



Issue Date: 10 June 2010

OALJ CASE NO.: 2010-LDA-00047

OWCP NO.: 02-186066

In the Matter of:

CHARLES J. KOVACS,
Claimant,

v.

MPRI, INC. / L-3 COMMUNICATIONS,
Employer,

and

ACE AMERICAN INSURANCE, CO.,
Carrier,

and

DISTRICT DIRECTOR, OWCP,
Interested Party.

DECISION AND ORDER AWARDING BENEFITS

This claim arises under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, as extended by the Defense Base Act, 42 U.S.C. § 1651 (the "Act"). I admitted the following exhibits into evidence at trial: Claimant's exhibits ("CX") 1-5 and 7-14; Employer's exhibits ("EX") 1-6; and Administrative Law Judge exhibits ("ALJX") 1-9. Hearing Transcript ("TR") at 10-14.¹ After trial, I admitted Claimant's posttrial brief into evidence on April 15, 2010 as ALJX 10 and Employer's posttrial brief into evidence on April 30, 2010 as ALJX 11, thereby closing the record.

I. Procedural History

On March 23, 2009, Charles J. Kovacs ("Claimant") filed a claim for compensation alleging disability in the form of posttraumatic stress disorder ("PTSD") as a consequence of work performed while employed by MPRI, Inc. / L-3 Communications ("Employer") as a police trainer in Iraq. CX 2 at 1. Employer controverted Claimant's claim for compensation on April 24, 2009. CX 3 at 1.

On February 3, 2010, Employer submitted a motion for summary decision arguing for dismissal of Claimant's compensation claim due to the absence of a genuine issue of material fact regarding the timely filing of Claimant's compensation claim. ALJX 9 at 1. Employer argued Claimant became aware of his alleged injury as early as April 2007, and therefore Claimant's filing of his LS-203 was untimely under both §§ 12 and 13 of the Act. ALJX 9 at 1-2. Claimant responded to Employer's motion, arguing his disability was in fact an occupational disease of which he did not become aware until September 24, 2008. *Id.* at 2. As such, Claimant believed the filing of his LS-203 fell clearly within the one-year and two-year provisions for notification of the employer and filing of a claim respectively set forth in §§ 12(a)

¹ At trial, I took CX 6 under submission. TR at 10. For the reasons stated below, I reject this exhibit.

and 13(b)(2) of the Act. *Id.*; 33 U.S.C. §§ 912(a), 913(b)(2). On February 12, 2010, I issued an Order Denying Employer's Motion for Summary Decision ("February 12 Order"). ALJX 9. In the February 12 Order, I found a genuine issue of material fact existed as to the characterization of Claimant's alleged disability as an occupational disease or injury. *Id.* at 3. This finding therefore served as a basis to preserve Claimant's compensation claim so that further determinations could be made as to Claimant's credibility and when he became aware of having PTSD. *Id.*

On February 25, 2010, I conducted a formal hearing into this matter in Las Vegas, Nevada.

II. Stipulations

The parties agreed to the following stipulated facts at trial:

1. The Act applies to Claimant's compensation claim.
2. An employer-employee relationship existed between Employer and Claimant at the time of Claimant's alleged injury or development of an occupational disease.
3. Claimant had reached maximum medical improvement at the time of trial.²
4. Claimant suffered from depression problems prior to his tenure with Employer.

TR at 5-6.

III. Issues in Dispute

Claimant presents the following issues for determination:

1. Did Claimant suffer an injury or occupational disease as a result of his work for Employer?
2. If Claimant did suffer an injury or occupational disease, is he entitled to temporary or permanent disability benefits and, if so, for what periods of time and at what rates?
3. What is the proper average weekly wage?
4. Did Claimant timely file and timely give notice to Employer of his claim?

ALJX 10 at 1. Additionally, should Claimant be entitled to compensation, the Employer seeks a determination of its entitlement to special fund relief under § 8(f) of the Act. TR at 14-15.

IV. Summary of Conclusions

For the reasons given below, I find Claimant suffers from a permanent total disability in the form of PTSD that was caused by the circumstances of his employment with Employer. Furthermore, Claimant's PTSD in this case constitutes an occupational disease, making the notification to Employer and filing of his claim timely under §§ 12(a) and 13(b)(2) of the Act. Consequently, Claimant is entitled to compensation at the weekly rate of \$1,160.36 beginning on September 24, 2008, which is to be increased annually according to the provisions contained in §§ 10(f) and 10(g) of the Act.

V. Background

Claimant was sixty-nine years old at the time of the hearing in this case. TR at 22. He was born in Detroit, Michigan, where he completed high school in 1959. *Id.* After completing high school, Complainant enlisted in the U.S. Army, where he served for thirty-eight months before being honorably

² The parties did not stipulate to a specific date on which Claimant reached maximum medical improvement.

discharged. *Id.* at 22-23. After his Army tenure, Claimant briefly worked as a hi-low truck driver. *Id.* at 23.

Claimant began a career in law enforcement in 1964 by joining the Wayne County Sheriff's Department in Michigan in 1964. *Id.* Claimant worked with the Sheriff's Department for two years until joining the Michigan State Police in 1966. *Id.* For his first ten years as a state police officer, Claimant served in the occupation of "road officer," after which time he received a promotion to sergeant. *Id.* Upon obtaining the rank of sergeant, Claimant transferred to the detective division, where he served as a case detective and did surveillance work. *Id.* Claimant served in this position for twelve years, after which he became a desk sergeant. *Id.* Claimant then served as a desk sergeant for three years before retiring from the Michigan State Police force after twenty-five years of service. *Id.*

Claimant and his wife moved to Las Vegas, Nevada, shortly after his retirement. *Id.* at 24. Once in Las Vegas, both Claimant and his wife procured jobs with the Clark County School District, Claimant as a police officer and his wife as a secretary in a dean's office. *Id.* Claimant worked for eleven more years as a police officer at what he described as an "at-risk school" in Clark County before retiring from this position in 2004. *Id.*

A. Claimant's Work History with Employer

Following his stateside law enforcement career, Claimant became interested in contract work as a police trainer in Iraq. This work began with a three-month stint with DynCorp International ("DynCorp") in March 2005. *Id.* at 24-25. Claimant testified he felt his background could be "an asset to the Iraqi police departments," and he consequently applied to be a police trainer. *Id.* at 25. During this period of employment, Claimant spent time in Baghdad, Diwaniyah, and Al Kut.³ *Id.* Claimant stated he took and passed – as part of his qualification for the police trainer position with DynCorp – the Minnesota Multiphasic Personality Inventory – 2 ("MMPI-2"). *Id.* Claimant further noted approximately twenty-five percent of the other applicants in his training class with DynCorp did not pass the MMPI-2, a consequence resulting in those applicants being rejected for work in Iraq. *Id.* Claimant testified he arrived at this estimate due to the fact that his training class was "down [by] approximately [twenty-five] percent" after a weeklong training class at which the trainees stayed together at a motel and during which the MMPI-2 was administered. *Id.* at 66-67. Claimant characterized his work with DynCorp as "successful." *Id.* at 26.

Claimant's involvement with Employer began almost immediately upon his return from his three-month stint in Iraq with DynCorp, although he did not return to his role as a police trainer for almost a year due to the length of the application process. *Id.* at 26. Claimant testified he completed his work with DynCorp in June 2005, and "within a month applied to" work for Employer. *Id.* Claimant again applied to be a police trainer and, after successfully completing Employer's own application process, began such work under a one-year contract with Employer sometime in late May 2006. *Id.* at 27; *see* EX 6 at 1; CX 5 at 3.

As with his employment in Iraq with DynCorp, Claimant again worked in multiple Iraqi cities as a police trainer with Employer. Claimant began his employment in the Baghdad Police College and worked there until December 2006. TR at 28. In December 2006, Employer transferred Claimant to Diwaniyah, where he lived at Camp Echo. *Id.* It was during Claimant's time at Camp Echo that he alleges he came under rocket and mortar attacks. *Id.* at 16.

³ The Hearing Transcript refers to Claimant's serving in "El Coot." *See, e.g.,* TR at 25. However, Iraq contains no such city. I therefore presume "El Coot" to be only an incorrect phonetic transcription of Claimant's pronunciation of this location.

Claimant testified extensively as to the frequency and circumstances surrounding attacks on his living quarters while working for Employer in Iraq. According to Claimant, the base on which he lived while in Baghdad received “very infrequent” enemy fire. *Id.* at 28. Claimant further stated that these intervals of such attacks were initially the same upon his arrival in Diwaniyah, which he described as “quiet” during the time he spent there at the end of 2006. *Id.*

Claimant described intensifying attacks on Diwaniyah in 2007 as the circumstances leading to his diagnosis of PTSD. When initially questioned about these attacks by his attorney, Claimant described these more frequent attacks as beginning in January 2007. *Id.* at 29. Claimant here described his position at Camp Echo in Diwaniyah “getting rocketed and mortared, basically on a daily basis.” *Id.* Claimant described one break in this pattern of attacks associated with the presence of a “striker unit” in the area. *Id.* at 29-30. According to Claimant, the striker unit’s presence resulted in a three-week respite from the attacks; however, once the unit left the Diwaniyah area, the attacks again resumed upon the base at which Claimant was located. *Id.* at 30.

