

**U.S. Department of Labor**

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**Issue Date: 10 August 2010**

**CASE NO.: 2009-LDA-460**

**OWCP NO.: 02-137911**

**IN THE MATTER OF**

**ANDRE COETZEE,  
Claimant**

**v.**

**DYNCORP TECHNICAL SERVICES,  
Employer**

**and**

**CONTINENTAL CASUALTY COMPANY,  
c/o CNA International  
Carrier**

**APPEARANCES:**

**GARY B. PITTS, ESQ.**  
On Behalf of the Claimant

**MICHAEL T. QUINN, ESQ.**  
On Behalf of the Employer

**BEFORE: PATRICK M. ROSENOW**  
Administrative Law Judge

# DECISION AND ORDER

## PROCEDURAL STATUS

This case arises from a claim for benefits under the Defense Base Act (the Act)<sup>1</sup> brought by Claimant against Employer and Carrier.<sup>2</sup> On 19 Dec 08, the matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. Following a pre-hearing conference, the parties waived their rights to present evidence and make arguments in person. Instead, they each submitted documents and agreed to file written briefs.

My decision is based upon the entire record, which consists of the following:<sup>3</sup>

### Exhibits<sup>4</sup>

Claimant's Exhibits (CX): 1-18

Employer's Exhibits (EX): 1-15

## FACTUAL BACKGROUND

On 4 Oct 04, Claimant was acting as a team leader on a security detail in Iraq when a bomb detonated. Claimant's armored vehicle was thrown in the air before landing on one side and rolling upright. Immediately following the explosion, Claimant was unable to escape from the burning vehicle, but was eventually rescued. A firefight ensued, two members of Claimant's team were killed, and several others were injured. Claimant was taken to the hospital complaining of neck and back pain. He worked for three more days before being sent home. On 2 Dec 04, Claimant returned to work in Iraq and continued to work there until 12 or 13 Mar 06 when he was sent home after more complaints of back pain. In July 2006 Claimant sought psychiatric care and alleged post traumatic stress disorder (PTSD) from the October 04 incident. He has not worked since seeking psychiatric treatment.

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<sup>1</sup> 42 U.S.C. § 1651 (the Defense Base Act is an extension of the Longshore and Harbor Workers' Compensation Act 33 U.S.C. § 901-950 (2010)).

<sup>2</sup> For simplicity both Employer and Carrier are collectively referred to herein as Employer.

<sup>3</sup> I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

<sup>4</sup> Some exhibits appeared to be *en globo* collections of records. Counsel were cautioned that in the case of any such exhibit (CX-14 & 15) only those pages specifically cited to would be considered a part of the record upon which the decision would be based.

## ISSUES & POSITIONS OF THE PARTIES

Although no formal stipulations were entered by the parties, there is no dispute that:

1. Claimant suffered physical harm by an explosive device in Iraq on 4 Oct 04 while working for Employer under circumstances that would bring his injuries within the jurisdiction and coverage of the Act.
2. There was timely notice, claim and controversion.
3. Claimant was entitled to indemnity and medical benefits as a result of injuries from the 4 Oct 04 incident.
4. Claimant's average weekly wage (AWW) at the time of injury was \$2,937.06.
5. Claimant is not currently working and has not worked since his separation from Employer.

Claimant contends he is unable to return to his original employment and still requires more treatment before reaching maximum medical improvement (MMI). He argues that since Employer has not shown suitable alternative employment, he is temporarily totally disabled. Employer responds that Claimant has recovered from his injury and can return to his original job.

## LAW

Although the Act should be construed liberally in favor of the claimant,<sup>5</sup> the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,<sup>6</sup> which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.<sup>7</sup> In arriving at a decision, 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.<sup>8</sup>

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<sup>5</sup> *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

<sup>6</sup> 5 U.S.C. § 556(d)(2009).

<sup>7</sup> *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).

<sup>8</sup> *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1990); *Atl. Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968).

## Causation

Section 2(2) of the Act defines “injury” as “accidental injury or death arising out of and in the course of employment.”<sup>9</sup> In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.<sup>10</sup> The presumption takes effect once the claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.<sup>11</sup>

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which ***could have caused*** the harm or pain.<sup>12</sup> These two elements establish a *prima facie* case of a compensable “injury” supporting a claim for compensation.<sup>13</sup>

A claimant’s credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption.<sup>14</sup>

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that claimant’s condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by such conditions.<sup>15</sup> “Substantial evidence” means evidence that reasonable minds might accept as adequate to support a conclusion.<sup>16</sup> Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption

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<sup>9</sup> 33 U.S.C. § 902(2)(2010).

<sup>10</sup> 33 U.S.C. § 920(a)(2010).

<sup>11</sup> *Gooden v. Dir., OWCP*, 135 F.3d 1066 (5th Cir. 1998).

<sup>12</sup> *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 331 (1981), *aff’d sub nom. Kelaita v. Dir., OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990).

<sup>13</sup> *Id.*

<sup>14</sup> *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff’d sub nom. Sylvester v. Dir., OWCP*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

<sup>15</sup> *See Gooden*, 135 F.3d at 1066; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976); *Conoco, Inc. v. Dir. [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (5th Cir. 1999); *La. Ins. Guar. Ass’n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (5th Cir. 1999); *Lennon v. Waterfront Transp.*, 20 F.3d 658, 28 BRBS 22 (5th Cir. 1994).

<sup>16</sup> *Avondale Indus. v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1998); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is “less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of the evidence”).

created by Section 20(a).<sup>17</sup> The testimony of a physician that no relationship exists between an injury and claimant's employment is sufficient to rebut the presumption.<sup>18</sup>

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and no longer controls the outcome of the case.<sup>19</sup> If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.<sup>20</sup> The presumption does not apply, however, to the issue of whether a physical harm or injury occurred<sup>21</sup> and does not aid the claimant in establishing the nature and extent of disability.<sup>22</sup>

Where work causes a preexisting condition to become temporarily symptomatic, the Employer's liability extends only until the symptoms resolve.<sup>23</sup>

In evaluating evidence, the ALJ must determine the credibility and weight to be attached to the testimony of the medical witnesses and is entitled to deference in doing so.<sup>24</sup> Generally, the opinion of a treating physician is entitled to greater weight than the opinion of a non-treating physician.<sup>25</sup> However, an ALJ is not bound by the opinion of one doctor and can rely on the independent medical evaluator's opinion and evidence from the medical records over the opinion of the treating doctor.<sup>26</sup> A claimant's credibility may be relevant if in developing their opinions, doctors relied on what the claimant told them.<sup>27</sup>

### Nature and Extent

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.<sup>28</sup> Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

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<sup>17</sup> See *Smith v. Sealand Terminal, Incl*, 14 BRBS 844 (1982).

