinic; Claimant's military and employment records from Pulaski County Sheriff's Office, Lifetouch National School Studios, Inc., and labor market surveys

Post hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

### I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant injured his psychological health on August 31, 2007, while employed as an employee of Employer in Iraq.
2. Claimant timely advised Employer of injury and filed an appropriate claim concerning said injury.

3. Employer timely filed its Notice of Controversion.
4. An informal conference was held on August 3, 2009.
5. Claimant's average weekly wage at the time of injury was \$2,904.74.
6. Employer paid Claimant temporary total disability at the weekly compensation rate of \$1,114.44 from September 8, 2007 to August 1, 2008 and from August 1, 2008 to present.
7. Employer paid Claimant's medical benefits to date.
8. Claimant has not returned to his usual job.

## **II. ISSUES**

The following unresolved issues were presented by the parties:

1. Nature and Extent of Disability: Whether Claimant is entitled to any additional benefits.
2. Entitlement to Section 7 medical benefits.
3. Claimant's loss of earning capacity.
4. Attorney fees and expenses.

## **III . STATEMENT OF CASE**

### **A. Background**

Many of the facts concerning Claimant's work background and injury are uncontested. The record shows Claimant to be a 53 year old male born in 1957 in Newark, New Jersey. Claimant has a high school education followed by eight months of work as a sheet metal apprentice. Then 20 years in the Air Force, after which he retire with an honorable discharge. While in the Air Force he worked as a cargo loadmaster flying in C-130's loading and unloaded cargo, paratroops and making air drops in support of humanitarian missions. Before beginning his civilian work in Iraq , Claimant never experienced or underwent any treatment for psychological, stress or sleeping problems. (Tr. 29, 30).

In October 1999, following his retirement from the Air Force, Claimant worked in the information technology field for Clear Point Technologies followed by work as a technical support officer for Impact Financial Services, deputy for Pulaski County sheriff's department

and mail carrier for the U.S. Postal Service. After this he worked with KBR in Iraq commencing July 19, 2004, as a logistics coordinator arranging all flights for the embassy in Kuwait and Baghdad. (Tr. 31, 32; EX-1, p. 31, 36-38) In March 2006, Claimant returned to the U.S. for R & R and in April, 2006, was hired by L-3 as an assistant site manager. After which Employer sent him back to Iraq in May 2006. (Tr. 33).

As assistant site manager Claimant worked with intelligence and security commands supplying the Army and Department of Defense with linguists who served as interpreters. In that role he hired local nationals to accompany and provide vital information for military convoys of the 82<sup>nd</sup> and 101<sup>st</sup> airborne and air mobile combat divisions in support of their tactical operations. (Tr. 35). Interpreters were assigned to combat units that went on search and destroy missions. The Taliban and Al Qaeda regarded the interpreters as traitors and employed snipers to kill them when they could. If this happened Claimant had the responsibility of bringing interpreter bodies back to their families for identification and burial. Claimant hired and supervised about 300 interpreters routinely flying to combat locations every 10 to 14 days where they were stationed to pay them in cash for their services. (Tr. 39-42). During these deliveries which were mostly done by helicopters, Claimant came under direct enemy fire about 40 to 50% of the time. Claimant was not armed or provided a body guard. (Tr. 43, 44). Claimant also came under indirect enemy fire at bases in Baghdad and Kirkuk. (Tr.45). Although Claimant was never wounded, the helicopters he used were hit and on one occasion had to land because of no hydraulics. (Tr. 46). In addition, snipers shot at Claimant when he was on the ground. (Tr. 48).

Claimant received promotions and commendations for his work which kept him busy putting in 12 hours a day, 7 days a week and at times 12 to 16 hours per day. (Tr. 56). In accordance with the hazardous duties of his position Claimant received hazard duty pay. (EX-1, p. 9).