Claimant described several details associated with the attacks, including damages to the base and casualties associated with the attacks. He noted he would usually take shelter in concrete sewer pipes positioned on the base during the attacks; however, he stated he often could not recall how he had arrived at the shelters once an attack began. *Id.* at 32. He described the shelters as pipes three to four feet in diameter and covered with sandbags. *Id.* Claimant stated he was issued personal protective gear, and testified he would carry such gear with him to the shelters if such attacks woke him from his sleep. *Id.* at 30. Claimant also stated he associated the possibility of “a physical assault on the camp” following each mortar attack on the base, *id.*, although he presented no evidence that such an assault ever occurred. Claimant described two instances of casualties resulting from the attacks. In one instance, Claimant witnessed shrapnel from one of the mortar attacks kill a single American soldier. *Id.* In the other instance, mortar fire landed on the camp’s laundry facilities and consequently killed several people. *Id.* at 31. Claimant attempted to offer assistance after this attack, noting he could “smell . . . [bodies] burning inside” upon arriving at the site of the destroyed laundry facilities. *Id.* at 30-31.

Claimant’s attorney presented him with certain exhibits to review at trial following his testifying independently as to the circumstances, frequency, and duration of the mortar attacks in Diwaniyah. At the beginning of trial, however, I took under submission the issue of the admissibility of one of these exhibits – an anonymous blog entry submitted by Claimant that purportedly describes the circumstances and frequency of the mortar attacks during his stay in Diwaniyah. *See id.* at 33; CX 6. In his closing brief, however, Claimant offers no argument as to why such a document should be admitted into evidence. While hearsay evidence is admissible in these proceedings, it is only allowed if found to be reliable. *See A. M. Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154, 157 (1990) (citing *Richardson v. Perales*, 402 U.S. 389, 402 (1971)). In this case, Claimant fails to demonstrate how an anonymous blog is in any way reliable. I therefore exclude Claimant’s Exhibit 6 from the record.

Claimant’s attorney also presented Claimant with excerpts from a second report purporting to describe the circumstances in Diwaniyah during Claimant’s tenure there. This second report is entitled “The Fight for Diwaniyah: The Sadrist Trend and ISCI Struggle for Supremacy” (“Diwaniyah Report”) and was authored by Patrick Gaughen of the Institute for the Study of War. *See CX 7* at 6. In relevant part, the Diwaniyah Report states that “[c]ontrol of Diwaniyah was first contested in April 2007, after the headquarters of Multi-National Division – Central South (MND-CS) at Forward Operating Base (FOB) Echo had been exposed to months of repeated indirect fire by [Mahdi Army] militants.” *Id.* at 8. The Diwaniyah Report next notes that, as a result of the operations of a joint American-Iraqi force, “Shi’a extremists were detained” and “a brief drop in indirect fire attacks” resulted. *Id.* However, after these troops exited the area “indirect fire attacks on FOB Echo rose . . . and would average of 100 a month

through September [2007].” *Id.* When asked if this description accurately coincided with his own recollection of the frequency of mortar attacks and the intervention of the striker unit to which he had testified, Claimant agreed. TR at 33-36.

On cross-examination, Claimant admitted to providing information to Employer characterizing the rocket and mortar attacks as occurring “for six weeks, five times per week” during his contract with Employer. *Id.* at 59. Claimant testified to putting this information in an email to Kathy Marianelli, a representative for Employer, and confirming to Ms. Marianelli that such information was correct. *Id.* at 57-59; *see* EX 6 at 42; CX 5 at 5. Employer’s counsel concluded from this information that such attacks occurred only during the final six weeks of Claimant’s tenure with Employer in Iraq, *id.* at 59, although no citation to the record was given to support such a conclusion that the attacks occurred exclusively during this period of time. Claimant’s LS-203, dated March 23, 2009, indicates the rocket and mortar attacks occurred during March and April 2007. CX 2 at 1. However, Claimant continued to state on cross-examination that these attacks began in January 2007. TR at 59.

B. Claimant’s Activities and Symptoms Upon Returning from Iraq, Including His Medical Treatment and Independent Medical Examination

Upon completing his year-long contract with Employer in May 2007, Claimant returned to live with his wife in Las Vegas. *Id.* at 36. According to Claimant, some time after returning to the United States he began to notice “there were a lot of things . . . that weren’t quite the same.” *Id.* Claimant elaborated by describing problems sleeping, loss of libido, and his becoming antisocial and more irritable. *Id.* at 37. Claimant described enjoying activities such as attending hockey games with his wife, gardening, and socializing with friends and acquaintances prior to working in Iraq with Employer, but noted he no longer enjoyed engaging in such activities after his return from Iraq. *Id.* at 37-38. Despite the fact Claimant would later learn such symptoms were associated with PTSD, he testified to having no knowledge such symptoms were associated with PTSD upon his return from Iraq. *Id.* at 38.

Claimant’s diagnosis with PTSD came by way of conversations with other veterans and several visits to medical professionals employed by the U.S. Department of Veterans Affairs (“VA”). Claimant first spoke to other veterans about his symptoms and feelings, noting such conversations sometimes ended with these veterans recommending Claimant seek professional help as he may have PTSD. *Id.* at 38-39. After his discussions of his symptoms with other veterans, Claimant then sought treatment from the VA, where he first saw Dr. Zimmerman, who Claimant testified was “a medical doctor.”⁴ According to Claimant, Dr. Zimmerman referred him to a psychologist, “Mr. Earl.” *Id.* at 39-40. Claimant stated he then visited Mr. Earl sometime in August 2008, who suspected PTSD and further referred Claimant to see a psychiatrist, Dr. Graham. *Id.* at 40. Claimant stated Dr. Graham “made out some forms” and “asked [him] some questions” before referring him to Dr. Herbert Goldman. *Id.* Dr. Goldman then diagnosed Claimant with PTSD. *Id.*; CX 1 at 4.

Claimant’s medical records from the VA – although incomplete so far as they were submitted to the Court when compared with Claimant’s testimony – contain numerous diagnoses of PTSD from various medical professionals. On September 24, 2008, Dr. Stephen Billmyer diagnosed Claimant with PTSD. CX 1 at 2. In doing so, Dr. Billmyer noted Claimant’s experiencing mortar attacks while working in Iraq as well as his trouble sleeping since his return. *Id.* at 3. On October 9, 2008, Dr. Goldman also diagnosed Claimant with PTSD. *Id.* at 4. Dr. Goldman in his notes from this visit with Claimant additionally diagnosed chronic depressive disorder, for which Dr. Goldman consequently increased

⁴ As is detailed below, Claimant sought treatment from a number of medical professionals within the VA. Aside from the position descriptions listed below their signature lines in his medical records, however, Claimant offers no evidence of the qualifications or credentials possessed by any of these professionals.

Claimant's dose of Venlafaxine. *Id.* at 4, 9. Dr. Goldman also noted Claimant's admission of suicidal ideation and "crying spells," but stated the former had ceased after Claimant had discussed the ideations with his wife. *Id.* at 8.

On October 24, 2008, Claimant again visited Dr. Billmyer, who characterized Claimant as "bored with retirement," but noted during the visit that Claimant was "the least pressured and most mellow since I've known him," possibly as a result of recently prescribed medications. *Id.* at 11.

On November 14, 2008, Claimant visited with Mr. Nick Clough, a clinical nurse specialist with the VA. Mr. Clough noted Claimant's complaints of increased "chronic, intermittent" suicidal ideation, increased startle response, and increased hypervigilance as well as Claimant's disinterestedness in attending group sessions for his PTSD at the VA. *Id.* at 13. Claimant did express a desire, however, to seek out one-on-one psychotherapy. *Id.*

On December 16, 2008, Claimant again saw Dr. Goldman, who characterized Claimant as "very depressed." *Id.* at 15. Claimant stated to Dr. Goldman "that nothing has meaning for him anymore" and that he spent most days "puttering" around his house and watching hockey games on television. *Id.* Dr. Goldman also noted Claimant's description of repeated suicidal ideation, but further noted Claimant's statements that he had not formulated any plan to act on such ideations. *Id.*

On December 30, 2008, Claimant attended a group therapy session at the VA. *Id.* at 16. Dr. Sean Zielinski, a psychologist, facilitated the therapy session, which focused on the attendees' improving interpersonal relationships. *Id.* After the meeting, Claimant met in a smaller group with Pat Duncan, a social worker, where Claimant stated he would consider attending the group therapy sessions on a regular basis. *Id.* at 15-16.

On January 13, 2009, Claimant again saw Dr. Billmyer. *Id.* at 17-19. Dr. Billmyer noted Claimant's "mental anguish from experiences in Iraq" continued and again diagnosed Claimant with PTSD. *Id.* at 18-19. Dr. Billmyer did note, however, that Claimant had begun attending group therapy sessions at the VA as well as exercised five days per week. *Id.* at 19.

On February 3, 2009, Claimant again saw Dr. Goldman for treatment of depression and PTSD. *Id.* at 19-21. During this visit, Claimant complained of "bad thoughts," which included harming dogs; suicidal ideation; and being "fed up with everything." *Id.* at 20. Dr. Goldman again diagnosed Claimant with PTSD and depression. *Id.*

On February 26, 2009, Claimant again saw Dr. Zielinski for treatment of PTSD, depressive disorder, and personality disorder with borderline passive-aggressive features. *Id.* at 24-25. Dr. Zielinski's notes from this visit give Claimant a score of fifty on the Global Assessment of Functioning ("GAF") test. *Id.* Claimant described to Dr. Zielinski during this visit experiencing mortar and rocket attacks approximately five times per week for a duration of six weeks in Iraq. *Id.* Claimant further described himself as "depressed most of life" and recently experiencing flashbacks and nightmares of his experiences while in Iraq. *Id.* Claimant stated he no longer attempted to associate with other people as a result of his PTSD symptoms and his interest had waned in activities he before found enjoyable. *Id.* Claimant also for the first time in his VA history described hearing voices. *Id.* at 22. As a consequence of his interactions with Claimant and review of his record, Dr. Zielinski diagnosed Claimant with chronic PTSD, depression, and personality disorder. *Id.* at 22. Dr. Zielinski further characterized Claimant as someone who "lacks insight" and is "extremely dogmatic" based on what Dr. Zielinski characterized as Claimant's racist views. *Id.* at 21, 23. Dr. Zielinski concluded such statements by Claimant were indicative of a mentality that would not be conducive to therapy sessions, and therefore recommended a course of antidepressants as a method of treatment for Claimant. *Id.* at 21.