<sup>18</sup> See *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

<sup>19</sup> *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).

<sup>20</sup> *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (4th Cir. 1997); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Greenwich Collieries v. Maher Terminals*, 512 U.S. 267 (1994).

<sup>21</sup> *Devine v. Atl. Container Lines, G.I.F.*, 25 BRBS 15 (1990).

<sup>22</sup> *Holton v. Indep. Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

<sup>23</sup> *Carlson v. Bethlehem Steel Corp.*, 8 BRBS 486 (1978). *Crum v. Gen. Adjustment Bureau*, 12 BRBS 458 (1980), *aff'd* 738 F.2d 474 (D.C. Cir. 1984).

<sup>24</sup> *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961); *Pimpinella v. Universal Maritime Servs., Inc.*, 27 BRBS 154 (1993).

<sup>25</sup> *Downs v. Dir., OWCP*, 152 F.3d 924, (9th Cir. 1998); see also *Loza v. Apfel*, 219 F.3d 378 (5th Cir. 2000)(Social Security administrative law decision).

<sup>26</sup> *Duhagan*, 31 BRBS 98 at 99.

<sup>27</sup> *Houghton v. Marcom, Inc.*, (BRB Nos. 99-0809 and 99-1315)(April 25, 2000)(Unpublished).

<sup>28</sup> *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1980).

Disability is defined under the Act as an “incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment.”<sup>29</sup> Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.<sup>30</sup> Thus, disability requires a causal connection between a worker’s physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

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.<sup>31</sup> A claimant’s disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.<sup>32</sup> Any disability suffered by a claimant before reaching maximum medical improvement is considered temporary in nature.<sup>33</sup>

The question of extent of disability is an economic as well as a medical concept.<sup>34</sup> 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.<sup>35</sup>

## EVIDENCE

***Claimant testified at deposition in pertinent part that:***<sup>36</sup>

He was born on 26 Apr 1962 and lives in Kamma Park, Port Elizabeth, South Africa. He had the equivalent of a high school education and was in the South African military from 1981 to 1994 as an infantryman. From 1994 on, he was in the reserves. Then he was a carpenter and a decorative sand blaster before taking employment in Iraq. He had planned to stay in Iraq indefinitely. Ever since he went to the military he has enjoyed that work. He had gotten divorced a year before he left for Iraq so he had no ties. Before going to Iraq, he was in very good physical condition and had no limitations. He had not seen a psychologist or psychiatrist.

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<sup>29</sup> 33 U.S.C. § 902(10)(2009).

<sup>30</sup> *Sproull v. Stevedoring Servs. of Am.*, 25 BRBS 100, 104 (1991).

<sup>31</sup> *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh’g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Servs. v. Dir.*, *OWCP*, 86 F.3d 438, 444 (5th Cir. 1996).

<sup>32</sup> *Trask*, 17 BRBS at 60.

<sup>33</sup> *Berkstresser v. Wash. Metro. Area Transit Auth.*, 16 BRBS 231 (1984); *SGS Control Servs.* at 443.

<sup>34</sup> *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *E. S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128, 131 (1991).

<sup>35</sup> *Elliott v. C & P Tel. Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988); *La. Ins. Guar. Ass’n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).

<sup>36</sup> EX-10, CX-2.

He was employed by Dyncorp from 28 Aug 04 until March 06. In the beginning, he was a team member, but later, he became a team leader but he still participated in missions. He was the team leader for one of the personal security detail teams based in Baghdad and was paid about \$11,000 per month.

Once he got his mission, his job was to decide on mission briefs, work out routes normal and escape routes, work out communication, assist the principals and look after their safety, escort them when the motorcade has stopped, and ensure that the principals were protected at all times. They were supposed to have days off during the week, but generally worked seven days a week. They were on call 24 hours a day, but most of the time the earliest they would go out on missions was at first light. They would try to get missions completed before dark because the danger escalates then. He would carry a M4 and a 9mm pistol. The team also carried smoke grenades in case they need to utilize escape routes.

There were a total of four vehicles used per team. The front and rear vehicles were up-armored Tahoes and the two vehicles that were used to transport the principals were armored SUVs. After his explosion, the company took more protective measures such as putting armor on the front and rear vehicles and putting in bullet proof glass. The rear vehicle of the convoy had a specialized gunner with a submachine gun. He wore personal body armor and a helmet at all times on a mission because of the threat level. He and/or his team were attacked by insurgents on numerous occasions.

On 4 Oct 04, the team was based at the Baghdad Hotel, which was on the other side of the river from the Green Zone. They had to pick up two principals from the American Embassy. They left the hotel coming out a side alley that was running adjacent to the main road in Baghdad and he noted that the guards normally used in the front section of the hotel guarding the gate were not there. As he turned to the median, he put his hand on the radio to radio the team leader in the front vehicle and the bomber who was sitting on the side of the street came charging up. They formed an "L" shape, but the bomber pulled into the L shape and detonated the bomb. His vehicle flew up into the air, landed on the right hand front and rear wheels, and then fell back onto its wheels again.

He could not get out of the vehicle because of the damage caused by the bomb. The vehicle was starting to burn, so some of the guards jammed the door open so he could get out. He ran to the rear vehicle and pulled out two people. The assistant team leader helped him pull the well gunner out of the well because the machine gun had wedged itself between the roof and the floor. They managed to get him out while taking fire. They were involved in that firefight for five to ten minutes. There were probably five or six insurgents shooting at them. The American Army arrived at that time with helicopters and they helped the Army

remove all the vehicles, the injured, and the dead. Two members of his team were killed in the explosion. The driver of the vehicle was injured and the assistant team leader had a knee injury. The Iraqi that was in the vehicle had a piece of shrapnel through his head. The other two people in that vehicle were killed. Twenty-eight civilians were also killed and many more were injured.