## **B. Claimant's Injury and Subsequent Treatment**

The events leading up to Claimant's injury were as follows: In the second week of August 2007, Claimant learned that 12 scouts in Charlie Company of the 101<sup>st</sup>, who lived next to Claimant died in a helicopter crash. This was followed by a blast that hit nearby bunkers requiring medical evacuation of additional company personnel and a subsequent rocket attack that destroyed a nearby building and counter intelligent trailers which apparently terrified linguists and disturbed Claimant who was responsible for calming down the linguists. When Claimant was exposed to additional rocket attacks the following morning, he had a panic attack. Claimant sought medical treatment and was directed to a Major Washington who evaluated Claimant and recommended Claimant be sent back to U.S. for treatment. (CX-1, p.2; Tr. 70-72)

Claimant returned to the U.S. and sought medical treatment at the VA where he was diagnosed and treated for anxiety NOS, dysomnia and allergic rhinitis by a Dr. Shanna Palmer. He was referred to the Arkansas Psychiatric Clinic where he was diagnosed and treated for PTSD and depression by Dr. Tim A. Kimbrell and then referred back to Amy Pollard, PhD and Dr. Palmer. (CX-1, pp. 3-17; Tr. 73) Claimant has continued treatment with Drs. Pollard and

Palmer on many occasions since this referral seeing them several times every month (CX-1, pp.18-108).

Currently, Claimant takes Pristiq for depression, Bethanechol for urination and Sonata for sleeping. On cross, Claimant admitted both he and his physicians believe he can work. (Tr. 78) Currently, he sees Dr. Pollard every three weeks and Dr. Palmer every two months for medication. Claimant receives \$1,500.00 a month pension from the Air Force and a \$1, 000.00 a month in service connected disability.

### **C. Labor Market Surveys (EX-15, 17)**

Claimant met with Employer's vocational expert, Alix Lockart and received two market surveys from her after being interviewed concerning his past employment and education. (Tr. 79-82). The first survey was dated February 10, 2010, and the second one is dated January 28, 2011, and was received just a week before the hearing. The first survey was 100 pages in length and consisted of SAGE Cognitive & Conceptual Abilities Test, C-CAT and Vocational Aptitude Battery (VAB), a transferability of skills report, a vocational assessment of Claimant's current medical status, personnel and education, and labor market survey. The labor market survey identified the following job categories and specific jobs deemed to be appropriate:

#### **Logistics:**

1. Lockheed Martin-load master instructor- Little Rock, AFB (\$33,000-\$39,000, annual salary).
2. K Force-Senior Systems Administrator, Tampa, Florida (\$65,000, annual salary).
3. CAE-Site Maintenance Manager, Tampa, Florida (\$38,000, annual salary).
4. BAE Systems-Operations I, Rockville, Maryland (\$41,000, annual salary).
5. Catholic Health Initiatives-Distribution Tech, Little Rock (\$25,000, annual salary).

#### **Information Technology:**

6. Dept. of Veterans Affairs-Program Specialist-Little Rock (\$46,625-\$60,612-annual salary).
7. 360 Recruiting- IT Administrator- Little Rock (\$50,000-\$70,000, annual salary).
8. The Computer Hut- IT Services Dispatcher-Little Rock(\$24,060, annual salary).
9. Air Transport I International-Support Technician-Little Rock (\$28,000-\$35,000, annual salary).

## **Communication**

10. City of Little Rock- Communications Call Taker- Little Rock (\$25,734, annual salary).
11. City of Little Rock- Public Safety Dispatcher, Little Rock (\$24,564- \$35,564- \$38,038, annual salary).
12. Catholic Health Initiative-Patient Access Team Lead- Little Rock (\$24,000, annual salary).
13. Aerotek Aviation-Avionics Technician- Lenexa, Kansas (\$41,600-\$44,720, annual salary).
14. Verizon Wireless-Coord-Tech Support- Little Rock (\$38,000,annual salary).

## **Business Consultant/Management Trainee**

15. Kroger Corporation- Management- Little Rock- (\$37,000-\$40,000, annual salary).

The labor market survey was based apparently upon a medical evaluation of Claimant by White –Johnson who diagnosed Claimant with a generalized Anxiety disorder, resolving and a personality disorder with no symptoms to impede his employment. (EX-15, p. 83) Dr. Johnson found Claimant at maximum medical improvement then or within two to three months.

Upon receiving the labor market survey, Claimant went to apply for some of those jobs but could not find some of these jobs on their websites. Apparently, one of these jobs which he did not apply for, included AirTransport International. The second survey included the opinions of Dr. White-Johnson, clinical psychologist plus the opinions of psychiatrist, Dr. Wogelfanger, psychologist, Nick A. De Filippis, treating psychiatrist, Jeff Palmer and psychologist, Dr. Amy Pollard. Based upon Claimant past work experiences educational background and Claimant's release to work, Alix R. Lockart found the following jobs appropriate:

## **Logistics**

1. Ryder Logistics-Senior Service Manager- Little Rock (\$36,000, annual salary).
2. Lockheed Martin-Supply Technician- Little Rock (\$25,000, annual salary).