On March 3, 2009, Claimant attended another group therapy session at the VA. *Id.* at 25. Dr. Zielinski again facilitated the therapy session, which twenty-one veterans attended and which focused on developing positive responses to negative feelings. *Id.*

On April 8, 2009, Claimant again saw Dr. Zielinski for treatment of severe and chronic PTSD. *Id.* at 30. During this visit, Dr. Zielinski noted in Claimant's file that Claimant had been "gang raped" while serving in the U.S. Army from 1959 through 1962. *Id.* Claimant, however, testified at trial that this incident involved him being held down by a group of soldiers Claimant perceived to be intoxicated while one of the soldiers sexually assaulted him. TR at 43-44. Dr. Zielinski's notes from the April 8, 2009 meeting indicated Claimant achieved a score of thirty-five on the GAF, and Dr. Zielinski again diagnosed Claimant with PTSD, depression, and personality disorder. CX 1 at 28-30. Dr. Zielinski further concluded Claimant's symptoms and complaints led him to the conclusion that Claimant should be considered permanently and totally disabled. *Id.* at 27. On April 15, 2009, Dr. Zielinski amended his April 8, 2009 report at the request of Claimant. *Id.* at 25-27. This change came as a result of an April 12, 2009 letter from Claimant to Dr. Zielinski regarding Dr. Zielinski's notes about Claimant's relationship with his father as well as his characterization of Claimant as having "racist ideology." *Id.* at 25-26. While Dr. Zielinski admitted to mistakenly characterizing Claimant's relationship with his father based on the prior notes of other medical professionals at the VA, he refused to change his characterization of Claimant as racist and continued to believe such ideology constituted a barrier to Claimant's successful utilization of therapy as a means to combat his PTSD and chronic depression. *Id.* at 26-27.

On April 16, 2009, Claimant saw Dr. Mojtaba Motlagh for medication management and psychotherapy regarding his PTSD and depression. *Id.* at 33. Dr. Motlagh noted Claimant had discontinued taking antidepressants and characterized Claimant as neither racist nor having been abused as a child by his father based on a conversation with Claimant. *Id.* at 32. Dr. Motlagh further noted Claimant's complaints of nightmares and insomnia related to both his experiences in Iraq as well as the sexual assault Claimant experienced while in the Army. *Id.*

On July 2, 2009, Dr. Zielinski issued a letter stating Claimant was permanently and totally disabled. *Id.* at 34. Dr. Zielinski attributed Claimant's PTSD as "more likely than not" the result of his work in Iraq. *Id.* In the letter, Dr. Zielinski noted Claimant's then undergoing treatment for PTSD as well as his suffering numerous symptoms and psychiatric conditions, including "severe, chronic depression, anger, irritability, labile mood swings, chronic insomnia, flashbacks, periodic nightmares, anhedonia, difficulty dealing with people, and social withdrawal." *Id.* Dr. Zielinski issued a similar letter on December 10, 2009. *Id.* at 40. Claimant also agreed with assessment so far as it reflected his ability to obtain employment given his PTSD. TR at 42-43. Claimant testified to experiencing problems with everyday tasks such as getting out of bed and leaving the house. *Id.* at 43.

On October 29, 2009, Dr. Sean Duffy conducted an independent medical examination of Claimant. CX 1 at 35-39. Dr. Duffy reviewed Claimant's VA medical history from September 24, 2008 through April 16, 2009 as well as Claimant's history of work with Employer and DynCorp in Iraq. *Id.* at 35-37. Dr. Duffy noted Claimant's frustration with the treatment he had received through the VA medical system as well as problems Claimant expressed associated with potentially attempting to secure treatment through Medicare. *Id.* at 37. Claimant also testified to his dissatisfaction with the resources available for treatment at the VA. TR at 41-42. Dr. Duffy further noted Claimant had some history of heart problems, including hypertension, the implant of a stent, and his taking of Plavix and Zocor – as well as the fact that Claimant had recently lost weight. CX 1 at 37. Dr. Duffy consequently assessed Claimant as having no history of PTSD prior to his work with Employer, but noted that "[s]ubsequent to his return [from Iraq, Claimant] developed classic symptoms of posttraumatic stress disorder including increased arousal, heightened startle response, irritability, change in mood, change in sleep, and emergence of depressive

symptoms such as suicidal thinking.” *Id.* at 38. Dr. Duffy agreed with Dr. Zielinski’s assessment that Claimant should continue to be treated with medications. *Id.* However, he did not share Dr. Zielinski’s view regarding psychotherapy, noting Claimant could benefit from individualized therapy sessions. *Id.* at 38-39. Dr. Duffy further diagnosed Claimant with PTSD and major depressive disorder, noting Claimant achieved a GAF score of fifty. *Id.* at 39; TR at 42.

On cross-examination, Claimant testified as to when he first became aware of his PTSD symptoms. Claimant testified to feeling “fear” in Iraq immediately following the rocket attacks that began in January 2007, *id.* at 62, but stated he did not know at the time he experienced such fear that it would eventually become part of what was later diagnosed as PTSD. TR at 45-46. When asked if he considered such fear “abnormal,” Claimant stated his supervisor in Iraq experienced similar fear. *Id.* at 46. Claimant admitted to experiencing irritation toward his wife, loss of libido, trouble sleeping, hypervigilance, suicidal ideation, antisocial behavior, and the hearing of voices, and admitted such symptoms were present upon his return from Iraq. *Id.* at 48-49; EX 5 at 40. When asked why he did not seek treatment for such symptoms, Claimant stated he attributed such symptoms and feelings to “the alienation of being away for a year” and not his suffering from any diagnosable psychological problem. TR at 49. Claimant continued to insist, however, that he first became aware of his having PTSD when diagnosed with the disorder in August 2008. *Id.* at 55-56. Claimant stated he could not recall when the suicidal ideations began, but did affirm that they had been worsening over time. *Id.* at 67-68. Claimant also affirmed that he had not experienced hearing voices, suicidal ideation, social isolation, or loss of libido while in Iraq. *Id.* at 70-71. However, when pressed to identify the interval between his encountering these symptoms and seeking help from the VA, Claimant could not recall. *Id.* at 71-72.

Claimant also testified on cross-examination as to his rationale for not returning to Iraq to engage in further work with Employer. Claimant admitted to contacting Employer about returning to Iraq, although he disagreed with Employer’s counsel’s characterization of this contact as a request to return to Iraq, instead calling this exchange a request for information. *Id.* at 50. Claimant further admitted, however, that he stated during his deposition that he “requested to go back to Iraq,” but stated this was “misinterpreted” as he was only “getting information about going back” as opposed to requesting to return to undertake further work for Employer. *Id.* When pressed further for his reasons for not returning to Iraq, Claimant stated his wife’s influence over him constituted the “main” reason for his not returning to Iraq, although he admitted his PTSD symptoms also played a role in his decision not to return. *Id.* at 50-51.

Claimant filed his LS-203 on March 23, 2009. *See* CX 2; EX 5 at 40-41. In section twenty-four of this form, Claimant described the circumstances giving rise to his PTSD as follows:

I was assigned to Camp Echo as a Police Instructor under contract with [Employer] in December 2006. In the months of March, [sic] and April 2007 we came under multiple mortar, [sic] and rocket attacks from outside the camp. When I returned home, I felt strange in my relationship with my wife. I was very irate towards her, for no explained reason. I lost any desire for sex, had trouble sleeping, and became very acute of any sound that resembled an incoming rocket or mortar. I felt over time that these problems would cease. When the continued to get worse, I sought treatment at the VA facilities in Las Vegas, Nv. I have suicide thoughts, hear voices, and have antisocial behavior.

EX 5 at 40-41.

VI. Analysis

A. Claimant's Credibility

I am empowered to make credibility determinations with respect to the testimony of witnesses appearing before me. *See Stevedoring Servs. of Am. v. Dir.*, OWCP, 10 Fed. App'x 440, 442 (9th Cir. 2001); *Int'l Transp. Servs. v. Kaiser Permanente Hosp., Inc.*, 7 Fed. App'x 547, 549 (9th Cir. 2001); *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 618 (9th Cir. 1999); *Todd Pac. Shipyards Corp. v. Dir.*, OWCP, 913 F.2d 1426, 1432 (9th Cir. 1990). In this instance, Claimant was the only witness who testified, and I find him to be credible. Although Claimant's attorney did sometimes prompt him with leading questions during the hearing, *see, e.g.*, TR at 34 (Claimant's attorney's positing of question requiring Claimant only agree that mortar and rocket attacks resumed after striker force left area near Camp Echo); *id.* at 35 (Claimant asked by his attorney if agreed with another account indicating frequency of rocket attacks); *id.* at 39 (Claimant told by his attorney when and from whom he received PTSD diagnosis and asked to agree), I found Claimant to be focused and consistent in his testimony on the stand. As discussed below, exhibits admitted into evidence demonstrate Claimant's recollection of the frequency and intervals of rocket and mortar attacks at Camp Echo is consistent with at least one outside account of such attacks occurring in 2007 in Diwaniyah. Furthermore, Claimant's testimony as to the emergence of the symptoms giving rise to his PTSD diagnosis is consistent with the severity of symptoms, such as suicidal ideation and the hearing of voices, that appear in his medical records.