He was on the scene for about an hour and a half. They eventually went back to the hotel and into their offices, where he removed his body armor. He felt his chest closing up on him and he couldn't breathe. Some of the other team members assisted him, removed his body armor, and took him immediately to the medics. The medics determined something had gone wrong with his back. It was in a spasm, which made it hard to breathe properly. They rushed him to the hospital in the Green Zone.

The doctor at the hospital took him off duty for two days and said if he had more problems to return to the hospital, which he did. They then took him off duty and off the team while he stayed at the hotel. He probably went to the hospital three times before Employer decided to send him home to South Africa so he could see a specialist and find out exactly what problem he had with his back.

He was sent home either 21 or 22 Oct 04, which was 17 or 18 days after the incident. During that time, he only worked about three days. That was as a team member, which was very difficult. When he would put his body armor on, his back would go into spasms and it was very difficult to breathe. The body armor was part of the problem but didn't create the problem. It simply contributed to the fact that his back was already injured because there was extra weight on his back. The weight made the spasms come on much more quickly. He also had back pain and breathing problems when he was not wearing the body armor.

When he returned home to South Africa, all he had was a back injury. No other body parts hurt.<sup>37</sup> He chose to see Dr. Verrier, who had previously treated his daughter after a car accident. He was not sent to Dr. Verrier by Carrier, but went on his own. After two visits, Dr. Verrier referred him to Professor Brighton.

He saw Professor Brighton maybe two or three times, and got medications and injections for his lower back and neck. Neither Dr. Brighton nor Dr. Verrier signed a release to allow him to return to Iraq in December 2004. Dr. Brighton wrote a note stating that he should rest his back for four to six months. He was told to take it easy, not to lift anything heavy or put weight on his back and keep himself as quiet as possible during that time. He was not able to perform his

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<sup>37</sup> Claimant states that the back injury was causing pain in his lower back and neck, but that his predominant injury was to his back.

duties as team leader with those restrictions. The doctor's report was sent to Employer, so they knew of his restrictions.

He was told by the head of PSD at the time that he had to return to Baghdad because they couldn't afford to let him stay home for four to six months. He was told upon his return to Baghdad, he would be placed on light duty such as working in the Intelligence office. On 2 Dec 04, he returned to Iraq, but there were no job alterations made to accommodate his restrictions. The day he came back, he was called into the office and told that he had signed an employment contract and that he must be a team member and perform his duties as a PSD member from the moment that he returned. So, he performed his usual duties without accommodation for his back. That included working 24 hours a day, seven days a week, often wearing PPE. He complained to Employer and was told to carry out his duties because he had signed a contract.

If he had had a choice, he would not have performed the duties he did when he returned to Iraq, but he felt obligated to perform his duties, although they were strenuous and painful. During this time, he constantly went to the medics at the hotel for pain tablets. He also would go to the Green Zone hospital for treatment, which basically entailed physical therapy. On his leave, he would go home and see Professor Brighton. He does not have medical records from the medics. Employer should have the medical reports from the Green Zone. He has not had much luck getting that information.

In 19 Oct 05, he sprained his ankle. They were escorting one of the principals at one of the prisons in Baghdad and he stepped into a hole and twisted his ankle. As a precautionary measure, he was sent to the hospital to have it checked out. They took some X-rays, gave him medication, and said it was strained.

Somewhere around 12 or 13 Mar 06, he was sent home. Employer had a new head person in Iraq and who looked through the files and saw that he had been involved in an explosion. The new head person called him in, asked him what happened, and sent him home immediately for further treatment. The new head person said that he still clearly had a back injury and he must go back home until he is fully recovered, at which time he could come back to Iraq. He agreed with the new boss' assessment.

He returned to Plettenberg Bay and two months later moved to Port Elizabeth, about 120 miles away. Between March 2006 and the present day, he has seen Dr. Brighton at least four times. The last time he saw Dr. Brighton was November 2008, about a year ago. Dr. Brighton recommended that he see him every three months. The last medication refill he got was on 14 Nov 08, for the duration of eight months. He has not seen any doctors for his back since November 2008 and

has not engaged in any professional therapy, although he does exercises and has bought a machine to give himself back massages. The activities help a little bit to relieve the spasms, but he has to do it right away or otherwise it really doesn't help. He has to do the massages on a regular basis. He doesn't have a back injury on his spine. The pain is mostly caused by the nerve endings in the neck and lower back causing spasms. He has these spasms every day and certain activities cause the spasms. Dr. Brighten explained to him that his nerve endings have minute tears in them and with the activities he performed by wearing body armor and not resting his back, the nerve endings healed but increased in size. Now, instead of the nerve endings receiving the different fluids from the brain to activate the actual nerve ending, the nerve ending is now impulsing itself, and that causes spasms. When it happens, he cannot do anything. He has to stretch and try to do exercises because the longer he leaves his back like this, the worse the spasms get.

When he does not have spasms, his back is still limited. Over time, his back will get worse and stiffer. He cannot bend forward the way he used to. If he works with his hands out in front of him, such as when he washes dishes, he will have a spasm afterward. He cannot walk very far or stand very long, or he will have a spasm. If he stands for five or ten minutes, he will have a spasm. He can drive a vehicle, but only for short distances because he will have to take a break and stretch his back. When he sees Dr. Brighten, which is a 120 mile trip, he has to stop twice.

His last employment was with Employer in Iraq in March 2006. Since then, he has had no income other than from Employer. He has not worked as a carpenter since he returned from Iraq because he cannot bend or use machinery.

He saw no mental health professional before he returned from Iraq in March 2006. The only other time he saw someone was on the day of the explosion in October 2004, when Employer's psychologist came down to debrief them and ask if they were okay. He started to have psychiatric symptoms on his return in 2006. He didn't recognize the symptoms but his family did. He was short tempered while he was driving. He was not sleeping, withdrawing from conversations, and had lost interest in activities or hobbies he had been before he went overseas. Dr. Brighton referred him to Dr. Breedt because he said a lot of times pain is tied up with psychological problems and wanted to see if Claimant was putting up a psychological barrier. He has been seeing psychologist Dr. Chris Breedt since June or July 2006. Dr. Breedt picked up that he was suffering from PTSD. He saw Dr. Breedt on a regular basis. The last time he saw Dr. Breedt was in February 2009. At one point he was seeing Dr. Breedt once a week because the doctor was concerned about his severe depression, but due to expenses, he can't afford to see him that often.