## **Information Technology**

3. Catholic Health Initiative- IT Project manager-Little Rock (\$88,000, annual salary).

4. ABC Financial Services-Technical Support Rep.-Little Rock (\$36,000, annual salary).
5. Transamerica Life Insurance Co.-Web Analyst/Coordinator, Little Rock (\$30,820-\$40,940, annual salary).
6. City of Little Rock- Program Analyst- Little Rock (\$53,095-\$79,643, annual salary).
7. City of Little Rock-Sr. Information Systems Specialist- North Little Rock (\$36,263-\$51,474, annual salary).

### **Communications**

8. Verizon Wireless- Assistant Manager- Conway Arkansas (\$37,000-\$39,000, annual salary).
9. AT &A Store- Customer Service Representative-Little Rock (\$21, 944, annual salary).
10. A T & A-Retail Sales Consultant- Little Rock, (\$16,453-\$32,240, annual salary).
11. ABC Financial Services, Inc.,-Learning Instructor-Little Rock (\$30,000-\$45,000, annual salary).

### **Business Consultant /Management Trainee**

12. Catholics Health Initiatives-IT Project Manager-Little Rock (\$88,000, annual salary).
13. Bridgestone Retail Operation- Manager Trainee- Little Rock (\$35,000-\$40,000 annual salary).
14. ADT- Installation Coordinator-Boca Raton, Florida (\$29,120- \$31,200, annual salary).
15. Transamerica Life Insurance Company- Supervisor Document Services-Little Rock (\$42,780-\$45,000, annual salary).

### **Security Officer**

16. Baptist Medical Center- Security- Little Rock (\$14,160, annual salary).
17. Baptist Medical Center-Security /Valet-Little Rock (\$14,160, annual salary).
17. Catholic Health Initiatives-Security Officer-Little Rock (\$19,000, annual salary).

19. GAS Secure Solutions, Security Officer- Little Rock (\$17,680, annual salary).
20. Allied Barton Security Services-Security Officer-Little Rock (\$17,160-\$18,720, annual salary).

Claimant received three separate mental status evaluations. The first evaluation came from psychologist, Judy Johnson on June 27, 2008, who found Claimant to have a resolving anxiety disorder and a personal disorder with narcissistic and anti-social features. Dr. Johnson found Claimant had no need or desire to return to work but is fully capable of performing employment and had no symptoms that would impede employment. (EX-7).

The second evaluation was performed by psychiatrist, Dr. Roger Vogelfanger on May 24, 2009, and produced a different diagnosis and ability to work. The evaluation consisted of an interview of Claimant and a review of his medical records. Claimant related numerous traumatic events commencing in July 2004, when initially employed by Haliburton in Baghdad. At which time, the vehicle he was riding in from Baghdad to the airport came under automatic weapons fire to his later employment with Employer. Whereupon in the process of delivering cash payment to Iraqi linguists, his helicopter was subject to rocket attacks. In August 2007, Claimant began to experience increased anxiety, insomnia, difficulty concentrating and depressed mood. This in turn led him to seek psychiatric help and eventual return to the US. Where he received treatment at the Arkansas Psychiatric Clinic by psychologist, Dr. Amy Pollard and psychiatrist, Dr. Jeffery Palmer who diagnosed PTSD and Depressive Disorder, NOS.

Dr. Vogelfanger performed a mental status examination and agreed with Drs. Pollard's and Palmer's diagnosis of PTSD and Depressive Disorder NOS. Dr. Vogelfanger disagreed with psychologist, Dr. Judy Johnson diagnosis and evaluation in that Dr. Johnson misunderstood and reported erroneous facts concerning Claimants combat experience. Further, there was no evidence to support her diagnosis of personality disorder. Dr. Vogelfanger thought it was possible for Claimant to work in the U.S., but would probably find it difficult due to his current level of symptomatology which he considered moderate with 80% considered to be permanent with a GAF of 56, depression with dysphonic mood, social withdrawal and limited insight. (EX-6)

