

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 March 2012

Case No: 2010-LDA-00403

OWCP No: 02-169967

In the Matter of:

JEFFREY M. STARR,

Claimant,

v.

SERVICE EMPLOYEES INTERNATIONAL, INC./
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
c/o CHARTIS PROPERTY CASUALTY,

Employer/Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES: Gary B. Pitts
Attorney for the Claimant

Jerry R. McKenney
Attorney for the Employer

BEFORE: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER - GRANTING BENEFITS

This claim is filed pursuant to the Defense Base Act (DBA), as amended, U.S. Code, Title 42, Chapter 11, and is governed by the implementing Regulations found at Code of Federal Regulations, Title 20, Chapter VI, Subchapter A, Part 704 and Title 29, Part 18. This case was forwarded to the Office of Administrative Law Judges on June 18, 2010, with notation of an injury occurring in Iraq on October 23, 2007 (OWPC No. 02-169967).

A formal hearing was held on May 12, 2011 in Atlanta, Georgia, at which time the parties were afforded full opportunity to present evidence and argument as provided in the Act and applicable regulations. The Director did not appear. At the hearing, Administrative Law Judge exhibit 1 through 5, stipulations in joint exhibit 1, Claimant's exhibits 1 through 17 and Employer's exhibits 1 through 6, 8 through 11, 13 through 15, 17 through 20, 22 through 27, 30 through 34, 36, 37 and 39 were admitted without objection¹ (TR 5-10). EX 21, 35, 40 and 41 were reserved for specific documents submitted post-hearing. Submitted post-hearing was a supplemental labor market report as EX 42 and Final Disposition order from the Superior Court of Jason County, Georgia as EX 43. EX 21, 40 and EX 41 were not submitted for consideration. EX 7, 12, 16, 28, 29 and 38 were withdrawn by Respondent's counsel. The post-hearing written briefs filed by the respective counsel for the Claimant² and the Employer were also considered.

The findings of fact and conclusions which follow are based upon a complete review of the entire record, in light of argument of the parties, as well as applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

The Parties have stipulated to, and this Administrative Law Judge finds, the following as fact (JX 1):

1. The date of injury/accident was October 23, 2007.
2. The injury was in the course and scope of employment.
3. An Employer / Employee relationship existed at the time of the accident.
4. The Employer was advised of the injury on October 23, 2007.
5. Notice of Controversion was filed on June 16, 2009 and June 7, 2010.
6. An informal conference was held on May 19, 2010.
7. The Claimant reached maximum medical improvement on October 21, 2010.

¹ The following exhibit notation applies: JX - joint exhibit; ALJX – Administrative Law Judge exhibit; CX – Claimant exhibit; EX – Employer exhibit; TR – transcript page

² After August 1, 2006, the Department of Labor policy requires the use of initials for claimants' name in the headings and use of a descriptive title in the decision. Accordingly, "Claimant" is used in this decision vice the proper name of the individual who is the subject of this decision.

The Parties entered oral stipulations on the record, and this Administrative Law Judge finds, the following as fact (TR 6-7):

1. The Claimant sustained a work-related injury to his right side, a right-side facial fracture, injury to his spine, back, cheek, hands and left side on October 23, 2007, while performing assigned duties as a heavy truck driver.
2. The October 23, 2007, work-related injury arose out of an in the course of Claimant's employment by Respondent Employer pursuant to a government contract within the scope of the Defense Base Act.
3. The Claimant suffered no economic loss until November 2, 2007.
4. The Claimant is entitled to temporary total disability compensation benefits based on the October 23, 2007, work-related injury from November 2, 2007 through October 20, 2010.
5. The Respondent paid temporary total disability compensation for the October 23, 2007, work-related injury at a rate of \$984.99 per week for the period from November 2, 2007 and continuing.

ISSUES

The issues remaining³ to be resolved are (TR 7-8):

1. Did the Claimant suffer a traumatic brain injury on or about October 23, 2007, that is covered under the Defense Base Act?
2. Did the Claimant suffer an injury by a worsening of his psychological condition arising out of the October 23, 2007, events such that the psychological condition was covered by the Defense Base Act?
3. Is the Claimant entitled to permanent partial disability benefits at any time since October 21, 2010?
4. Is the Claimant entitled to permanent total disability benefits at any time since October 21, 2010?
5. What was the Claimant's average weekly wage on October 23, 2007?
6. Is the Claimant entitled to neurological, psychological or psychiatric medical benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA)?
7. Are the cervical injections ordered by Dr. K. Reynolds reasonable and necessary medical treatment under §907 of the LHWCA?
8. Is the Respondent entitled to §908(f) relief of the LHWCA?⁴

³ By his representation in the post-hearing brief regarding submission of an attorney fee petition, Claimant's counsel mooted the issue of entitlement to legal fees and costs raised at the formal hearing.