B. Section 20(a) Presumption

Under § 20(a) of the Act, a court may presume that a claimant's injury or occupational disease causally relates to his or her employment. *See Pedroza v. BRB*, No. 05-75449, slip op. at 14090 (9th Cir. Oct. 1, 2009); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 331 (1981). However, for a claimant to receive the benefit of the § 20(a) presumption, he or she must establish two elements: (1) that physical harm, pain, or injury has occurred and (2) that working conditions existed or an accident occurred that could have led to such harm. *See U.S. Indus./Fed. Sheet Metal, Inc. v. Dir.*, OWCP, 455 U.S. 608, 615-16 (1982); *Kelaita*, 13 BRBS at 329-31; *see also Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 959 (9th Cir. 1998). In this case, I therefore look first to see if Claimant has successfully established these two elements necessary to invoke the § 20(a) presumption.

1. First Element Necessary to Invoke § 20(a) Presumption: Working Conditions That Could Have Led to Claimant's Alleged Injury

Employer does not seriously press for the nonexistence of circumstances at some point during Claimant's employment with Employer that could have given rise to Claimant's PTSD. Employer does, however, argue that Claimant's exposure to such circumstances – mortar and rocket fire – lasted for only six weeks in April and May 2007. ALJX 11 at 9, 11-12. Claimant, however, contends these attacks began in January 2007 and continued through the end of his tenure with Employer in May 2007. ALJX 10 at 4. Consequently, I turn to the record to determine exactly when the rocket and mortar attacks occurred that allegedly gave rise to Claimant's PTSD.

Four instances in the record speak to the duration and intervals of the mortar and rocket attacks sustained by Claimant while working for Employer in Iraq: Claimant's LS-203, Claimant's emailed employee statement to Employer, the Diwaniyah Report, and Claimant's own testimony. Claimant's LS-203 describes an interval of rocket and mortar fire in March and April 2007, CX 2 at 1, while his employee statement describes such attacks as having occurred in April and May 2007. *See* CX 5 at 3, 5. Additionally, Claimant noted in his employee statement that the attacks during these months occurred approximately five times per week. *Id.*

On cross-examination, Employer's counsel attempted to force Claimant to concede that the mortar and rocket attacks began in April 2007; however, Claimant continued to insist the attacks began in January 2007. TR at 59. I find Claimant's assertion as to these attacks beginning in January 2007 to be credible. Although the aforementioned exhibits do evince – in Claimant's own words – rocket and mortar attacks in April and May of 2007, neither exhibit *exclusively* limits the occurrence of such attacks to these months only. Furthermore, the Diwaniyah Report indicates rocket and mortar attacks on Camp Echo were ongoing months prior to April 2007. The Report clearly notes that “in April 2007 . . . the headquarters of Forward Operating Base . . . Echo *had been exposed* to months of repeated indirect fire by . . . Militants.” CX 7 at 8 (emphasis added). Employer does not contest this version of the attacks on Claimant's position while in its employ, which coincides with Claimant's testimony that rocket and mortar attacks began in January 2007 at Camp Echo. TR at 59. Aside from its attempt to pigeon-hole Claimant into a version of these events in which the mortar and rocket attacks began in April 2007 on the basis of Claimant's failure to mention attacks prior to April 2007 in his LS-203 and his statement to Employer, Employer offers no affirmative proof that such attacks *did not* begin prior to this date as evinced by the Diwaniyah Report. See CX 7 at 8. Employer also does not challenge the details testified about by Claimant associated with the rocket and mortar attacks, such as his witnessing of the killing of a soldier by shrapnel from a mortar explosion, *id.* at 30, and his smelling of burning flesh associated with a mortar attack which destroyed Camp Echo's laundry facilities. *Id.* 31. Consequently, I find Claimant underwent rocket and mortar attacks while in Employer's employ from January 2007 through the end of his tenure in May 2007. Although such attacks may have intensified in March, April, and May of 2007, I find no evidence that *no* attacks occurred in the months prior to April 2007. Such circumstances constitute working conditions that could have given rise to Claimant's PTSD.

2. Second Element Necessary to Invoke § 20(a) Presumption: Claimant's Alleged Harm

Claimant's medical records are consistent in so far as multiple medical professionals – including the independent medical examiner, Dr. Duffy – diagnose him with PTSD. See CX 1 at 2 (Dr. Billmyer's diagnosis of PTSD on September 24, 2008); *id.* at 4, 9 (Dr. Goldman's diagnosis of PTSD on October 9, 2008); *id.* at 22 (Dr. Zielinski's diagnosis of PTSD on February 27, 2009); *id.* at 32 (Dr. Motlagh's diagnosis of PTSD on April 16, 2009); *id.* at 39 (Dr. Duffy's diagnosis of PTSD on October 29, 2009). Consequently, I find Claimant meets this second element and is entitled to the benefit of the § 20(a) presumption.

3. Rebuttal of the § 20(a) Presumption

In order for Employer to overcome Claimant's § 20(a) presumption, it must present “substantial evidence” to rebut the *prima facie* case made above by Claimant that his alleged injury relates causally to working conditions while with Employer. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). Substantial evidence must go beyond mere allegations and unreliable speculation and must be more than the submission simply of any admissible evidence. *Rainey v. Dir., OWCP*, 517 F.3d 632, 637 (2d Cir. 2008). However, such evidence need not necessarily support a ruling in Employer's favor; instead, it need only be of the type that “a reasonable mind *might* accept as adequate to support a conclusion.” *Am. Grain Trimmers, Inc.*, 181 F.3d at 818 (quoting *Del Vecchio*, 296 U.S. at 286) (emphasis added).

In this case, Employer does not offer – beyond conjecture – evidence to sever the causal link between Claimant's employment with Employer in Iraq and his PTSD diagnosis. While Employer does note it was “unable to confirm any facts regarding any of the alleged traumatic incidents that may have caused Claimant's condition,” ALJX 11 at 4, I find such a circumstance insufficient to rebut the § 20(a) presumption. As noted in Part VI.A, *supra*, I find Claimant to be credible and that the frequency and duration of the rocket attacks to which he testified coincides with an independent account of such attacks

at Camp Echo that was admitted into evidence. Other events – including Claimant’s sexual assault while in the Army, his prior employment in Iraq with DynCorp, his father’s disciplinary attitude toward him as a child, and prior depression, *see* CX 1 at 24, 32, 35 – could potentially be viewed as circumstances other than his employment that partially contributed to Claimant’s PTSD. However, the opinions of the numerous medical professionals, many of whom had knowledge of these earlier experiences, evidence a causal link between Claimant’s PTSD and his 2006-2007 employment with Employer. *See* CX 1 at 4, 9, 22, 26, 34, 37-38, 40. Furthermore, Employer offers no evidence or argument that other events in any way sever the causal link between Claimant’s PTSD and his employment with Employer. Consequently, I find Employer cannot rebut the § 20(a) presumption, and Claimant’s PTSD was caused by his employment with Employer as a police trainer in Iraq during 2006 and 2007.

C. Characterization of Claimant’s PTSD as an Occupational Disease or Traumatic Injury

As noted, I preserved the issue of the classification of Claimant’s PTSD as an occupational disease or injury in my February 12 Order. *See* ALJX 9 at 3-4. Such categorization is crucial because of the differing limitations periods applicable to injuries and occupational diseases under §§ 12 and 13 of the Act. Here, I again discuss the classification of Claimant’s PTSD as an occupational disease or traumatic injury. I ultimately conclude Claimant’s PTSD is an occupational disease and that Claimant’s claim for compensation and benefits was therefore timely filed.

1. Differing Filing Periods Applicable to Occupational Diseases and Traumatic Injuries

Sections 12 and 13 of the Act set forth the differing limitations periods applicable to injuries and occupational diseases. Under § 12(a), a claimant must provide “[n]otice of injury . . . within thirty days after the date of such injury . . . , or thirty days after the [claimant] is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury . . . and the employment.” 33 U.S.C. § 912(a). For occupational diseases, however, the claimant is provided with up to one year to give the employer notice of his or her claim after he or she “becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the . . . disability.” *Id.* Despite such requirements, § 12(d)(3)(i) nevertheless allows claims to go forward even when notice is given to the employer beyond the periods set forth in § 12(a) so long as “the employer or carrier was not prejudiced due to the failure to provide notice.” *Id.* § 912(d)(3)(i).

Similar to § 12(a), § 13, which governs the filing of claims, provides differing limitations periods based on whether the claimant’s claim for compensation rests on an injury or occupational disease. Under § 13(a), a claimant has up to one year to file his or her claim in the case of an injury once he or she “is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury . . . and the employment.” *Id.* § 913(a). A claimant conversely has up to two years to file a claim in the case of an occupational disease once he or she “becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of the relationship between the employment, the disease, and the . . . disability.” *Id.* § 913(b)(2). Under both §§ 12 and 13 of the Act, a claimant receives the benefit of a presumption that the claim was filed and notice given within the limitations periods provided. *See* 33 U.S.C. § 920(a)-(b); *Bath Iron Works Corp. v. U.S. Dep’t of Labor*, 336 F.3d 51, 57 (1st Cir. 2003); *E.M. v. DynCorp Int’l*, 42 BRBS 73, 75 (2008); *Blanding v. Oldham Shipping Co.*, 32 BRBS 174, 178 (1998); *Lewis v. Todd Pac. Shipyards Corp.*, 30 BRBS 154, 156 (1996); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140, 145-46 (1989).