The third evaluation was performed by neuropsychologist, Dr. Nick A. DeFilippis on December 17, 2010, and consisted of an interview, review of Claimant's records, various tests (MMPI-2 Million Clinical Multiaxial Inventory, Structured Inventory of Malingered Symptomatology, SIMS), TOMM, WAIS-IV, WRAT-4, WMS-IV, Mental Status Examination. Claimant was found to be functioning with a premorbid intellectual level of functioning at the low end of average, no learning disability, emotional issues interfering with his ability to concentrate, PTSD, low grade depression with mild psychological difficulty. Claimant was also found unable to work overseas with mild memory problems but otherwise possessing the ability to function in any occupation. (EX-8)

#### **D. Testimony of Drs. Amy Pollard, William Palmer, Nick A. DeFilippis**

Dr. Pollard, a psychologist, met Claimant on September 25, 2007, during which she took a general medical, psychiatric, family, social history and Claimant's current problems including panic attacks, anxiety, guilt feelings, reliving events, isolating from people, avoiding crowds, feeling edgy. Dr. Pollard diagnosed PTSD and setup additional sessions involving cognitive, behavioral, and relaxation therapy to improve mood and symptoms and desensitization. Over the treatment, Dr. Pollard testified that Claimant has met some of the goals of his treatment: reduction of anxiety. Claimant has not been able to full achieve the ability to relate to others.

Claimant has met with Dr. Pollard at different intervals depending upon his needs. At the beginning of his treatment Claimant's symptoms were severe. Now, Dr. Pollard stated they are moderate with a need to improve on interpersonal functioning, with work helping him in this regard but with therapy continuing when stressors occur. Claimant in the summer of 2009 experienced a major depressive disorder when he experienced a failing dating relationship and saw senate hearings on Iraq that made him quite upset. In Dr. Pollard's opinion, Claimant still needs therapy on a regular basis for the next six months and after this for more acute instances that may occur. Further, Claimant can still make improvements and will experienced symptoms on a life time basis. On January 26, 2011, Dr. Pollard and Palmer filled out an OWCP-5 form stating Claimant was at maximum medical improvement unable to perform his usual work but could work eight hours per day but must avoid duties or work environments in or near a combat zone of environment with loud or sudden noises, explosions, gunfire or sirens, crowds of people in large or small spaces or environments which may have sudden unpredictable activity. (CX-20).

Dr. Pollard would thus have Claimant avoid work in a combat environment or in a crowded circumstance around lots of people, lots of noise, in a lot of unpredictable activity or unpredictable change in environment . In December 2010, Dr. Pollard administered the MMPI-2 which showed Claimant still with intrusive recollections, dreams, nightmares, emotional detachment, explosive angers. Dr. Pollard testified that Claimant had been cooperative and straightforward but she could not predict whether his symptoms would resolve with work and that her testimony was based upon reasonable psychological probability.(EX-22).

Dr. Palmer, a psychiatrist who has treated Claimant along with Dr. Pollard, testified he did a mental status examination of Claimant in October 2007 and diagnosed PTSD, depression NOS and panic disorder and prescribed Zoloft and Klonopin with Dr. Palmer limiting his practice and treatment to medication management. As far as work is concerned Dr. Palmer did not recommend Claimant resume the work he was doing prior to seeing him i.e. combat work environment. Concerning Claimant's depression Dr. Palmer found it to be in remission but with a continuing need to use his medications indefinitely at the present time. Further he did not consider Claimant at maximum medical improvement but had permanent disabilities in that he should never work in combat or places with loud noises. Dr. Palmer like Dr. Pollard found Claimant to cooperative, straightforward with his testimony based upon reasonable medical probability. (EX-21).

Neuropsychologist, Dr. DeFilippis, testified about his interview and testing of Claimant and stated that Claimant could work overseas but should not work in a combat environment. According to his evaluation of Claimant, he did not diagnose depression because of his PTSD symptoms that encompassed. Dr. DeFilippis found Claimant to have significantly improved with treatment with his PTSD with Claimant having a mild inability to concentrate but this did not affect or impair his ability to work. Dr. DeFilippis placed Claimant at maximum medical improvement with his PTSD symptoms resolving and having only a mild affect upon his functioning with Claimant needing only a few more sessions. (EX-30)