From time to time he takes medication for his psychological issues when he finds it difficult to cope. He takes medication to calm down and medication to sleep. His symptoms are that he is detached, cannot sleep, and is irritable. Even if he did not have the back injury, he still could not be a team leader in Iraq. He still has three or four flashbacks a month about explosions or small arms fire. About twice a month, he also has nightmares where he is on a mission and is being attacked by either a car bomb or an IED. The nightmares affect his ability to function because he withdraws from activities, family, and friends.

In July 2009, he was diagnosed with a tumor on his pituitary gland. He has had two surgeries on it. The first surgery was unsuccessful and he is in the process of recovering from the second surgery, which was on 14 Sept 09. The neurosurgeon said that they would only be able to determine whether he was at 100-percent once all the swelling had dissipated, about three months after the operation. He is on hormone replacements since the surgery and has not taken any psychotropic medication since then.

***Incident report states in pertinent part that:***<sup>38</sup>

VBIED/SAF attack on 4 Oct 04 killed one person and injured several others. The team was enroute to the Green Zone when a car came alongside and detonated a bomb.

***Employer's injury report states in pertinent part that:***<sup>39</sup>

Claimant injured his back on 4 Oct 04 in Baghdad when insurgents detonated a VBIED next to the convoy. Claimant had a pinched nerve which caused muscle spasms.

***Dr. Stanley Brighton testified at deposition and his records and reports state in pertinent part that:***<sup>40</sup>

He is an active medical practitioner and is registered in rheumatology. He met with Claimant for the first time in May 2006 upon a referral from Dr. Verrier. Dr. Verrier did X-rays and an MRI that were within normal limits and he felt he had done what he could do as an orthopedic surgeon for Claimant, whose main physical problem at the time was shrapnel injuries. Claimant told him he was seen by the paramedics and a chiropractor who manipulated his neck because a vertebra had slipped. Claimant also told him that the following day he was in severe spasm

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<sup>38</sup> CX-1 & EX-9.

<sup>39</sup> CX-3 & EX-8.

<sup>40</sup> EX-14. CX-14-15(as cited see n. 4).

above his neck and his lumbar spine. Claimant said if he turned his neck, he could hear it clapping. Claimant did not have an actual spasm in his presence.

When he examined Claimant's spine, he noted that Claimant had a very flat lumbar spine. Some believe that could predispose him to back problems, but that is a controversial position. The flat spine is a genetic trait unlikely related to the explosion. Claimant's flexation was significantly reduced, his fingertip to floor measurement was minus 26 centimeters, which means Claimant was unable to bend. His bending was notably reduced and Claimant had significant pain when bending left or right. The straight leg test was 60 degrees to the left and 60 degrees to the right. His hips and trochanteric bursas were within normal limits. His neurological examinations were within normal limits.

When he examined Claimant's lumbar spine, he found severe pain and tenderness in his back upon flexation. The MRI showed no significant abnormalities. He told Claimant that everything points to the fact that he probably had a whiplash injury. He thinks there was marked whiplash of his neck between the helmet and the body armor, and his pelvis and legs were flung around by the explosion, whipping him against this heavy abdominal chest body armor. Whiplash is very common and if symptoms persist for any period of time, they tend to become very disabling and very chronic. There can be a stretching and/or bleeding of the soft tissue. Some suggest that there is damage to the nerve endings where the muscles and ligaments are joined to the spine.

He prescribed Baclofen for Claimant and gently manipulated his low back. He did a para vertebral lumbar block with Lidocaine. This involved injecting the Lidocaine into the solus space on either side of the spine, which often provides both a diagnostic test and marked relief of symptoms. It did nothing for Claimant. The fact that it did nothing may be significant because there is research showing that when it gives relief, it is blocking an inflammatory response coming from the discs. It indicated to him that there was probably no leaking disc. Since the MRI did not show a bulging or ruptured disc, there is not much evidence of disc damage. The injection would not have any effect on other cause of pain other than disc damage. It is unlikely the injection would have any effect on nerve damage. Whiplash is a logical conclusion. Prolonged recovery is very unlikely for Claimant, particularly because he did not have adequate early treatment. Such patients can pass into the chronic phase and by then it is very difficult to correct. Claimant reported having had sustained severe neck and low back pain upon returning to work.

As of 31 May 06, he believed Claimant had muscle spasms following a bomb explosion, had PTSD, and required psychological treatment as part of his chronic pain management.

He saw Claimant again on 19 Jun 06. Claimant reported some relief for the first day or so, but added that the pain came back as before, maybe due to the placebo effect. It's hard to say what impact Claimant's psychological complaints have on his physical pain. It's commonly accepted that the whiplash recovery rate is lower if there are underlying psychological factors. He gave Claimant Lyrica at full dosage and it had no effect whatsoever.

One of the psychologists or psychiatrists prescribed Amitriptyline in low dosage. He increased the dosage as that has been shown to be effective. Claimant said that sometimes it helps and sometimes it doesn't. Claimant has told him that he was using Sertraline, an antidepressant resulted in fewer spasms in his back, albeit at the same level of pain.

As of 2 Jul 06, he felt that Claimant had a whiplash injury but it was difficult to differentiate that from his underlying psychological problems because Claimant did not have proper counseling following the attack. He recommended that Claimant have both adequate psychological counseling as well as physical treatment for his underlying back problem. He recommended further therapy for three months followed by a full assessment.

On 20 Sept 06, he filed an OWCP-5a stating that Claimant may not work because of the whiplash injuries suffered in the bomb blast and PTSD. He opined that Claimant could do office work, but not his usual security detail.

On the visit of 14 Mar 07, Claimant's reported spasms were down from daily to two or three per week. Claimant still had to be careful, since any activity, could bring on a spasm despite the medication. Chronic pain that has continued for more than a few months can significantly delay the recovery process.

On 26 Jun 07, he filed a report stating that Claimant had back spasms that interfere with sleep and that Claimant needed psychological and pharmacological intervention. He opined that Claimant was unable to do any physical work because it triggers spasms, that Claimant needs additional therapy, and that he could neither return to his previous employment nor perform the physical labor previously required when Claimant owned his own business.