The characterization of Claimant’s PTSD as an occupational disease or injury is the primary issue disputed by the parties in this case given the more generous filing periods applicable to occupational diseases. Employer argues Claimant’s PTSD should be categorized as an injury – not an occupational

disease – and as such, Claimant has failed both to give timely notice to Employer and timely file his claim pursuant to the requirements of §§ 12 and 13 of the Act. ALJX 11 at 5-18. Alternatively, Employer argues that even if Claimant’s PTSD is properly categorized as an occupational disease, Claimant was aware of it as such both during his time in Iraq or immediately upon his return to the United States in May 2007, either of which scenarios would make Claimant’s March 2009 notification to Employer of his PTSD untimely under § 12(a) of the Act. *See id.* at 13-14. Claimant conversely argues his PTSD should be characterized as an occupational disease resulting from his extended exposure to mortar fire and rocket attacks in Iraq, and as such he both timely gave notice and timely filed his claim. ALJX 10 at 9-12. Given the parties’ opposing positions on this issue, I turn below to the issues of whether Claimant’s PTSD is most properly characterized as an injury or occupational disease and when exactly Claimant became aware of his PTSD for the purposes of §§ 12 and 13 of the Act.

2. Characterization of Claimant’s PTSD as an Occupational Disease or Traumatic Injury

Several courts – including the Ninth Circuit – utilize the same definition in defining “occupational disease” within the context of workers’ compensation law: “any disease arising out of exposure to harmful conditions of employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally.” *Port of Portland v. Dir., OWCP*, 192 F.3d 933, 940-41 (9th Cir. 1999); *LeBlanc v. Cooper / T. Smith Stevedoring, Inc.*, 130 F.3d 157, 160 (5th Cir. 1997); *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 752 n.2 (1st Cir. 1992); *Gencarelle v. Gen. Dynamics Corp.*, 892 F.2d 173, 176 (2d Cir. 1989); *see* 3 A. Larson & L. Larson, *Larson’s Workers’ Compensation Law* § 52.00, at 52-1 (LexisNexis 2009). Such a definition yields three elements that must be met for an occupational disease to exist. *See R.D. v. DynCorp Tech. Servs.*, No. 2008-LDA-00174, slip op. at 6 (ALJ Nov. 12, 2008). First, the claimant must be afflicted by a “disease,” which may be defined as “any deviation from or interruption of the normal structure or function of any part, organ, or system . . . of the body that is manifested by a characteristic set of symptoms and signs.” *Dorland’s Illustrated Medical Dictionary* 385 (26th ed. 1985). Second, the disease must be the result of “harmful conditions of employment.” Third, the harmful conditions giving rise to the disease must be unique to or more prevalent in the form of employment in which the claimant is or was engaged as compared to “employment generally.” Furthermore, the Seventh Circuit, in accepting the aforementioned definition, has also acknowledged that the “gradual, rather than sudden onset” of symptoms afflicting a claimant may be yet an additional requirement for a finding of an occupational disease. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 938-39 (7th Cir. 2000). Given these criteria, I now turn to the circumstances and symptoms of Claimant’s PTSD to see if it fits within the preceding framework. I ultimately conclude Claimant’s PTSD meets the above four requirements and therefore constitutes an occupational disease.

a. Claimant’s PTSD is a Disease

As an initial matter, I noted the definition of a “disease” in the workers’ compensation context has been construed as more inclusive than in other contexts. For example, the Surgeon General has characterized the distinction between “diseases” and “disorders” as follows: “The term ‘disease’ generally is reserved for conditions with known pathology (detectable physical change). The term ‘disorder,’ on the other hand, is reserved for clusters of symptoms and signs associated with distress and disability (i.e., impairment of functioning), yet whose pathology and etiology are unknown.” *The Surgeon General, Mental Health* 44 (1999), available at <http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c2.pdf>. Such a categorization would arguably appear to exclude the categorization of PTSD as a disease. However, “disease” within the workers’ compensation context has been defined more broadly to include “any serious derangement of health.” *Gencarelle*, 892 F.2d at 176 (emphasis added); *R.D.*, No. 2008-LDA-00174, slip op. at 6 (emphasis added). Furthermore, although a search of case law reveals the issue has not been one of broad consideration, several of the state courts and an administrative law judge that have taken up the question

of whether PTSD may be considered a disease have allowed its characterization as such. *See R.D.*, No. 2008-LDA-00174, slip. op. at 6-8; *Biasetti v. City of Stamford*, 735 A.2d 321, 322-23 (Conn. 1999); *Brunell v. Wildwood Crest Police Dep't*, 822 A.2d 576, 577 (N.J. 2003); *Fairfax County Fire & Rescue Dep't v. Mottram*, 559 S.E.2d 698, 699 (Va. 2002).

Given such context, I find Claimant's PTSD to constitute a "disease." Claimant has consistently reported a number of symptoms to his medical professionals that have worsened over time since his return from Iraq. These include sleep disturbance, CX 1 at 1, 3, 24, 28, suicidal ideation, *id.* at 8, 12, 13, 15, 20, 36, antisocial behavior, *id.* at 8, 15, 24, depression, *id.* at 4, 9, 10, 12, 14, 15, 22, 28, 32, 38, hypervigilance, *id.* at 13, 26, 28, crying spells, *id.* at 8, 24, decreased libido, *id.* at 8, and thoughts of harming animals. *Id.* at 20, 36. A number of medical professionals have consequently diagnosed Claimant with PTSD based on discussions with him about these symptoms. *See id.* at 2, 4, 9, 22, 32, 39. Dr. Duffy, who conducted an IME of Claimant on October 29, 2009, stated Claimant exhibited "classic symptoms" of PTSD. *Id.* at 38. Furthermore, Claimant testified to the interruptive effects of his PTSD on his overall mental and psychological state. TR at 37-38, 41, 50-52. Dr. Zielinski also summarized in two letters these effects, which include trouble sleeping, suicidal ideation, his inability to procure permanent employment, and his inability to socialize as he did before serving as a police trainer for Employer in Iraq. CX 1 at 34, 40. Claimant's testimony and medical records therefore demonstrate how the effects of his PTSD interrupt the normal function of his overall mental and psychological state. Consequently, I find Claimant's PTSD meets the first requirement for classification as an occupational disease. *See R.D.*, No. 2008-LDA-00174, slip op. at 6-7.

b. Claimant's PTSD Arose from Harmful Conditions Present During His Tenure with Employer

The second requirement for an occupational disease is its attribution to harmful conditions of the employment in which the claimant engaged. *See Port of Portland*, 192 F.3d at 940-41. As discussed in Part VI.B.1, *supra*, Claimant has demonstrated his PTSD arose out of the existence of such conditions during his tenure with Employer in the form of the insurgent mortar and rocket attacks on Camp Echo – along with his bearing witness to the destruction and death associated with such attacks – during the first half of 2007. As with the preceding element, no clear view exists as to the types of "harmful conditions" which may give rise to an occupational disease.

Congress provided no definition for occupational disease from which such "harmful conditions" might be discerned, but in amending the act in 1984 it characterized such a "hazardous condition" as may cause an occupational disease as being "a harmful physical agent or . . . toxic substance." H.R. Rep. No. 98-570, at 10 (1984). Although the mortar and rocket fire existent during Claimant's tenure in Iraq with Employer in no way qualifies as a "toxic substance," there is arguably room within the definition of "physical agent" for such conditions to exist. "Agent" may be defined as "something that produces or is capable of producing an effect," while "physical" may be interpreted as broadly meaning "perceptible especially through the senses and subject to the laws of nature." *Merriam-Webster Online*, <http://www.merriam-webster.com/dictionary> (last visited May 12, 2010). In this case, the rocket and mortar attacks may be considered such a "physical agent" giving rise to his PTSD. As discussed in Part VI.B.1, I find there is no dispute as to Claimant's perceiving such rocket and mortar attacks, and the medical records and Claimant's testimony clearly establish the psychological and physical effects upon Claimant as a result of having witnessed such attacks. One may conversely argue that no quantifiable way exists to measure the physical effects of such attacks upon Claimant as such effects are only discernable as revealed via the symptoms of his PTSD. However, given the Act's purpose of aiding those whose employment comes within its auspices and precedent requiring liberal interpretation of its provisions toward this purpose, *see Metro. Stevedore Co. v. Brickner*, 11 F.3d 887, 889 (9th Cir. 1993);

Dir., OWCP v. Robertson, 625 F.2d 873, 878 (9th Cir. 1980), I find reasonable the categorization of mortar and rocket fire as such a “harmful conditions” giving rise to an occupational disease.

Furthermore, while courts also vary on the exact parameters of the types of “harmful conditions” capable of giving rise to an occupational disease, they have interpreted such a requirement in a way that may include the circumstances of the mortar and rocket attacks here at issue. For example, the Fifth Circuit limits such conditions to “exposure to dangerous substances,” *LeBlanc*, 130 F.3d at 160. The *LeBlanc* court, however, relied on language from the Second Circuit’s *Gencarelle* opinion, which did not limit so narrowly the types of conditions allowed, noting such conditions must be only “of an external [and] environmental nature.” *Gencarelle*, 892 F.2d at 176. The Seventh Circuit interprets such a requirement even more broadly, allowing it to encompass the type of repetitive arm and hand motions giving rise to carpal tunnel syndrome – even if such work occupied only fifteen percent of an employee’s time while at work. *Carlisle*, 227 F.3d at 939. In examining the above case precedent, at least one administrative law judge, Larry W. Price, has found experiences similar to those encountered by Claimant in Iraq – “explosions and gunfire” on a daily basis as well as “witness[ing] the deaths of others” – to constitute the type of “harmful conditions” capable of giving rise to an occupational disease. *R.D.*, No. 2008-LDA-00174, slip op. at 7. Given the “external, environmental nature” language of *Gencarelle* and the court’s finding in *Carlisle* that repetitive joystick movements constitute a “hazardous condition” capable of giving rise to an occupational disease, I find such an interpretation of this requirement to be reasonable.