#### **IV. DISCUSSION**

##### **A. Contention of Parties**

Claimant contends that (1) Section 20 (a) presumption requires Claimant to demonstrate only that working conditions were capable of causing the disability and need for medical treatment with Employer then obligated to present substantial evidence showing that working conditions did not cause the harm citing *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1<sup>st</sup> Cir. 1982), (2) Claimant met his burden by his testimony showing he experienced many life threatening instances because of his work with linguists in Iraq which in turn caused him to experience at panic attack, depression and PTSD which was confirmed Drs Pollard, Palmer, DeFilippis and Wogelfanger; (3) Claimant's treating doctors and examining psychologist Dr. DeFilippis confirm the fact that Claimant has made progress in dealing with PTSD but still needs additional treatment including psychotropic medications to deal with anxiety and depression, C.F.R. 702.405; (4) Claimant has shown he is unable to return to his employment with Employer in Iraq and thus is entitled to total disability which is permanent as confirmed by Drs. DeFilippis on December 17, 2010 and Drs. Pollard and Palmer on January 26, 2011; (5) Employer failed to show suitable employment thus allowing Claimant to continue receiving both temporary total and permanent total disability compensation.

Employer contends that (1) Claimant is entitled to temporary partial disability in that his treating physicians have opined he has not reached maximum medical improvement in that his condition has and continues to improve and as such has not stabilized and is only temporary in nature citing *Hawaii Stevedores, Inc .v. Ogawa* ,608 F. 3d 342 (9<sup>th</sup> Cir. 2010); *Stoute v. Shea-Bail*, 12 BRBS 755 (1981); (2) Employer has shown suitable alternative employment by its vocational expert who show the availability of general job openings in Claimant's community which he could realistically and likely secure but concerning which Claimant never diligently tried to secure listing 25 different jobs which Claimant could perform including that of Transportation Security Administrator paying up to \$148, 340 and information technology jobs paying between \$17,160 to \$88,000 annually; (3) Claimant's lack of diligence was seen in his failure to keep a record of his job search or follow up on his job applications, or apply with a prospective employer in the appropriate or prompt manner; (4) Employer has provided all reasonable and necessary medical benefits for his psychological injuries.

## **B. Credibility and Section 20 (a) Presumption:**

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5<sup>th</sup> Cir. 1981).

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

In this case, I was impressed by Claimant's honesty concerning his mental impairment but nonetheless, possessing the ability and willingness to work. Indeed Claimant has shown such willingness over his adult life, even if it involved danger to himself. Contrary to Employer's assertions, Claimant correctly applied for a number of positions over the internet without additional and personal contact. For even Employer's vocational expert found repeated efforts at personal contact were unsuccessful at employers such as Lockheed Martin, CAE-USA, Catholic Health Initiatives, Dept. of Veterans Affairs, Tiber Creek Consulting Inc., Verizon Wireless, City of North Little Rock. (EX-15, pp.84, 86, 90, 91, 93,99,; EX-17 pp.5, 9, 15) An example of the futility of personal contact can be seen in the job at Catholic Health which paid up to \$88,000 but which did not provide for personal contacts in the initial hiring process. Nevertheless, Employer would have me criticize Claimant as being less than diligent because he did not try what its own expert failed to achieve.

Indeed Employer would have me chastise Claimant for not applying to all those listed on the second job survey. Despite the fact that it was received shortly before the hearing and would even have me require Claimant contact the Department of Homeland Security for a position as Transportation Security Administrator which paid up to \$148,340 when such a job could not be found in the record<sup>1</sup>.

Section 20(a) provides:

In any proceeding for the enforcement of a claim for compensation under the Act it shall be presumed, in the absence of substantial evidence to the contrary

(a) That the claim comes within the provisions of this Act.

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<sup>1</sup> Employer's counsel at page 11 of its brief makes reference to such a job at EX-15, p. 69 but this job does not appear there nor anywhere in the record as far as the undersigned can find.

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5<sup>th</sup> Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287

This presumption functions to link the harm suffered by Claimant to his employment. *Noble Drilling v. Drake*, 795 F.2d 478 (5<sup>th</sup> Cir. 1986); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). The Section 20(a) presumption shifts the burden to Employer to come forward with substantial countervailing evidence that the injury or harm was not caused by Claimant's employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Brennen v. Bethlehem Steel*, 7 BRBS 947 (1978). Thus, once the presumption applies, the relevant inquiry is whether Employer has succeeded in establishing the lack of a causal nexus. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). When there has been a work-related accident followed by an inquiry, the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act. *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626 (1982), *aff'd mem.*, 722 F.2d 747 (9<sup>th</sup> Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984).

If Employer fails in this attempt, Claimant may properly rely on the Section 20(a) presumption to link his injury with his employment. If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 56 S.Ct. 190 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 297 (2d Cir. 1982).

This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980); *Anderson v. Todd Shipyards*, *supra*, at 21; *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981).