⁴ In his post-hearing brief, Respondent's counsel raised the issue of §908(f) relief for the first time. The District Director was not placed on notice of this "new" issue; however, since the Respondent failed to establish such entitlement based on the evidence of record, the untimeliness of this "new" issue is moot.

PARTY CONTENTIONS

Claimant's Contentions:

Claimant's counsel submits that prior to the Claimant's deployment to Iraq to work for Respondent, he no depression or mood changes, could concentrate, did not pause before speaking and had no sleep pattern problems. He submits that as a result of the October 23, 2007 accident where the truck the Claimant was driving in a military convoy went off a bridge in Iraq and fell 60 feet, the Claimant suffered a compression fracture of C5 and C6, a concussion, facial fractures, and bruised ribs, as well as headaches, personality changes, post-traumatic stress disorder symptoms, and a closed head injury difficulty with concentration, short-term memory, sleep patterns, and word selection.

Claimant's counsel argues that the evidence established a prima facie entitlement of disability compensation and medical benefits under the DBA and that the Respondent has not rebutted the presumptions due the Claimant under §920 of the Longshore and Harbor Workers' Compensation Act and has failed to establish that there is suitable alternate employment for the Claimant to perform given his medical-vocational restrictions and the effect of his prescribed medication.

Claimant's counsel submits that the Claimant earned an average weekly wage of \$1,691.18 per week while working for the Respondent from December 19, 2006 through November 2, 2007. He seeks a finding that the Claimant suffered a traumatic brain injury and worsening of psychological condition from the October 23, 2007 truck accident; that the Claimant is entitled to medical benefits including neurological care, psychological care and cervical injections; that the Claimant is entitled to temporary total disability compensation benefits from November 2, 2007 through October 21, 2010 and permanent total disability compensation benefits from October 22, 2010 and continuing; and that the average weekly wage on October 23, 2007 was \$1,691.18.

Employer's Contentions:

Employer's counsel submits that the evidence establishes that the Claimant suffered from headaches and psychological issues prior to beginning work for the Respondent and that recent neuropsychological examination did not reveal any significant cognitive dysfunction and that the Claimant is magnifying or feigning physical and mental problems. He submits that the Claimant's geo-caching activities and discussions about driving trucks and medical evidence demonstrate no serious cognitive impairment. He argues that the Claimant's alleged traumatic brain injury and post-traumatic stress disorder is not related to the October 23, 2007 accident.

Employer's counsel submits that a significant number of jobs were identified that the Claimant could perform in Georgia within his medical-vocational limitations prior to his move to Michigan. Subsequent to his move, 12 more jobs were identified as suitable alternate employment for the Claimant in Michigan and 7 suitable jobs were identified overseas. He reports that the Claimant is currently incarcerated in Georgia for a minimum of 5 years of a 10 year sentence following conviction in Georgia on October 27, 2011.

Employer's counsel agrees with Claimant's counsel that the Claimant's average weekly wage on October 23, 2007 was \$1,691.18. Employer argues that the Claimant is not credible in his statements to medical providers, that the objective evidence does not support the subjective complaints, that there is no objective evidence of traumatic brain injury, cognitive dysfunction or mental disorder.

SUMMARY OF RELEVANT EVIDENCE

Testimony of Claimant (TR 12-61)

The Claimant testified that he is a 49 year-old high school graduate with 8 years enlisted time in the U.S Air Force after high school. He later worked as a service writer for automobile dealership, retail sales and then truck driving, first over-the-road and then local deliveries.

The Claimant testified that he began driving trucks overseas on a one year contract as a heavy truck driver and was promoted to foreman while in Iraq. His wheels up date to Iraq was December 19, 2006. His work in Iraq was 7 days per week with a 12 hour minimum workday. He was paid to November 1, 2007. As a heavy truck driver he drove outside the wire for tactical resupply convoys to the U.S. Marines. The convoys he drove had been attacked with small arms, grenade and IED's several times. When outside the wire he wore personal protective gear of Kevlar helmet and level 3 or 4 body armor with ceramic plates.

The Claimant testified that on October 23, 2007, he was driving a semi-tractor trailer in convoy from Camp Eltacato to Camp Fallujah across the Euphrates River when his brakes malfunctioned and the truck made a hard left turn he could not correct. His truck went over the edge of the bridge, dropped approximately 60 feet and landed 30 feet out from the bridge. He was wearing the body armor and seat belt while driving. The Kevlar helmet chin strap broke and the helmet "smashed up everything on the right side of my face." He reported he had no recollection of events from the time he drove off the bridge until he was at the bottom of the fall. He did not recall losing consciousness but was told he had facial fractures and a concussion. He reported his hands shoved the steering wheel through the dashboard, he had contusions to both hands and his chest, his leg hit the turn signal and crushed the dashboard, he had cuts and bruises over his legs, knees, hands and arms, and his major injury was the head injury and bleeding. He exited the truck to the river bank and was unable to communicate with the convoy by radio. He then climbed up to the roadway and was met by a Marine medic who did some quick repairs before putting him in a convoy vehicle to push on to Camp Fallujah. He reported CX 12 were photographs of the truck and trailer taken by the recovery team.