Although the question of whether or not events experienced by Claimant while in Iraq constitute “hazardous conditions” sufficient to give rise to an occupational disease has not been examined by the Benefits Review Board or any federal circuit court, I find these events constitute such conditions in this case. This is due to the liberal interpretation I am required to give to provisions of the Act in favor of claimants seeking its protections as well as other courts’ broad interpretations of the types of conditions which have been found to give rise to occupational disease, including the findings of my colleague, the Honorable Judge Price, with respect to similar combat experiences. Consequently, I find Claimant’s PTSD meets the second requirement for classification as an occupational disease. *See R.D.*, No. 2008-LDA-00174, slip op. at 7.

c. The Mortar and Rocket Fire Experienced by Claimant Was Unique to His Employment as a Police Trainer in Iraq

The third requirement for an occupational disease is that the conditions giving rise to the alleged disease be “present in a peculiar or increased degree by comparison with employment generally.” *Gencarelle*, 892 F.2d at 176 (citation omitted). Employer challenges Claimant’s ability to meet this requirement. ALJX 11 at 10. Employer argues Claimant’s experiencing of rocket and mortar attacks is not unique to his working in a “war zone.” *Id.* Employer instead reasons the amount of conflict in such areas varies so greatly – as some war zones are “highly hostile areas” while others are “quiet areas that witness no hostility” – that the mortar and rocket attacks cannot be said to be “peculiar” to war zones generally.

Such an argument fails in light of courts’ interpretation of this requirement. “The hazardous activity *need not be exclusive to one’s employment*; it need only be sufficiently distinct from hazardous conditions associated with other types of employment.” *Gencarelle*, 892 F.2d at 177 (emphasis added). While Employer attempts to subdivide and categorize the events at issue here into potentially infinite levels of “war zones,” courts that have considered this issue draw a much more general distinction – such “hazardous conditions must be ‘peculiar to’ one’s employment as opposed to *other employment generally*.” *Id.* at 177 (emphasis added); *see Carlisle*, 227 F.3d at 939; *Liberty Mut. Ins. Co.*, 978 F.2d at 752 n.2. While courts have applied such distinction to exclude activities such as walking and stooping,

Port of Portland, 192 F.3d at 941; *Gencarelle*, 892 F.2d at 176-77, Employer directs me to no case law supporting an argument that experiencing mortar and rocket fire is an activity encountered in “employment generally.” I therefore find the mortar and rocket fire experienced by Claimant while working for Employer was peculiar to his employment as a police trainer in Iraq, *see R.D.*, 2008-LDA-00174, slip op. at 8, and that Claimant meets the third occupational disease requirement.

d. Claimant’s PTSD Symptoms Came About Gradually

As noted, at least one court adheres to a requirement that the resultant symptoms of an occupational disease must arise via “gradual, rather than sudden onset.”⁵ *Carlisle*, 227 F.3d at 938-39. Employer here argues Claimant experienced PTSD onset immediately after each mortar attack in Iraq. ALJX 9-10. Employer bases this argument on Claimant’s experiencing of “fear and anger that were not normal for him” after each mortar or rocket attack, symptoms Claimant allegedly experienced “immediately” after each attack. *Id.* at 9. Employer notes “[i]ntense fear” is a symptom the DSM-IV associates with PTSD. Employer reasons Claimant’s experiencing of such fear equates to a case of immediate-onset PTSD, which by its very nature cannot be “gradual,” and consequently cannot be categorized as an occupational disease. *Id.*

I find such an argument to be wholly unpersuasive. Twice during trial Employer’s counsel attempted to rhetorically transform Claimant’s testimony from an admission of having experienced fear after each mortar or rocket attack into a version where Claimant experienced full-blown PTSD after each such incident. TR at 45-46, 60-61. In both of these instances, Employer’s counsel was either admonished or the form of the question was objected to as vague. *Id.* at 46, 60. Although Claimant admitted to emotions of fear (and elation) associated with the individual mortar and rocket attacks, *id.* at 63, he testified on redirect that he experienced other symptoms associated with his PTSD – including suicidal ideation, social isolation, and loss of libido – only upon returning to the United States. *Id.* at 70-71.

Employer again attempts in its post trial brief to transform a single characteristic of PTSD into a wholesale diagnosis attributable to Claimant while employed in Iraq. According to Employer:

Intense fear is a characteristic symptom of PTSD, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition. The onset of Claimant’s condition occurred immediately after each unexpected mortar or rocket attack and Claimant was able to trace the onset of his symptoms back to the six week attack on his camp.

ALJX 11 at 9.

Such reasoning rests on a partial reading of the diagnostic criteria listed in the DSM-IV. The DSM-IV lists six major categories of criteria for PTSD diagnosis. *Diagnostic and Statistical Manual of Mental Disorders* 427-29 (4th ed. 1994). “Intense fear” is but one criteria of the first of these six categories, which relates to characteristics of the traumatic event itself. *Id.* at 428. The DSM-IV diagnostic criteria for PTSD, however, also requires a person (1) “persistently reexperience” the traumatic

⁵ In requiring such a condition in occupational disease determinations, the *Carlisle* court relied on the 1992 version of Larson’s treatise on workers’ compensation law. *See Carlisle*, 227 F.3d at 938-39 (citing 1B A. Larson, *Workman’s Compensation Law* § 41.31 (1992)). The most recent version of this treatise appears to acknowledge the diminished importance of such a characteristic in distinguishing between traumatic injuries and occupational diseases. *See* 3 A. Larson & L. Larson, *Larson’s Workers’ Compensation Law* § 52.04[3], at 52-33, -34 (LexisNexis 2009). As the characterization of PTSD as an occupational disease is a somewhat novel determination, however, I include this element in my analysis.

event; (2) exhibit at least three types of behavior demonstrating avoidance of stimuli associated with the traumatic event; (3) exhibit at least two types of “symptoms of increased arousal”; (4) experience the symptoms in the prior three categories for at least one month; (5) and undergo “clinically significant distress or impairment in social, occupational, or other important areas of functioning.” *Id.* at 428-49. Employer puts forth no evidence itself nor points to any portion of the record to demonstrate Claimant exhibited symptoms or characteristics within the other five categories of diagnostic criteria for PTSD while in Iraq.

Although Claimant’s medical records contain no diagnosis of delayed- or sudden-onset PTSD, they do indicate a steady worsening of his symptoms over time. Claimant’s initial complaints to his VA medical providers included only trouble sleeping, CX 1 at 2, but later worsened to admissions of “crying spells” and suicidal ideation. *Id.* at 8. Claimant later complained of “intermittent” but “chronic” suicidal ideation, and noted increased startle response. *Id.* at 13. Claimant’s symptoms then worsened further to include thoughts of harming animals, *id.* at 20, antisocial behavior, *id.* at 24-25, and the hearing of voices. *Id.* at 22. Although there exists a gap in Claimant’s medical records from his return from Iraq in May 2007 until his first visit to Dr. Billmyer in September 2008, I find the records available demonstrate a gradual and progressive worsening of the symptoms giving rise to Claimant’s diagnosis of PTSD. Furthermore, Claimant provided credible testimony that – despite his admission of fear while experiencing each individual mortar and rocket attack in Iraq – the above symptoms were not present while he worked in Iraq for Employer. *See* TR at 70-71. I find such evidence demonstrates the gradual – and not sudden – emergence of Claimant’s PTSD. Claimant consequently meets the fourth and final requirement for a finding of occupational disease.

D. Timeliness of Claimant’s Filing of His Claim and Notification to Employer

Because I find Claimant’s PTSD is an occupational disease, I look to the notification and filing requirements set forth respectively in §§ 12(a) and 13(b)(2) of the Act. As noted, these sections provided Claimant with one year to notify Employer and two years to file a claim for compensation as a result of his PTSD. *See* 33 U.S.C. §§ 912(a), 913(b)(2). In either instance, the period of time applicable to such notification or filing began to run when Claimant “bec[a]me[] aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the . . . disability.” *Id.* §§ 912(a), 913(b)(2). The level of awareness required on behalf of a claimant is identical under either of these sections of the Act. *See Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233, 240 (1990).

As an initial matter, certain dates related to this determination are not in dispute. For example, neither party contends Claimant did not conclude his employment with Employer in late May 2007.⁶ Furthermore, it is undisputed that Claimant filed his claim for compensation on March 23, 2009, CX 2 at 1. It is initially unclear or Employer and Claimant disagree, however, as to the date on which Employer received notification of Claimant’s claim for compensation and when Claimant gained or should have gained awareness of his PTSD.

Claimant argues his filing on March 23, 2009 of his LS-203 claim for compensation form – in addition to establishing the date of his filing of his claim – constitutes the date on which Employer received notice of such a claim. *See* ALJX 10 at 9-10; CX 2 at 1. Additionally, Claimant submits an LS-207 notice of controversion of right to compensation form in which Employer states it also first gained knowledge of Claimant’s claim for compensation on March 23, 2009. CX 3 at 1. Curiously, Employer

⁶ The exact date on which Claimant concluded his work as a police trainer in Iraq for Employer is unclear, although it appears to be either May 24, 2007 or May 26, 2007. *See* CX 2 at 1; TR at 27. In either case, the exact date is inconsequential in light of the subsequent discussion.

submits a second LS-207 form in which it states it gained knowledge of Claimant's claim for compensation on May 8, 2009. EX 2 at 2. In its posttrial brief, however, Employer argues that "Claimant did not notify Employer of his injury until March 23, 2009." ALJX 11 at 14. Given Employer's use of this earlier date of notification and its failure to address the earlier LS-207 submitted by Claimant, I find Employer received notification of Claimant's claim for compensation related to his PTSD on March 23, 2009.