In the present case, Claimant established both elements of a the Section 20 (a) presumption by showing both a work related a injury and conditions which could cause such. Indeed Employer stipulated Claimant injured his psychological health at work for Employer on August 31, 1007. Concerning the nature of that injury, I find the most knowledgeable person in that regard to be Dr. Amy Pollard who has provided consistent therapy for Claimant over a long period of time.

### C. Nature and Extent of Injury

Disability under the Act is defined as incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment, 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial).

A permanent disability is one which has continued for a lengthy period and is 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 (5<sup>th</sup> Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached so that a claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). In this case it is clear from Dr. Pollard that Claimant's PTSD with anxiety, depressive symptoms and social adjustment problems has stabilized with Claimant going from severe to moderate symptoms with a continuing need for treatment,

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156 (5<sup>th</sup> Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5<sup>th</sup> Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5<sup>th</sup> Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). An employer must show the existence of realistically available job opportunities within the geographical area where the

employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market. *Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676, 679 (1979). If employer does not offer suitable work at its facility, the Fifth Circuit in *Turner*, established a two-pronged test by which employers can satisfy their alternative employment burden:

- (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
- (2) Within this category of jobs that a claimant is reasonably capable of performing, are these jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

661 F.2d at 1042; *P&M Crane*, 930 F.2d at 430.

If the employer meets its burden by establishing suitable alternative employment, the burden shifts back to a claimant to prove reasonable diligence in attempting to secure some type of alternate employment shown by the employer to be attainable and available. *Turner*, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. *Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987). Moreover, if claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 748 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986). If a claimant fails to satisfy this complementary burden, there cannot be a finding of total and permanent disability under the Act. *Turner*, 661 F.2d at 1043; *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89,92 (1984); *Equitable Equip. Co. v. Hardy*, 558 F.2d 1192 (5<sup>th</sup> Cir. 1977). Claimant's credible complaints of pain alone may be enough to meet this burden. *Golden v Eller & Co.*, 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71 (5<sup>th</sup> Cir. 1980). If a claimant's physical injury leads to psychological injuries, a finding of permanent total disability may be warranted. *Parent v. Duluth, Missabe & Iron Range Railway Co.*, 7 BRBS 41 (1977); *Mitchell v. Lake Charles Stevedores*, 5 BRBS 777 (1977). Once a claimant makes a *prima facie* showing the burden shifts to the employer to show suitable alternative employment. *Clophus v. Amoco Pro. Co.*, 21 BRBS 261 (1988). A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *MacDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986).

In this case, I find that Claimant's mental condition has improved but it is questionable he can continued to improve because of lifelong symptoms for which still needs treatment according Dr. Pollard (EX-22, p.42,43). These continued symptoms include nightmares, anxiety, flashbacks, and panic symptoms occurring out shopping in a large place. Id at 44-47. Claimant will certainly need psychotropic medication according to Dr. Palmer on an indefinite basis (EX-21, p. 38).

As far as whether Employer has shown suitable alternative employment, Employer claims that it identified 25 different jobs in March 2010 in the Cabot, Arkansas region which Claimant could reasonably perform including transportation security administrator when considering age, education, work history and physical capabilities. Employer claims that the only restriction placed upon Claimant was that he could not work in a combat zone and that these jobs paid up to \$148,340 annually. Subsequently, Employer claims it identified 20 additional jobs paying between \$17,160 to \$88,000 annually. Further, Employer claims Claimant failed to diligently search for any of these jobs as demonstrated his lack of a record of a job search, no follow up after filing an application or not filing his application according to proper process such as at the City of North Little Rock that requires an applicant go through the human resources office rather than apply online as Claimant did or failing to apply at all.

Employer would have me find me the highest paying job of \$148,340 as suitable or those paying up to \$88,000 despite the fact that the first job paying \$148,340 could not be found in the record whereas the existence or possibility of Claimant being hired for the second was questionable because of the lack of any personal contact with said employer by Employer's vocational expert. Moreover all of these jobs assumed Claimant had no physical or mental impairment except working in combat situation. However, Claimant had other impairments including work that involved loud or sudden noises, crowds, unpredictable activity or according to Dr. Nick DeFlippis activity that involved large amounts of new information on a continuing basis.