The Claimant testified that he was initially treated at the scene by a Marine medic in the convoy and then by a KBR medic at Camp Fallujah before being convoyed back to "Camp TQ" where he saw another medic. He was then taken by ambulance to the base medical facility and then taken by medivac to the Green Zone and then to Bagdad. He reported being examined and then sent back to the United States for repairs and rehabilitation. He arrived stateside on November 4,

2007 and saw his family physician, Dr. LePor who referred him to a neurologist, clinical psychologist and an ear-nose-throat doctor.

The Claimant denied sleep pattern problems, depression, inability to concentrate, moodiness or mood changes before deployment to Iraq. He denied seeing a psychologist or psychiatrist prior to going to Iraq. He reported chronic pain since the accident and uses prescription Oxymorphine, Lyrica, Lexapro, and occasionally a muscle relaxer. The Lexapro was prescribed by Dr. Reynolds, an anesthesiologist. He reported that he has not been seen by a psychological professional though Dr. Reynolds has requested such evaluations. He has also not been seen by a neurologist. He reported that he suffers with sleep problems, depression, concentration problems, mood changes, and moodiness since Iraq. He reported “tremendous problems” with memory where things that have happened recently being most affected.

The Claimant testified his injury treatment included breaking and resetting his nose, clean out sinus infection. He reported his doctor recommended “trying to do cervical injections to see if they might be able to reduce the narcotics that I’m on” but it has not been approved by insurance. He was taken off Methadone “because of the fear of long-term liver damage” and now takes up to 4 Oxycontin per day for pain. He reported his understanding that Dr. Reynolds placed him a maximum medical improvement on October 21, 2010, and that he was not to lift over 20 pounds and not carry over 10 pounds. He reported that he has not been able to find employment and does not expect to find any in the field he’s been trained because of the work restrictions and the narcotics that he takes.

The Claimant testified that he gets up to four hours sleep between 10:00 PM and 6:00 AM in two hour increments naps after taking pain medication. He stated that the neck and facial pain were the predominant initial issues and when they were stabilized on medication and surgery, the sleep and psychological problems were brought more to the forefront, but were always there. He reported he was even prescribed sleeping pills by Dr. Reynolds when he got back from Iraq.

On cross-examination, the Claimant testified that he now does “some geo-caching” as a hobby for two years, about one or two times a month. This involves using GPS to find objects hidden by others and reporting your findings on a web-based logbook. He reported the level of difficulty ranges “from a five year-old to a professional athlete” depending on the difficulty and location of the object. He downloads information from his computer to his GPS unit and then uses the GPS directions to find the hidden objects. He reported most of his geo-caching searches have been level one on flat ground. He reported he also takes care of his horses and enjoys grooming, feeding, and watering them.

The Claimant testified that when he “heard the loud boom and [the] truck started to veer left” he tried to “correct the truck the way that you’ve been taught ... and when those attempts didn’t work, to just hang on.” He reported no remembering how long it took from when the truck went off the bridge until it hit bottom, though he remembered exiting the truck cab, climbing up the embankment and being cut by constant wire between the T-walls on the river bank and the bridge in the dark. He had no help getting back to the bridge. When he got to the bridge, a Marine from the gun truck calmed him down until a medic came. He was still wearing his flak jacket and thought he was wearing his Kevlar helmet. The medic stopped the bleeding and

placed him in another truck in the convoy to push on. At Camp Fallujah he was met by a foreman and taken to KBR medics. KBR medics cleaned him up and placed him on the next convoy back to "TQ." He saw the medics at "TQ," was given some pain medication, walked to his "hooch" about 100 yards away and returned to the medical clinic the next morning because of the pain. He was taken to the military hospital at "TQ" by ambulance less than 24 hours after arriving back at "TQ." He was placed on IV and given "morphine or something, because I was out of it the rest of the time." He then transferred to the hospital in Bagdad's Green Zone where some x-rays were done and it was determined further treatment would have to be in the United States. He reported it took about four days to arrange travel back to the United States. He flew back to Chicago in business class and was met by a driver in Chicago who drove him home to South Bend, Indiana.