Employer argues Claimant became aware of his PTSD on May 24, 2007, upon completion of his contract with Employer in Iraq.⁷ ALJX 11 at 14. Employer posits two theories to support this assertion. First, Employer argues Claimant had actual knowledge of his PTSD because his "symptoms began while he was employed in Iraq with Employer, immediately following each mortar attack." *Id.* at 13. With respect to this theory, I again direct Employer to my reasoning in Part VI.C.2.d. As discussed, there I found Claimant's PTSD revealed itself to him gradually rather than immediately after each rocket or mortar attack and rejected Employer's argument that the fear associated with such attacks constituted fully diagnosable PTSD. Here, Employer again fails to demonstrate how the existence of but a single symptom of PTSD notified Claimant of such an affliction. Second, Employer argues even if Claimant had no actual knowledge of affliction with PTSD, he nevertheless had sufficient awareness of its effect upon his earning capacity as evidenced by his decision not to extend his contract in Iraq with Employer. ALJX 11 at 14. Specifically, Employer directs my attention to portions of the transcript where Claimant was questioned about his motivation for not returning to Iraq. When asked by Employer's counsel why he had not returned to Iraq following his initial one-year contract, Claimant agreed he had stated his decision was due in part to his "not feeling quite right" upon his return to the United States. TR at 47, 50. When pressed for an explanation as to what this meant, Claimant testified that although his PTSD symptoms may have played a role in his not returning to Iraq, his main motivation for not returning to Iraq was the displeasure it caused his wife. *Id.* at 50-51. Employer argues this testimony demonstrates awareness on behalf of Claimant of his PTSD sufficient to trigger §§ 12's and 13's limitations periods. I find both of these arguments unpersuasive.

While at least one circuit has held a decrease in earning power attributable to an alleged injury or occupational disease may be sufficient by itself to initiate the running of § 13's (and consequently § 12's) limitation period, *see, e.g., Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141-42 (5th Cir. 1984), the Ninth Circuit has clearly articulated a standard requiring more than the claimant's simple recognition of affected earning capacity:

[S]ection 13(a) means that the limitations period does not begin to run until the employee is aware that his injury has resulted in the impairment of his earning power. Furthermore, . . . a claimant is not injured for purposes of the [§] 13(a) statute of limitations until "he [becomes] aware of the *full character, extent and impact of the harm done to him.*"⁸

Abel v. Dir., OWCP, 932 F.2d 819, 821 (9th Cir. 1991) (citing *Todd Shipyards v. Allan*, 666 F.2d 399, 401 (9th Cir. 1982)) (emphasis in original). Under this standard, awareness of injury or occupational disease may not occur until the claimant fully grasps the complete scope of such injury or occupational disease – despite an existent impairment in earning power. Furthermore, although a medical diagnosis is not necessary for such awareness, it is a significant factor in the analysis of determining when a claimant becomes aware of an occupational disease for §§ 12 and 13 purposes. *See id.* at 822 ("A doctor's advice

⁷ Employer associates such awareness with its theory that Claimant's PTSD constitutes a traumatic injury. Although I find such a theory unpersuasive, *see supra* Part VI.C, I presume Employer nevertheless adheres to its view that upon this date Claimant became aware or should have been aware of his PTSD.

⁸ Although the *Abel* court discussed the limitations period with respect to traumatic injuries, the court specifically noted its logic regarding "awareness" also applied to occupational diseases. *See* 932 F.3d at 822 n.3.

is the best of reasons for a claimant's believing himself not reduced in earning capacity."); *Allan*, 666 F.2d at 401-02 (holding claimant not aware of "compensable injury" for § 13 purposes until diagnosed with such by treating physician).

In this case, Employer argues the combination of Claimant's experiencing some symptoms of PTSD while still in Iraq coupled with his decision not to extend his employment relationship with Employer in part due to "not feeling quite right" constitutes awareness on the part of Claimant of his PTSD by May 24, 2007. ALJX 11 at 14. Employer, however, directs me to no case law supporting such a proposition. I reject such an argument in light of the Ninth Circuit precedent cited above. In doing so, I am then left to determine exactly when Claimant became aware of his PTSD. In turning to the record, I find Claimant instead became aware of his PTSD in September 24, 2008. CX 1 at 2. Although Claimant testified to being diagnosed with PTSD in August 2008, TR at 40, his VA medical records contain no evidence of such a diagnosis. Consequently, I will use the date of September 24, 2008 to determine whether Claimant's notification to employer of his occupational disease and filing of his claim were timely. Claimant filed his LS-203 on March 29, 2009, *see* CX 2 at 1, and the record indicates Employer likewise received notification of Claimant's claim for compensation on this same date. *See* CX 3 at 1; ALJX 11 at 14. Given such a timeline, Claimant clearly filed his claim and served notice to Employer approximately six months after becoming aware of his affliction with PTSD. Under the one-year limitations period applicable to notification and two-year limitations period for filing applicable to occupational disease claims, Claimant's notification to Employer and filing of his claim for compensation were both timely. *See* 33 U.S.C. §§ 912(a), 913(b)(2).⁹

E. Nature and Extent of Claimant's Disability

A disability is the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment." 33 U.S.C. § 902(10). A disability is permanent if the claimant has any residual impairment after reaching maximum medical improvement, or if the disability has persisted for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). In the case of an "irreversible medical condition," the date of permanency and the date of diagnosis are one in the same. *Drake v. Gen. Dynamics Corp.*, 11 BRBS 288, 290 n.2 (1979). A claimant is presumed to be totally disabled where he or she establishes an inability to return to his or her usual employment. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989); *Elliott v. C & P Tel. Co.*, 16 BRBS 89, 91 (1984). If the claimant invokes this presumption, the burden shifts to employer to establish the availability of suitable alternate employment that the claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *Bumble Bee Seafoods v. Dir.*, *OWCP*, 629 F.2d 1327, 1328-29 (9th Cir. 1980).

I ultimately conclude Claimant's PTSD constitutes a permanent total disability, and I find such disability began on September 24, 2008 – the date of his first diagnosis of PTSD. *See* CX 1 at 2. Claimant argues for such a finding or, in the alternative, a finding of temporary total disability. *See* ALJX 10 at 7-8. Employer fails to address this issue whatsoever in its posttrial brief. I base the aforementioned finding on the totality of Claimant's VA medical records, giving particular attention to the letters of Dr. Zielinski written on July 2, 2009 and December 10, 2009.

With respect to the totality of his disability, Claimant has exhibited a growing number of intensifying symptoms associated with his PTSD since his initial diagnosis. *See supra* Parts VI.C.2.a, VI.C.2.d. Claimant testified such symptoms prevented him from procuring any sort of employment after

⁹ Even were I to choose instead to use August 2008 as the beginning of the §§ 12 and 13 limitations periods, Claimant's notification to Employer and filing of his claim would still be timely.

returning from Iraq in 2007, *see* TR at 50-52, an opinion that is shared by Dr. Zielinski. *See* CX 1 at 27, 23, 40. Employer’s counsel did briefly question Claimant about his efforts to find alternative employment after his return from Iraq in May 2007. TR at 51-52. However, nowhere does Employer argue Claimant possessed the ability to return to his former employment or maintain employment at any point beyond his diagnosis nor does it submit a labor market survey to demonstrate as much. I find such evidence demonstrates the totality of Claimant’s disability, which Employer fails to rebut. *See Turner*, 661 F.2d at 1038; *Bumble Bee Seafoods*, 629 F.2d at 1328-29; *Manigault*, 22 BRBS at 333; *Elliott*, 16 BRBS at 91.

I base my finding of permanency on the letters of Dr. Zielinski and the absence of an opinion or argument to the contrary on the part of either Dr. Duffy or Employer itself. In both of his letters, Dr. Zielinski characterizes Claimant’s PTSD as severe and chronic and notes Claimant’s “prognosis for improvement remains poor.” CX 1 at 34, 40. Such letters demonstrate – in the absence of evidence to the contrary – that Claimant’s PTSD constitutes an “irreversible” type of disability given the bleak prospects outlined by Dr. Zielinski. While Dr. Duffy, who performed the IME, does not explicitly share Dr. Zielinski’s outlook regarding Claimant’s potential for improvement – recommending further “pharmacotherapy” and “individual therapy” – he does observe that Claimant “has not responded to a variety of appropriate medications.” *Id.* at 38. Given such evidence submitted by Claimant and the lack of evidence or arguments put forth by Employer, I find an appropriate date of permanency for Claimant’s disability is his September 24, 2008 date of diagnosis. *See Drake*, 11 BRBS at 290 n.2.

F. Claimant’s Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for determining a claimant’s average annual earnings, which are then divided by fifty-two, pursuant to § 10(d)(1), to arrive at an average weekly wage (“AWW”). 33 U.S.C. § 910. The first method, § 10(a), applies to an employee who has worked “in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury.” *Id.* § 910(a). When § 10(a) is inapplicable, courts must look to § 10(b) before resorting to § 10(c). Section 10(b), like § 10(a), looks to “the immediately preceding year” of the injury, but instead utilizes the wages that “an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.” *Id.* § 910(b). Both §§ 10(a) and 10(b) apply only to “five-day” and “six-day” workers, *id.* § 910(a), (b), and § 10(b) additionally requires the submission of evidence of a substitute employee’s wages. *See Palacios v. Campbell Indus.*, 633 F.2d 840, 843 (9th Cir. 1980). If neither §§ 10(a) nor 10(b) apply, § 10(c) then mandates a determination that would “reasonably represent the annual earning capacity of the injured employee. 33 U.S.C. § 910(c).