In the absence of such consideration it is not possible to assume that any of the jobs listed by Employer's vocational expert would be appropriate for Claimant. That is no to say that such jobs may be appropriate but Employer has not shown this situation to exist. Further, as pointed out by Claimant counsel in its brief it is doubtful that Claimant possessed the necessary qualifications for many of those positions listed as suitable and available. For example, the jobs with K Force, 360 Recruiting, Tiber Creek Consulting, Aerotek, Kroger, Firestone, University of Arkansas required the following skill Claimant did not possess: extensive knowledge with Bash Shell environment (KForce), 5+ years experience with Microsoft Windows (360 Recruiting), good interpersonal skills and ability to work in a team environment (Tiber Creek Consulting), avionics technician to repair avionics systems on corporate jet (Aerotek), retail sales and management experience (Kroger and Firestone). ACIC certified (University of Arkansas).

## E. Medical Benefits

Section 7(a) of the Act provides that “the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require.” 33 U.S.C. 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). The test of whether medical treatment is necessary is whether the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). In order for medical care to be compensable, it must be appropriate for the injury, and the administrative law judge has the authority to determine the reasonableness and necessity of a procedure refused by employer. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). A claimant establishes a *prima facie* case that medical treatment is reasonable and necessary when a qualified physician indicates that such medical treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984).

The employer must raise the reasonableness and necessity of treatment before the judge. *Salusky v. Army Air Force Exch. Serv.*, 3 BRBS 22 (1975). The judge is required to make specific findings of fact regarding an employer's claim that a particular expense is non-compensable. *Monrote v. Britton*, 237 F.2d 756 (D.C. Cir. 1956). An administrative law judge may deny a medical expense he finds unnecessary, *Scott v. C & C Lumber, Inc.*, 9 BRBS 815 (1978); *See generally Weikert*, 36 BRBS 38. Elaborate and costly medical procedures not recognized in the medical community or found rational by a substantial group of other physicians can be found to be not necessary or reasonable medical treatment. *Pascaretti v. General Dynamics Land Systems*, 37 BRBS 477 (ALJ 2003). An employer is only liable for the reasonable value of medical services. See 20 C.F.R. § 702.413; *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, 518 (1978); *Potenza v. United Terminals, Inc.*, 1 BRBS 150 (1974), *aff'd*, 524 F.2d 1136, 3 BRBS 51 (2nd Cir. 1975). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

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. For example, an employer must pay for the treatment of the claimant's myocardial infarction, if the judge finds that it is causally related to a prior work-related injury. *See Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'g* 12 BRBS 65 (1980). If the disability results, however, from aggravation of an injury compensable under the LHWCA, incurred while the employee is working for a second covered employer, the second employer is liable for medical expenses due to the "reinjury." *Abbott v. Dillingham Marine & Mfg. Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Office of Workers Comp. Programs*, 698 F.2d 1235 (9th Cir. 1982).

Under 20 C.F.R. §702.401, medical care includes both medicines and the necessary cost of travel. Travel expenses incurred for medical purposes under Section 7 are recoverable by a claimant. *Day v. Ship Shape Maintenance Co.*, 16 BRBS 38 (1983); *Tough v. General Dynamics Corporation*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978). Under 20 C.F.R. §702.404, employer's and carrier's responsibilities for chiropractic treatment is to the extent that the reimbursable services for treatment consist of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings. 20 C.F.R. §702.404.

In this case, I find that Claimant has clearly established a need for continuing psychological and psychiatric services to address the need for both psychological services in the form of cognitive behavioral and psychiatric services by issuance of psychotropic medication by the testimony of Drs. Pollard, Palmer, and Vogelfanger. Since Claimant's work in Iraq exposed him to PTSD, depression, anxiety, panic attacks, Employer is responsible for psychological and psychiatric services related thereto.

#### **F. Interest and Attorney Fees**

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, aff'd in pertinent part and rev'd on other grounds, sub nom. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. '1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## V. ORDER

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

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from August 31, 2007 to January 26, 2011, based on a stipulated average weekly wage of \$2,904.74 at the maximum compensation rate of \$1,114.44. Employer shall receive credit for all compensation previously paid Claimant.
2. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908 (a) of the Act for the period from January 27, 2011 to present and continuing based on a stipulated average weekly wage of \$2,904.74 at the maximum compensation rate of \$1,114.44.
3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries to Claimant psychological health pursuant to Section 7(a) of the Act.
4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. ' 1961.

Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

**A**

**CLEMENT J. KENNINGTON  
ADMINISTRATIVE LAW JUDGE**