The Claimant testified that his wife called Dr. LePro for an appointment and he saw an associate in two or three days after arriving home. He was given pain killers and a muscle relaxant, but could not recall if he was given sleeping pills at that time. He reported that he started dreaming about the truck accident within the first couple of days of the accident "and those dreams really have never stopped." He reported the dreams are of falling off things like decks, roadways, trees, docks, and "anything you could possibly fall off of, either on foot or in a vehicle."

The Claimant testified that he has not worked since his return from Iraq though he has looked for work by "word-of-mouth." He talked to different business in the Dalton area and to several drivers but has been told that there is no work for him due to his restrictions. He had not submitted any applications for work. He reported that if there were retail jobs within his restrictions he "would certainly apply" for the job and would even go to Iraq or Afghanistan if he could get medical clearance.

The Claimant testified that the after accident report indicated a mechanical failure with the truck and that if he did not know that he would have thought there was an IED involved.

The Claimant testified that he had migraine headaches while in the Air Force while he was an imagery interpretation specialist staring at illuminated film through a microscope day after day. He attributed the headaches to neck strain. He reported the headaches ended when he stopped imagery interpretation and did not occur again until the injury in Iraq. Since coming back from Iraq he has changed vehicle oil a couple of times and planted couple of flowers in the yard. The owner's son cuts the grass. He stated that he would participate in vocational retraining and would like to stay in the transportation field. He stated he can do the basics of computer use, can use the internet, and can use e-mail.

On re-direct examination, the Claimant testified that his truck was the last of five trucks behind a gun vehicle (a six vehicle "stick") in the center "stick" with another "stick behind him. He reported that the first truck in the "stick" behind him would not have seen his truck go off the bridge since it was probably still maneuvering through tank traps before the 90 degree bend to the bridge. He reported that the night was very dark and the bridge was a very dangerous area with several battles having occurred in the "city triangle" area. He reported he had trouble getting back up to the bridge because he had to go over T-walls and through constantan wire.

The Claimant testified that he was aware that he had been diagnosed by a doctor with post-traumatic stress disorder on June 8, 2009. He reported that he had not seen a psychologist or psychiatrist for post-traumatic stress disorder. He stated that before surgery he had extreme pressure in the head from infections and the sinus cavities. He reported that since the accident he has a pausing speech pattern that would make it difficult to do retail sales like he did before. He indicated that he knows the words he wants to say but his brain processes differently to say it. He reported he lives in a quiet part of the country because he believes he could not handle the stress and noise of a non-rural location.

On re-cross examination, the Claimant testified that he lived in Grand Rapids, Michigan 15 years ago and then in downtown Mishawaka until the Iraq events. He reported the metropolitan area of Mishawaka, South Bend, and Elkhorn has about 200,000 to 300,000 people. He testified that he believed it was Dr. Mosalar who diagnosed post-traumatic stress syndrome and recommended a psychologist or psychiatrist seeing him. He stated he is limited from returning to work by pain, the medication and inability to sleep adequately.

Claimant's November 12, 2010 Deposition (EX 8)

The Claimant testified by deposition that he was born on July 28, 1961 and lives alone in a rented trailer in Chatsworth, Georgia. He has married and divorced four times and has two dependent minor children. He reported his treating physician is Dr. Kiley Reynolds at the Spine Care and Pain Management Center in Rome, Georgia. He has been prescribed Opana and Lexapro and occasionally the muscle relaxer Soma. Dr. Scott LePor is his family physician. He reported that the speech hesitation during testimony began "as I climbed out of the truck."

The Claimant testified that he graduated from high school and completed 1/2 -year at college before joining the Air Force and being an imagery interpretation specialist. Later he had courses in customer relations with employers Mercedes Benz and Volvo. With Mercedes Benz, Volvo, Volkswagen and Chevrolet he was a service advisor/writer who wrote repair orders and repair estimates for vehicles. He left the automotive field to become an assistant retail manager at a shoe store. Later he worked driving trucks. He has a commercial driver's license from Georgia with hazmat, tanker, and multiple trailer endorsements that expire July 28, 2013. Prior to working for Respondent SEII, he was a city driver making deliveries in South Bend, Indiana, using a semi-tractor trailer earning \$14.50 per hour for 42.5 hour workweeks.

The Claimant testified he learned of overseas work with SEII from another truck driver and put in an application. He was contacted by a recruiter who explained the basics of the work, area and program. Another recruiter called him and set up testing and in-processing. The additional testing was over a computer in a test center in Michigan and involved psychological questions. He was sent to Houston for processing and received a physical evaluation there and testing to see if he could don personal protection equipment and get up a drive a truck. He had classes in Houston where living conditions and the threat of injury were covered. His wheels up date was December 19, 2006. When he arrived in Iraq there was training at two camps before arriving at his base, Camp Al-Taqaddum, or Camp "TQ." He reported that the Camps where he trained were attacked by mortars and Camp TQ was attacked at least once a month. Every other day his driving duties took him outside the wire for 10 to 14 hours. The convoys were shot at frequently.