On 2 Jul 07, he filed an OWCP-5c confirming Claimant's work restrictions.

By 9 Mar 09, Claimant reported using Tramacet, an analgesic, which was helping with the back pain. The last time he saw Claimant was on 21 Dec 09. Claimant explained his pituitary surgery and the fact that another doctor had diagnosed PTSD. He was worried about this new information from Claimant and wondered

if the headaches could have resulted from the pituitary issue rather than the accident. This information came out of the blue. Claimant was unable to give him any information about how the tumor was discovered or if it was removed.

On a 16 Mar 09 report, he noted that Claimant was still in pain, that Claimant had a 2/9 Waddell's sign, not indicative of psychological causes of pain, and that Claimant is to be considered permanently disabled.

Claimant was a large man, slightly overweight, who could typically be able to hold a five kilogram weight. Sometimes psychological factors play into someone's physical condition but he was not aware of anything in Claimant's home circumstances. He does not believe that Claimant is capable of doing any work. He has tried to ascertain what work Claimant does. Claimant appears to be incapable of lifting anything in front of him. He briefly examined Claimant, who still had a marked tenderness of his spine and marked pain upon flexion/extension and side bending. Claimant had a one or two out of nine positive Waddell's signs.

Looking at the OWCP-5C form, he thinks that Claimant could walk maybe one kilometer in a half hour and that is consistent with what he believes Claimant can do currently. The form says that Claimant could stand for a half hour but he can't even do that anymore. He cannot reach forward and twist and partial rotation is very sore. Bending could be done for a very short period only. Claimant can operate a motor vehicle but not for very long distances. He has asked Claimant to come down from Port Elizabeth to see him which is 300 kilometers and three to four hours of driving. Claimant said he has to stop frequently and stretch his back. Repetitive activities of the wrists seem to be fine. His elbows are fine and he can push and pull and lift his arms without a strain forward. He cannot squat and must limit climbing on the stairs. Claimant more or less fits into his current status.

To treat Claimant in the future, he might suggest an epidural to inject cortisone into the spine, risotomy or a caudal block. The risotomy is not curative and may have to be repeated every six months. Another possibility is a discogram to provoke the pain pattern. He believes that Claimant is at MMI. He allows that Claimant may benefit from a multidisciplinary pain clinic in a properly constructed rehabilitation program, but his gut tells him it won't help.

*Dr. Lawrence J.S. Willies testified at deposition and his records and reports state in pertinent part that:*<sup>41</sup>

He is a retired orthopedic surgeon but for the past five years he has been doing medical/legal reports for the Road Accident Fund and other minor civil claims. He was flown up to Port Elizabeth in December 2009 to examine Claimant. He found Claimant to be terribly cooperative and took a general history. He was not provided much in the way of clinical information, which was very vague. Very few records were provided for his review, other than reports from Drs. Brighton and Verrier and the details of the history were very limited and possibly inaccurate.

He did a physical examination of Claimant's cervical spine, back and limbs. To perform the evaluation, he asked Claimant to go through a series of movements in all directions and a palpitation to see if there was any undue tenderness. He also checked the muscle tone of the cervical muscles. He did not find anything unusual but may have noted a bit of tenderness. He found a good range of motion for a man his age with some discomfort at the extremes of movement, but that was not a major issue. He had good muscle tone and there was no local tenderness in his cervical spine muscles. His flexation in the lumbrosacral spine was a little bit limited to the proximal third of his lower leg and other movements were reduced. He felt at the time that it was a little bit voluntary. Claimant wasn't prepared to extend himself but didn't have any undue pain or discomfort in the erector spinous muscles along the posterior iliac crest on both sides. That was not a significant issue. Other than that, there was nothing he could find wrong with Claimant's back.

In addition to examining the lumbar and cervical spine, he also did an examination of Claimant's upper and lower limbs from the neurological, vascular and muscle tone aspect. There was absolutely nothing he could find that would explain Claimant's complaints of pain. Claimant's main complaint was of muscle spasms, but in the short period of time he could examine Claimant, he was not able to elicit any spasms, although Claimant did state that after the examination, he experienced discomfort in his low back. At the time of the accident, Claimant was probably quite shaken up with muscle stretching and local bruising, but other than that, the MRI and the X-ray revealed no physical damage to the vertebral column. The MRI would have shown anything regarding the discs and the soft tissue.

There was no obvious wasting of his upper or lower extremities. With a case of inactivity, one would expect a person to be rather thin. Claimant certainly appeared physically to be within reasonable appearance for his age and within

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<sup>41</sup> EX-6 & 12.

normal activities. He certainly didn't look debilitated in any way. Claimant's muscle tone indicated to him that Claimant had lived a relatively active life.

Since Claimant said that if he did anything, he would get muscle spasms, he suggested an occupational therapist investigation to go through physical activities and assess what might have brought out these spasms that he could not elicit in his examination.

He thought that, taking into account the appearance of his muscles and limbs, Claimant may have been exaggerating bilateral weakness. He felt there was nothing physical to explain this weakness. He also noted that the sensory changes described by Claimant cannot occur anatomically. Claimant's lower back pain started in his buttocks and was circumferential down to his knees most of the time, occasionally down to his feet. That is not possible from an anatomical point of view because the nerves come out in dermatomes at various levels and it just doesn't happen that way.

Claimant told him that he had been instructed by Employer not to work until the case was settled. He thinks Claimant could quite easily carry out an administrative supervisory job where he investigates problems. He did not find anything that would prevent Claimant from physically going back to work at his usual employment. The body armor might cause some discomfort, but he thinks Claimant can still drive. Generally speaking, he thinks Claimant could cope with a reasonably physically active occupation. He finds it unusual that Claimant returned to work after a month or two against his doctor's advice but was able to work for 15 months without any undue problems.

A whiplash injury with no significant neurological deficit at the time tends to be relatively minor. Those injuries are generally settled within two years. The ones that have significant findings or symptoms are generally the ones that have long term problems.

After examining Claimant, he found nothing to explain the reasons for Claimant's pain symptoms. Claimant had no weight loss, no muscle wasting in upper and lower limbs, and his weakness appeared to be voluntarily exaggerated.