Claimant argues for and I find proper the application of § 10(c) in this case.¹⁰ First, Claimant was a seven-day worker while employed as a police trainer in Iraq for Employer. *See* EX 1 at 1; CX 5 at 3 (stating Claimant’s “work hours” were “6:30 AM to 2:00 PM 6 to 7 days per week”). As discussed in the preceding paragraph, §§ 10(a) and 10(b) apply only to five-day and six-day workers. Second, in cases of occupational disease, “the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.” 33 U.S.C. § 910(i). In this case, Claimant’s “injury” therefore occurred on September 24, 2008. As the evidence demonstrates Claimant has not worked in the year preceding this date, § 10(a) would therefore be inapplicable. Finally, neither Claimant nor Employer submitted into evidence proof of a substitute

¹⁰ As with the nature and extent of Claimant’s disability, Employer omits entirely from its posttrial brief any discussion of Claimant’s AWW or applicable compensation rate.

employee's wages for the "immediately preceding year in the same or in similar employment in the same or a neighboring place" as required by § 10(b). *See id.* § 910(b); *Palacios*, 633 F.2d at 843. Consequently, I apply § 10(c) in determining Claimant's average annual earnings.

Before turning then to a determination of Claimant's average annual earnings under § 10(c), however, I briefly address my decision not to apply § 10(d)(2) of the Act. I find this discussion appropriate given the somewhat novel nature of characterizing PTSD as an occupational disease. Section 10(d)(2) contains a specific provision applicable to the calculation of an AWW in the case of occupational diseases. However, for such provisions to apply, a claimant must have "retired," 33 U.S.C. § 10(d)(2), which the Regulations applicable to the Act define in pertinent part as when a claimant has "*voluntarily* withdrawn from the workforce." 20 C.F.R. § 702.601(c) (emphasis added). For retirement to be voluntary in the case of an occupational disease, it cannot be due in any part to the occupational disease giving rise to the claim at issue. *See Hansen v. Container Stevedoring Co.*, 31 BRBS 155, 157 (1997) (citing *Pryor v. James McHugh Constr. Co.*, 18 BRBS 273 (1986); *McDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986)). If such a decision to cease work is due in any part to the occupational disease at issue, then the a claimant has not "retired" within § 10(d)(2)'s meaning, and its directive as to the determination of AWW does not apply. *Id.*

In this case, although Claimant stated his wife's attitude toward such a perspective return constituted the "main" reason behind his decision not to return to Iraq, the record demonstrates Claimant's decision not to return to Iraq for an additional period of employment with Employer was due in part to his "not feeling quite right." TR at 47, 50. Although Claimant did not understand the full extent of his PTSD when he returned to the United States, such testimony indicates that the emergence of symptoms that Claimant would later discover in part constituted PTSD played a role in his decision not to return to Iraq. Consequently, any attempt to characterize Claimant's failure to return to Iraq as "voluntary retirement" – therefore making applicable the provision for AWW determination set forth in § 10(d)(2) – would be misguided. *See Hansen*, 31 BRBS at 157. Instead, § 10(c) should be used for a determination of Claimant's earnings in calculating his AWW. *See McDonald*, 18 BRBS at 138-84; *see also Martin v. Kaiser Co.*, 24 BRBS 112, 124 (1990); *Frawley v. Savannah Shipyard Co.*, 22 BRBS 328, 330 (1989).

When neither §§ 10(a) nor 10(b) can be "reasonably and fairly applied," § 10(c) mandates a calculation which "reasonably represent[s] the annual earning capacity of the injured employee." 33 U.S.C. § 910(c). The objective of § 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of the injury. *Empire United Stevedores v. Gatlin*, 936 F.3d 819, 823 (5th Cir. 1991). As noted, Claimant argues for the application of § 10(c) and submits IRS forms 1099 from 2006 and 2007 detailing income earned while working for Employer from May 2006 through May 2007. *See CX 9* at 1-2. Employer sets forth no theory or argument in its posttrial brief addressing what either Claimant's average annual earnings or AWW should be.

In light of the preceding discussion, I therefore utilize the earnings figures submitted by Claimant to calculate his average annual earning capacity under § 10(c) of the Act. Claimant earned \$81,725.45 from Employer in 2006 and \$89,755.14 from Employer in 2007.¹¹ When combined together, these figures yield an average annual earning capacity of \$171,480.59 for Claimant. Next, I divide this figure by fifty-two as required under § 10(d)(1) of the Act. *See* 33 U.S.C. § 910(d)(1). This ultimately yields an AWW of \$3,297.70.

¹¹ Although these figures originate from tax documents submitted by Claimant which cover two calendar years, *see CX 9* at 1-2, the sum total of these earnings covers Claimant's employment in Iraq with Employer, a period lasting fifty-two weeks. *See TR* at 27.

G. Claimant's Compensation Rate

Under the Act, a claimant adjudged to be permanently totally disabled is entitled to a compensation payment equal to 66 2/3 percent of his or her AWW. 33 U.S.C. § 908(a). In this case, Claimant's AWW is \$3,297.70. Consequently, Claimant's compensation rate is \$2,198.47.¹²

Two other provisions of the Act, however, must be applied to (and consequently adjust) the amount of compensation to which Claimant is entitled under the Act. First, § 6(b)(1) of the Act places a cap on compensation payments at two-hundred percent of the national average weekly wage. *Id.* § 6(b)(1). Second, because Claimant in this case has sustained a permanent total disability he is also entitled to annual adjustments in compensation equal to the lesser of the percentage by which the national average weekly wage increases or five percent. *Id.* § 910(f).¹³

Taking into consideration the aforementioned provisions, Claimant is entitled to the following: (1) from September 24, 2008 through September 30, 2008, compensation at a weekly rate of \$1,160.36; (2) from October 1, 2008 through September 30, 2009, compensation at a weekly rate of \$1,201;¹⁴ and from October 1, 2008 through September 30, 2010, compensation at a weekly rate of \$1,225.¹⁵ Beginning on October 1, 2010, Claimant is entitled to yearly adjustments of his weekly compensation rate per §§ 10(f) and 10(g) of the Act.

H. Section 8(f) Relief

Section 8(f) of the Act places a limit on an employer's liability under certain circumstances. 33 U.S.C. § 908(f). To be eligible for such relief, however, an employer bears the burden of proving the existence of three conditions: "(1) that the employee had an existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that the current disability is not due solely to the most recent injury." *Bunge Corp. v. Dir., OWCP*, 951 F.2d 1109, 1111 (9th Cir. 1991) (citing *Todd Pac. Shipyards*, 913 F.2d at 1429). Furthermore, an employer's entitlement to § 8(f) relief "must be raised and litigated in the same proceeding wherein permanent disability is at issue." *See Serio v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 106, 107-08 (1998) (citations omitted).

In this case, Employer – despite listing its entitlement to § 8(f) relief in its prehearing statement as an issue to be decided in this case, *see* ALJX 5 at 2 – omits any argument for (or mention of) such relief in its posttrial brief. This occurs despite my explicit allowance at trial of additional pages in Employer's posttrial brief to address such an issue. *See* TR at 73. Furthermore, although the record contains some evidence of a past history of depression with Claimant, his serving as a police trainer in Iraq, and his experience of sexual assault while enlisted in the Army, *see* CX 1 at 24, 32, 35, none of the medical professionals who treated Claimant expressed an opinion that such factors at all contributed to his PTSD. *See supra* Part VI.B.3. Consequently, I find Employer has waived any right it may have had to §8(f) relief and is not entitled to such relief.

¹² \$3,297.70 multiplied by 66 2/3 percent equals \$2,198.47.

¹³ National average weekly wage figures are available at <http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm>.

¹⁴ Section 10(g) of the Act states that "[t]he weekly compensation *after adjustment* under subsection [10](f) shall be fixed at the nearest dollar." 33 U.S.C. § 910(g) (emphasis added). As the Act contains no similar provision applicable to Claimant's preadjustment weekly compensation entitlement, I do not round such award to the nearest dollar.

¹⁵ Neither of these increases exceeds five percent when compared to the prior year. *See id.* § 910(f).

ORDER

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer shall pay Claimant permanent total disability compensation of \$1,160.36 per week from September 24, 2008 to September 30, 2008; \$1,201 per week from October 1, 2008 to September 30, 2009, and \$1,225 per week from October 1, 2009 to September 30, 2010. Employer shall pay Claimant permanent total disability compensation from October 1, 2010 thereafter subject to the adjustments provided for in §§ 10(f) and 10(g) of the Act.
2. Employer shall provide all past, present, and future medical care which is reasonable and necessary for the treatment of Claimant's work-related PTSD condition.
3. Employer is entitled to a credit for any compensation and medical benefits previously paid to Claimant.
4. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.
5. The District Director shall make all calculations necessary to carry out this Order.
6. Counsel for Claimant shall within twenty (20) days after service of this Order submit a fully supported application for costs and fees to counsel for Employer and to the undersigned Administrative Law Judge. Within twenty (20) days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within twenty (20) days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for Employer. If the two counsel disagree on any of the proposed fees or costs, Claimant's counsel shall within fifteen (15) days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have fifteen (15) days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California