He usually drove a flatbed with supplies, but occasionally drove a tanker. After the accident he was interviewed by telephone in the United States about a promotion applied for before the accident. A few days after the interview he was notified that he was offered a position as a supervisor of other drivers. The job involved scheduling trucks, making sure they were loaded right, assemble the drivers and check their personal protection equipment. The job was an inside-the-wire position. He did not perform work as a supervisor; however, there was a month period where the foreman had him inside the wire helping him work the yard with hooking up the right trucks and trailers, helping incoming trucks, and work that needed to be done to complete the mission. He reported vehicles in convoy had been hit by IEDs, the closest to him was 100 meters away. He only saw one person shot, and he was a Marine from their group who was shot in the arm by a sniper on the way back to Camp TQ. He indicated that when an attack event occurred it reinforced that the work was dangerous and did not really increase any anxiety. Above the truck driver was the bobtail – a truck driver in a tractor to help mover or repair tractors in convoy or to drag trailers where the tractor could not be repaired. A convoy commander was a truck driver in charge of the drivers during a convoy. The foreman stayed at camp and made sure the mission was completed. Over the foremen was the transportation manager.

The Claimant testified that on October 23, 2007 they water yard opened in the morning and they loaded pallets of water and brought the trucks back to the yard for staging the night convoy. He returned to the truck yard around 6PM and pushed out in armed convoy right after sundown in his normally assigned tractor, #2385, an armored-up six by four. The Claimant testified about convoy events leading up to, during, and after his tractor went off the bridge outside Fallujah in a manner consistent with his in-court testimony. He testified he filled out an incident report after the accident and that the bobtail and recovery team took pictures of the accident scene. Later he took part in an after-action-review to retrace all his actions and discussed the events with the safety officer.

The Claimant testified he was initially treated at the scene by a Marine medic who stopped the bleeding. When the convoy reached Fallujah, another medic cleaned him up and gave him Motrin. When the convoy returned to Camp TQ he received a pain killer. The next day he was taken to the base hospital due to pain in his head, neck, back, knees, thumb and face. There he had x-rays of his head, neck and back and medivaced to the Green Zone on a backboard with a morphine IV drip. About three days later he returned to Camp TQ and began his trip back to the United States. He reported seeing an associate of his family physician, Dr. LePro for medication for head, neck and back pain, as well as sleeping problems, which included nightly dreams of falling. He stated that his hyperawareness developed in Iraq has not decreased since returning to the United States.

The Claimant testified that he cannot drive for more than one hour before he stops due to headaches. He has numbness and tingling in his fingertips. He can work on a friend's small motors but not for more than 3-4 hours because of neck and low back pain, headaches and hand tingling. He reported he has not worked or looked for jobs since returning from Iraq.

The Claimant testified that he was initially treated by Dr. Krystl who ordered a cervical and spinal MRI. He was then referred to neuropsychologist, Dr. Mosselari. He has treated with Dr.

LePro and Dr. Reynolds in Georgia. Dr. Peter Fong is an associate of Dr. Reynolds. He denied any long-term medical issues prior to deploying to Iraq. He reported that he receives disability compensation payments every two weeks and has no unpaid medical bills. He denied receiving medicare or social security benefits though he did apply for social security benefits and was found not eligible for monetary benefits but the decision on health insurance benefits is still pending. He reported that Dr. Reynolds wanted a functional capacity evaluation, which was done, but he has no idea of the results. He reported that Dr. Reynolds wanted some test done for post-traumatic stress disorder and that Dr. Mosselari, as a clinical psychologist, recommended some further treatment.

The Claimant testified that he seldom sleeps longer than four hours since returning from Iraq and constantly wakes up from the tingling and numbness from his shoulders to his fingers and from dreams.

Medical Records of Claimant (CX 1; EX 9, 14, 18, 20, 24)

11/14/07 A cervical spine MRI was conducted and reported by Dr. P.A. Miro as revealing the cervical cord as normal in appearance without focal lesions; mild disc bulging without focal herniation or central stenosis at C2-3, 3-4, 4-5, and 6-7; foraminal narrowing secondary to tunicate process hypertrophy which is mild-left at C3-4, left at C4-5, bilateral at C5-6 and borderline at C6-7; and borderline central stenosis secondary to spurring and disc bulge at C5-6. The diagnosis included cervical spondylosis with multilevel foraminal narrowing.