***Dr. Bruce Bradfield testified at deposition and his records and reports state in pertinent part that:***<sup>42</sup>

He is a clinical psychologist from Cape Town and has Honor's Degree and a Master's Degree in Clinical Psychology. He has worked with people with traumatic stress disorder and is working toward a doctorate with a specialization in the transmission of trauma between generations. Typically, his treatment plan for patients is between six months and one-and-a-half years, which is medium to long-term psychotherapy.

On 4 Dec 09, and 22 Dec 09, he met with Claimant for three hour sessions to assess the presence of post-traumatic stress pathology and to what extent it may be disrupting Claimant's life. Claimant had depression and anxiety. His depression symptoms included sadness, lack of interest in pleasurable activity, a tendency toward withdrawal and isolation, lethargy and tiredness. His anxiety symptoms included a heightened vigilance (he describes being relatively paranoid and scanning the environment to assess his safety), and a dissociative phenomena (numbing where Claimant detaches from his emotional experiences because it is too painful to stay conscious of it). His anxiety is precipitated by memories and cognition related to his traumatic experience. He attributes these symptoms to October 2004 when Claimant was traveling in a convoy in Baghdad when an explosion killed a member of his team and injured Claimant. Claimant has profound sadness and guilt related to a colleague who was sitting in the seat Claimant was supposed to occupy.

There was a delay in symptom presentation. Claimant returned to South Africa for awhile, then went back to Baghdad, and only after leaving Baghdad the second time did the symptoms surface. The delay is not inconsistent with the diagnosis of PTSD. The delay makes diagnostic sense because Claimant had remained present in the traumatizing environment and was unable to experience fully the range of emotions which could result from trauma. Claimant needed to numb his emotional experience by what is called dissociative phenomenon. The difference between a person who numbs himself and one who is able to cope with the symptoms and can function is a function of the degree to which the person finds the experience overwhelming. There was not much time between his returning to South Africa and the onset of symptoms, so once he had returned to a safe environment, he was able to fully experience the agonies of the traumatic experience.

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<sup>42</sup> EX-7 & 11.

He has reviewed Claimant's medical records from Dr. Chris Breedt in Port Elizabeth. Those records are consistent with the symptoms Claimant presented to him. The primary diagnosis he made for Claimant was PTSD with a secondary diagnosis of major depression. He believes the acute triggering event was the explosion described in Baghdad, with the subsequent accumulation of the day to day need to cope. He attributes the depression to survivor guilt because Claimant has expressed a lot of grief over the death of his friend in the explosion in Baghdad. He also attributes the depression to Claimant's steady and dramatic decline in functioning since his return to South Africa. His physical and emotional frailty, interpersonal withdrawal, and loneliness combine to precipitate his present state. Claimant has a variety of stressful thoughts in addition to his anxiety, which leads him to experience himself as very complicated, uncertain and afraid and results in psychic unrest.

Claimant described physical injuries to his back and pain that had not been adequately managed. Claimant also described being physically exhausted as there was no relief from the pain. He does not believe that Claimant is capable of psychologically returning to his job in Iraq because his anxiety and depression are so severe they impact his ability to function interpersonally. He believes that a return to Baghdad could precipitate an intensification of the anxiety and depression that have not been sufficiently treated. He believes that with the proper medium to long term treatment, Claimant may be able to return to work.

He would prescribe a 12-18 month treatment program for Claimant that would address anxiety and mood pathology. Claimant's treatment is complicated by the fact that he has gone untreated for some time, which has caused a deeper impact on Claimant than simply anxiety and depression, progressing to the personality level. With this in mind, he would suggest cognitive behavioral therapy combined with a more in-depth psychological-type therapy. Claimant may benefit from medications to stabilize his mood, relieve his depression and relieve anxiety as needed. He cannot say with certainty, however, that with treatment, Claimant would be in a psychological condition to go back to the war zone. He can say with certainty that it would dramatically improve his chances to return to health.

He believes that Claimant could currently engage in some form of employment and that the change would be beneficial and promote his return to health. He would allow Claimant to return to full time duty and Claimant could scale back if that work load was unmanageable. However, he would restrict Claimant to a low stress environment because he has the potential to experience seizures. Since Claimant's previous work was very physically demanding, it would be difficult for him to return to that.

Regarding Claimant's interpersonal difficulties and tendency to withdraw, he would have to find alternative coping mechanisms which do not impact so severely or disruptively on his interpersonal experience. He believes that Claimant may be capable of working as a clerk at a hardware store, because it could strike a balance between being demanding in general and is not beyond Claimant's interpersonal abilities. Claimant has certainly declined enormously from someone who prior to his traumatic experience was relatively personable and gregarious and now is someone who is completely withdrawn. He believes Claimant still has those interpersonal skills, but feels unable to use them.

His first interview with Claimant was cut short because Claimant had a seizure in his office about 30 minutes into the procedure. Stress seems to aggravate Claimant to a point where seizure is likely. This further complicates his neurological condition.

On 20 Dec 09, he assessed Claimant and made a provisional diagnosis of PTSD, citing hypervigilance, avoidance of interpersonal contact and withdrawal, nightmares, etc. He also diagnosed major depressive disorder, citing hopelessness/helplessness, lack of interest in pleasurable activities, interpersonal withdrawal, and sleep disruption. He opined that Claimant had not had an opportunity to process feelings of fear, anxiety, grief and guilt and it could take longer to treat him successfully. He opined that the back pain is complicating the prognosis and that Claimant has developed high risk behaviors as a result of his trauma. He recommended weekly psychotherapy with possible pharmacological intervention.

***B. Christoffel Breedt testified at deposition and his records and reports state in pertinent part that:***<sup>43</sup>

He is a clinical psychologist in Port Elizabeth. He has a Master's Degree in clinical psychology and has been in private practice since 1989. He does not have specialized training in PTSD, but worked at a military hospital in Victoria at a time when there was a major conflict in his country. He has also worked at a military base. He has worked with police, military, and private citizens and about 10 percent of his patients had PTSD.