11/27/07 The Claimant was evaluated by Dr. J.S. Grewal for cervical pain radiating into the occipital regions at Elkhart General Hospital. He reported separate bilateral temple pain. He denied pain radiation into the upper extremities and denied numbness, weakness or tingling in the upper extremities. When taking prescribed Flexeril and Oxycodone, the pain is at 2/10 level. Pain is increased with activity, standing, walking, stairs, lying down, bending and lifting heavy objects. The 11/14/07 cervical MRI revealed mild bulging at levels C3-7 and mild foraminal narrowing at levels C3-7. Physical examination showed tenderness in the upper facet joints and less over the lower facet joints. Range of motion was decreased except in extension and flex. Facet loading test was positive bilaterally. Upper extremity sensation, strength, and reflexes were intact. Assessment was cervicogenic headaches secondary to cervical facet arthropathy. Continued medication and cervical injection were recommended. The cervical injection (diagnostic medial branch block) was performed later the same day at C3-4 left to block the 3rd occipital nerve.

11/29/07 The Claimant reported that the cervical injection “was the worse thing I’ve ever done” and denied any pain relief. He reported “when he got home and did the things he normally does, pain was even worse than normal.”

12/4/07 The Claimant was seen by Dr. J.S. Grewal in follow-up and reported no benefit from the cervical injection. A diagnostic right occipital nerve block was ordered and performed the same day near the mastoid process. Methadone was added as a long acting medication.

12/12/07 The Claimant was seen by Dr. J.S. Grewal in follow-up. The Claimant reported increased benefit from the Methadone and denied visual disturbances, anxiety, depression or difficulty sleeping. Cervical range of motion was severely restricted in all ranges. There was facet joint tenderness. Conservative treatment on medication with an increase in Methadone was prescribed. Claimant reported that the Methadone at nighttime combined with the Oxycodone provides significant pain relief so he can function to a greater degree. He denied pain radiation into the arms. Methadone was increased to twice daily. The Claimant reported problems with long and short term memory as well as dreams from the accident and also problems with concentration and focus and sensitivity to noise.

1/9/08 The Claimant was seen by Dr. J.E. Gottlieb in consultation for Dr. J.S. Grewal for neck pain into his shoulders and upper arms. Neck range of motion was limited to 60%, upper extremity sensation, strength

and reflexes were intact. X-rays showed moderate disc space collapse at C5-6 and C6-7. Dr. Gottlieb opined that the truck accident exacerbated the Claimant's cervical spondylosis and disc disease and caused the current necessary medical treatment. Plan was a course of physical therapy while neurologist Dr. Kristl evaluated the headaches.

1/21/08 The Claimant saw Dr. K.R. Kristl for a neurological consult. The Claimant reported pain from his shoulders to head, massive headaches, difficulty concentrating, difficulty finding words, tingling in both shoulders into the arms, increased head pain with activity, being awoken from sleep due to pain, personality changes, and some post-traumatic stress symptoms reliving the truck accident in Iraq. The mental status evaluation was reported as normal. The neurological evaluation was normal with normal strength, sensation and reflex. Dr. Kristl report the Claimant had a history of concussion and spinal injury from the accident in Iraq and "has signs and symptoms of significant closed head injury." He ordered s brain MRI, EEG and neuropsychological testing due to the diagnosed closed head injury. He ordered an EMG of the upper extremities was ordered "to try to further define his cervical spine injuries."

1/25/08 The Claimant was seen by Dr. J.S. Grewal in follow-up. The Claimant reported cervical pain radiating bilaterally to the occipital regions and temples and occasionally into the shoulders. He noted he was to begin physical therapy 3 times per week for 5 weeks per Dr. Gottlieb. He denied new symptoms, back pain, leg pain, anxiety, depression or difficulty sleeping. His mood and affect was appropriate. The plan was to continue current medications. Dr. Grewal continued the diagnosis of cervicogenic headaches possibly secondary to cervical facet arthropathy.

2/13/08 Dr. LePro referred the Claimant to neurology for complaints involving concentration, short-term memory, severe word finding problems, halting speech pattern and decreased sleep.

2/21/08 A routine brain MRI revealed no intracranial pathology and left side maxillary sinus disease, left ethmoid disease and left frontal sinus disease.

2/25/08 The Claimant was seen by Dr. J.S. Grewal in follow-up. Pain remained unchanged at 2/10 to 3/10 on medication. When severe, he reports numbness and tingling in shoulders and hands. He denied back pain, leg pain, anxiety, depression or difficulty sleeping. The plan was to hold off intervention at this time.

3/4/08 The EEG ordered by Dr. J.S. Grewal for history of headaches, neck pain and episodic numbness was reported as within normal limits. The EMG/NCV of the upper extremities was conducted and reported by Dr. K.R. Kristl as "subacute lesion of the left greater than the right with C6 nerve root."

3/6/08 The Claimant was seen in follow-up by Dr. J.E. Gottlieb for cervical spondylosis and stenosis on complaint of neck pain radiating into head and bilateral temples. Physical therapy helped range of motion but not the pain. Plan was to continue medication, hold therapy during work up by neurologist and neuropsychologist. No surgical intervention at this time. Recommend he see Dr. Augustio for sinus damage.

3/24/08 Dr. Gottlieb added Lycira for help with worsening neurologic component.

4/21/08 The Claimant was seen by Dr. J.S. Grewal for neck and shoulder pain. His pain was considered reasonably well-controlled on current medications. He reported pain increased at night and interfered with sleep. Methadone, Rozerem, Soma, Oxycodone and Cymbalta were continued.

4/25/08 P.W. Macellari, Ph.D., completed his neuropsychological evaluation of the Claimant which was conducted over March 3 and 28, 2008 and April 25, 2008. Mr. Macellari adequately recorded the October 23/24, 2007 events and the Claimant's complaints and treatment history. He reported that the Claimant gave his best efforts during the evaluation and that there were no sign of malingering or symptom exaggeration. The WAIS revealed a verbal IQ of 101, performance IQ of 83 and a full scale IQ of 93. The Claimant performed very poorly on verbal subtests that assess attention, concentration and verbal concept formation. He performed very poorly on performance subtests that assess conceptual set shifting, attention to detail, practical reasoning, and sequencing using visual social cues. He opined that these scores indicated significant diffuse cerebral dysfunction. The MAS revealed an impaired level of auditory short-term memory functioning which would

present a significant barrier to most independent work. There was also an impaired level of ability to learn new information presented in written or oral form that would be a substantial problem for all types of employment. Testing revealed significant bilateral loss of upper extremity tactile sensitivity and bilateral agrophesthesia. Psychomotor problem solving was seriously impaired bilaterally. The MMPI-2 was considered reliable and indicated some difficulty with openly expressing anger and under stress may have a tendency to develop physical symptoms. The diagnostic impression was that “a pattern of resolving diffuse cerebral dysfunction with more specific right hemispheric impairment” was present. Mr. Macellari opined that pain and medication side-effects may contribute to the cognitive and memory impairments. He recommended behavioral pain management and stress inoculation training as well as neuropsychological reevaluation in one year.

4/30/08 The Claimant was seen by Dr. M.A. Agostino on referral by Dr. Dr. Kristl for chronic sinusitis. Examination revealed deviated nasal septum, 80% left nasal obstruction, and hypertrophied right inferior turbinate. Plan was to continue steroid, saline and antibiotic plus consider surgery in future.

5/30/08 The Claimant was seen by Dr. J.S. Grewal for pain medication management. Tingling in the upper extremities into the finger tips was reported. He had good range of motion in all extremities. Medication was continued.

6/2/08 The Claimant followed up with Dr. Grewal’s office. He complained of neck pain radiating into the shoulders and up the back of the head. He noted numbness and tingling in the hands at night. He reported extended periods of work increased pain.

6/30/08 The Claimant underwent corrective nasal surgery for acquired depressed lateral cartilage and septal deviation on the left. The surgery was performed by Dr. M.A. Agostino.

9/18/08 The Claimant was seen in follow-up by Dr. J.S. Grewal for medication management. The Claimant reported right arm tingling when he wakes up in the morning and that it usually goes away in 30 minutes. Rozerem and Soma were discontinued. Cymbalta was decreased. A trial of Lycira was begun.

9/25/08 The Claimant reported that Lycira was causing disorientation and dizziness. He was to begin vacation the next day. The Lycira dosage was decreased.

9/26/08 The Claimant reported Lycira continued to make him dizzy after taking the medication and he did not feel safe driving vehicles after taking the medication. He was told to stop the Lycira until he returned from vacation.

10/29/08 The Claimant completed new patient medical questionnaire for Dr. LePor

11/18/08 The Claimant was seen by Dr. S.E. LePor to reestablish treatment. Dr. LePor took the Claimant’s medical history and did an examination which was within normal limits. He diagnosed chronic pain with referral for pain management. He also noted a cognitive decline since the head injury in Iraq and chronic upper back and neck pain. He recommended pain management and neurosurgical consult for chronic pain. He reported the Claimant’s cognitive decline as stable. In a “Referral Information” form completed by nurse Hubrley for the referral to pain management, the diagnosis listed was “PTSD” with no further explanation.

12/29/08 The Claimant was seen by Dr. K. Reynolds for neck pain radiating into right shoulder and arm. The Claimant is up and active 10 hours per day and managing 8 hours of sleep per night. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Claimant has had a traumatic brain injury as a result of the motor vehicle accident but has not been under the care of a psychiatrist or psychologist for post-traumatic stress disorder. A cervical MRI was ordered.