He met with Claimant on 13 Jun 06. Claimant told him he was involved in an explosion in Iraq and was depressed about what happened. Claimant mentioned to him that he had strong feelings of detachment, but in the first interview there were elements that did not affirm PTSD. He did not complain of recurrent distressing thoughts or mention any flashbacks. He referred to friends he lost in Baghdad and

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<sup>43</sup> EX-15.

his injuries and the trauma related to that. Claimant told him he came back from Iraq because of physical symptoms, and not psychological symptoms. In March 2006, a friend of Claimant's died of a heart attack and he said he was having difficulties coping with it. The loss triggered a psychiatric issue because Claimant had also lost his mother in September 2005. While the loss of a friend and a loss of his mother seem like triggers unrelated to his accident in Iraq, he likens it to the pebble in the pond analogy. Certain things will happen to a person and they cannot compartmentalize it, so it can trigger what he was exposed to in Iraq.

He then saw Claimant on 21 Jun 06 and 11 July 06. As of June 2006, Claimant had an absence of PTSD symptoms but was living off high levels of adrenaline and was emotionally numbed by the constant exposure to danger of the convoys being attacked. He diagnosed major depressive disorder with anxiety and recommended treatment directed toward depression and Claimant's loss of friends. Claimant's chronic pain created frustration.

He noticed that especially in the July session more of the losses were linked to Iraq. The person who died had just switched positions with Claimant on the convoy. He attributes it to survivor guilt. The fact that Claimant did not express any psychiatric connection to the event until July 2006 is not unusual. In the Dutch culture a macho guy will not easily acknowledge that he was traumatized or is struggling, so Claimant would have suppressed it. It's really hard for guys with a background in the Special Forces like Claimant to speak to a psychologist or to acknowledge that they have any psychological problems.

As of 20 Sept 06, he believed Claimant had repressed PTSD, which did not surface earlier because of numbing emotions and the distraction of physical injuries. He diagnosed major depressive disorder with anxiety and delayed onset, chronic PTSD. He filed an OWCP-5a opining that Claimant is not competent to work eight hours per day and treatment needed to be completed before prognosis could be assessed.

He saw Claimant 15 times, with the last visit on 20 Oct 08. He diagnosed Claimant with major depressive disorder with anxiety and delayed onset, chronic PTSD. It is difficult to say whether Claimant will need additional psychiatric care, but he thinks treatment should still be available to him for depression and PTSD. The last time he saw Claimant, Claimant was not in a very good place. He was irritable, verbal, expressive, angry, and having flashbacks and nightmares coming back. He was also sad, tearful, depressed at times and not sleeping well. Claimant did tell him that he had used antidepressants but there was a question regarding the effectiveness of the medication. He would likely have had Claimant's medication rechecked. This was a fall-off from his previous level because he had been in a

better place before. He would have suggested Claimant continue with the psychiatric treatments.

On 17 Nov 08, he filed a report stating that he changed his assessment and opined that Claimant had PTSD. He noted that Claimant was less defensive as treatment progressed and was being more open about his fears and showing less denial and repression. He amended the diagnosis to include PTSD and cited numerous reasons (horrific experience, flashbacks, conversation avoidance, detachment, difficulty sleeping, irritability, etc.) for the change in diagnosis.

He has not been getting paid for treating Claimant and that may influence his situation. Claimant initially paid him out of pocket but could not keep that up. But he is not really sure what happened with the financial situation. He thinks that Claimant may have been financially strained and was unable to pay him and it may have caused him to stop coming for treatment. His physical condition from the injury to his back would definitely have an effect on his depressive condition.

He does not think that Claimant can go back to a similar environment, but believes that from a psychological standpoint he can likely return to work in a different environment, perhaps woodworking, as he did before. Claimant can do something in a safe environment, but he would be concerned if Claimant were to return to an environment where he did patrols or got into acute danger situations in a war-like environment. He would not recommend that Claimant become a patrolman because the danger element is still there. He may be able to be a security guard depending upon where it is, but in South Africa, it may not be a suitable job for him based upon the level of local violence.

***Claimant's Employment contracts state in pertinent part that:*<sup>44</sup>**

He was being employed as a PSD team member making \$130,910 annually. The contract term was one year.

***Department of Labor forms state in pertinent part that:*<sup>45</sup>**

Claimant received his final indemnity payment on 6 Dec 04 after returning to work in Iraq on 7 Dec 04. Claimant was paid temporary partial disability benefits from 26 Oct 04 through 6 Dec 04 and temporary total indemnity benefits from 24 Mar 08 through 10 Sept 08. The last payment was made on 4 Sept 08. The claim was controverted on 08 May 09.

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<sup>44</sup> CX-4, 5 & 6.

<sup>45</sup> CX-9-11.

***Claimant's medical records state in pertinent part that:***<sup>46</sup>

Claimant was referred to medical care for cervical and lumbar pain following a VBIED on 4 Oct 04. He was restricted to wearing PPE only in life-threatening situations for the next two weeks.

On 26 Oct 04, Claimant saw Dr. Verrier who placed him on off-work status for a back/neck injury from 22 Oct 04 until 2 Dec 04. Dr. Verrier opined that Claimant's MRI was within normal limits but he had a soft tissue injury of the spine and should be excused from wearing PPE for three months. He also prescribed physical therapy.

On 18 Dec 05, Dr. Bruce Ritchie, a chiropractor, had been treating Claimant for a sprain/strain of the lumbar and cervical spine consistent with whiplash and opined that such pain can persist for five to 15 years. Claimant was treated with manipulative, massage and myofascial therapy but still required treatment and was not fully recovered.

***Claimant's medical bills state in pertinent part that:***<sup>47</sup>

Claimant made several thousands of dollars in payments for medical bills to various health care providers (Brighton, Verrier, Scribante, Chiropractic Health Care, Malberbe, Basson, Willemien Meint Jes, Breedt, Taylor,) between 27 Oct 04 and 9 Mar 09.

***Employer's travel records state in pertinent part that:***<sup>48</sup>

He has traveled 8388 kilometers to visit doctors from 3 Dec 05 through 9 Mar 09.

## **ANALYSIS**

Claimant alleges two injuries resulted from the explosion and subsequent fire fight he was involved in on 4 Oct 04. He claims he suffered an immediate injury to his back that caused him to miss work from the date of injury until he returned to work on 2 Dec 04. He worked without accommodation and in pain from that date until 13 Mar 06, when he was sent home. Once home, he experienced the onset of post traumatic stress disorder (PTSD) and has been unable to return to work since.

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<sup>46</sup> CX-14 (as cited see n.4) & EX-5.

<sup>47</sup> CX-15.

<sup>48</sup> CX-18.

Although the Claimant's testimony was presented by deposition and I was unable to observe him, I found his testimony to be very credible and consistent with the accident and medical records submitted into evidence. When Employer questioned how Claimant was able to return to work in Iraq for more than a year with an alleged back injury, Claimant credibly explained that he had been told modified duty would be available and returned to his duties, despite the fact that he had not been released by his doctor. The medical expert testimony corroborated his testimony about the delayed onset of his PTSD. Claimant continued to pay some of his medical and psychological providers out of pocket, even when those medical expenses were denied

### Physical (Back) Injuries

Employer concedes that Claimant suffered a work-related injury following a bomb blast on 4 Oct 04, but alleges that Claimant currently has no physical reason why he cannot return to his original employment. Claimant testified in deposition that he has spasms every day and that when he gets spasms, he cannot do anything, but must stretch or do exercises because the longer the spasms persists, the worse his condition gets. He added that even when he does not have spasms, his back is still limited and he cannot bend forward or work with his hands out in front of him. He testified that he can drive, but not for long distances and not without stretching his back.

Claimant's testimony is corroborated by his treating physician, Dr. Brighton, who believes that Claimant sustained a whiplash injury when Claimant was violently thrown about in a bomb blast while wearing body armor. He concedes that Claimant's injuries are not apparent in his MRIs but he opines that Claimant's pain likely results from nerve damage and is now chronic because of inadequate early treatment. He also noted it was difficult to determine what role Claimant's psychological problems play in his back condition. Nonetheless, Dr. Brighton concludes that Claimant is not capable of doing any physical work (either in South Africa or in Iraq) because he cannot lift anything in front of him and placed him at MMI as of 16 Mar 09.

On the other hand, Dr. Willies, a retired orthopedic surgeon hired by Employer to evaluate Claimant, found good range of motion, good muscle tone indicative of a body without debilitating pain, and a possible exaggeration of pain symptoms. Dr. Willies asserts that Claimant's X-rays and MRIs revealed no physical damage and that he was unable to elicit spasms while examining Claimant. He notes that whiplash injuries usually resolve in two years and could find no objective reason Claimant could not go back to work at his usual employment.

It is clear that Claimant injured his back, was able to return to work for a sustained period, and stopped only when his supervisor told him to be evaluated. However upon his return home, his treating doctor restricted him from returning to that job. I give greater weight to that opinion because Claimant's treating physician had an opportunity

to evaluate Claimant more closely and for a longer period of time. Thus, I therefore find that, due to his back injury, Claimant cannot return to his original employment and in the absence of suitable alternative employment, I find that Claimant's back injury rendered him totally disabled and permanently so as of 16 Mar 09.

### PTSD

Claimant's testimony and the medical expert evidence is essentially unanimous in supporting a finding that Claimant suffered from PTSD that is a consequence of the 4 Oct 04 explosion and firefight, but did not become manifest and symptomatic until his second return from Iraq in March 2006.

Claimant testified that although he did not recognize the symptoms, his family noticed that he was short tempered while driving, not sleeping and withdrawing from people and conversations. Claimant also testified that even without the back injury, he still does not believe he could be a team leader in Iraq because he still has three or four flashbacks a month about explosions or small arms fire and continues to have nightmares that he is being ambushed. Both mental health care professionals attribute his current stress symptoms to the attack by insurgents in Iraq on 4 Oct 04. The evidence is more than sufficient to invoke the Section 20(a) presumption.

That places on Employer the burden of producing substantial evidence in rebuttal. Employer cited that the fact that Claimant was able to return to work for a period and could still perform work-related duties as long as it was not in a combat area as evidence rebutting the existence of a psychiatric injury or its nexus to the explosion. Neither argument is persuasive and I find that Employer was unable to rebut the presumption. Even if it had been able to do so, I still would have determined that the weight of the evidence demonstrates the attack caused Claimant to suffer from PTSD. Claimant's mental health care providers provided a credible explanation for the delay in onset.

The two testifying providers supported Claimant's testimony. They stated that Claimant is not capable psychologically of returning to his job in Iraq because his anxiety and depression are so severe that they impact his ability to function interpersonally; that a return to Baghdad could precipitate an intensification of the anxiety and depression which to date have not been sufficiently treated; and that Claimant cannot return to a dangerous environment such as Baghdad. Therefore, I find that Claimant is unable to return to his original job because of his PTSD and in the absence of suitable alternative employment is totally disabled.

I further note that both providers recommend a long term treatment program, and I therefore find that Claimant has yet to reach MMI for his psychological injuries.

### **DECISION AND ORDER**

1. Claimant suffered a compensable physical injury to his back as a result of an insurgent attack in Iraq and became temporarily totally disabled on 4 Oct 04.
2. Claimant's average weekly wage (AWW) at the time of his injury was \$2,937.06.
3. Claimant remained temporarily totally disabled until he returned to work on 2 Dec 04.
4. Claimant once again became temporarily totally disabled on 13 Mar 06. He reached MMI related to his back as of 16 Mar 09, and became permanently totally disabled as to his back on that date.
5. Claimant suffered a compensable psychological injury for which he became temporarily totally disabled as of 01 Apr 06 to the present and continuing.
6. Employer shall pay Claimant temporary total disability compensation for his back injury from 04 Oct 04 through 01 Dec 04 based on his average weekly wage.
7. Employer shall pay Claimant temporary total disability compensation for his back injury from 02 Dec 04 through 01 Apr 06 based on his average weekly wage.
8. Employer shall pay Claimant temporary total disability compensation for his back and psychological injuries from 02 Apr 06 through 16 Mar 09 based on his average weekly wage.
9. Employer shall pay Claimant temporary total disability compensation for his back injury from 17 Mar 09 to the present and continuing based on his average weekly wage.
10. Employer shall provide Claimant with reasonable, appropriate, and necessary medical care in accordance with Section 7 for his mental and physical injuries.
11. Employer shall receive credit for all compensation heretofore paid, as and when paid.

12. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.<sup>49</sup>
13. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.
14. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.<sup>50</sup> 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. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

**ORDERED** this 10<sup>th</sup> day of August 2010, at Covington, Louisiana.

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**PATRICK M. ROSENOW**  
**Administrative Law Judge**

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<sup>49</sup> Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984).

<sup>50</sup> Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. Gen. Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director.