1/5/09 The Claimant was evaluated for physical therapy to address pain interrupting sleep, pain with cervical rotation, radiculopathy into the upper extremities and headaches. Dr. K. Reynolds approved a plan of care providing physical therapy 2 times per week for 4 weeks.

1/23/09 The Claimant was seen in follow-up by Dr. K. Reynolds for headaches and neck pain radiating into right shoulder and arm. The Claimant reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Methadone was increased to three time per day.

2/20/09 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into right shoulder and arm. The Claimant has improved by 60 percent since starting treatment with the clinic. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Cymbalta was decreased. Physical therapy was continuing.

3/20/09 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into right shoulder and arm. The Claimant has improved by 70 percent since starting treatment with the clinic. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal.

4/9/09 Dr. S.E. LePor reported that the Claimant has had a thorough evaluation and continuous follow-up for cervicogenic headaches, radicular pain to the upper extremities, chronic neck pain from cervical bulging disc. The Claimant "has remained relatively well controlled with medical therapy however there has been no organic improvement with patient's disability and at this time remains with the same prognosis of lifetime involvement."

4/17/09 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal.

5/15/09 The Claimant was seen in follow-up by Dr. K. Reynolds for neck and right shoulder pain, which was stable on medication but not at maximum medical improvement. He reports he "has improved by 50 percent since starting treatment" with the clinic. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. He reported Lyrica made him dizzy and jaw clenching with Cymbalta. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Cymbalta was discontinued and Lyrica was decreased.

6/8/09 The Claimant was seen by Dr. S.E. LePor in follow-up for chronic pain, post traumatic stress disorder, and cognitive disorder. The Claimant reported his cognitive difficulties at baseline. Physical examination revealed normal range of motion in the cervical, thoracic, and lumbar spine, normal mental status examination, normal neurological examination and normal strength, sensation and reflexes. Vitamin D3 was added to help with cognitive function.

6/11/09 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain and right shoulder pain. He reports he "has improved by 50 percent since starting treatment" with the clinic. The Claimant reported being more active with a concordant increase in pain. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. He was assessed for return to work status and found not able to return to work.

6/24/09 The Claimant was seen by Dr. L.A. Kelly for medical evaluation. Dr. Kelly accurately recorded the Claimant's medical history and events surrounding the injuries. He reviewed available medical records including those from Dr. K. Kristl who reported a March 4, 2008 EMG/NCS indicated a subacute lesion of the C6 nerve root and an EEG was normal. Dr. Kristl had described a history of concussion and cervical spine injury. Physical examination revealed bilateral cervical tenderness in the paraspinal muscles and trapezius muscle areas. Cervical flexion and rotation were at 75% with 50% cervical extension. Spurling maneuver was

positive. Upper and lower extremity strength and sensation were normal. Tricep reflexes were absent and decreased in the right bicep tendon. Dr. Kelly diagnosed cervical strain injury and cervical spondylosis. He recommended a repeat cervical MRI and repeat EMG/NCS of the upper extremities. He opined that treatment to date has been appropriate but that opiate medication appeared excessive to the objective signs. The prognosis was that there would not be permanent work restrictions unless the MRI or EMG/NCS revealed "some specific findings." He opined that the Claimant "is capable of performing activities of daily living without specific restrictions. As work restrictions, Dr. Kelly placed the Claimant at light duty with no lifting over 20 pounds, push/pull up to 30 pounds, and no overhead work.

7/8/09 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Effexor was increased.

8/5/09 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and down to the finger tips. Physical therapy had been completed and the Claimant continued home exercise so Oxycodone was decreased. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Cervical MRI and EMG were ordered.

9/2/09 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Dr. Reynolds reported the Claimant doing well on decreased Oxycodone dose. He intended to decrease and wean the Claimant off Methadone. Dr. Reynolds considered the treatment "in a holding pattern" while awaiting a cervical MRI, bilateral upper extremity EMG and chiropractic therapy.

10/3/09 The Claimant was seen by nurse D. Humphrey for medication refills. The Claimant reported increased neck pain due to coughing from allergies and colds the past month. He is stable on medication.

11/2/09 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Claimant did not tolerate decrease in Methadone which was ordered returned to three time per day. He was counseled not to drive while taking the prescribed medication – Oxycodone, Effexor, Lycira, and Methadone.

11/30/09 The Claimant was seen in follow-up by Dr. P. Fong for neck pain radiating into the arms and headaches. He reported being active 18 hours a day with an average of 6 hours of sleep at night. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Facet injections were ordered for the cervical pain and headaches. A cervical MRI was also ordered.

12/29/09 The Claimant was seen in follow-up by physician's assistant Juan He for neck pain radiating into the arms and headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He reported that the neck pain is moderately stable on current medications though it takes 4 hours to fall asleep after taking Effexor. He reported that his activities of daily living have improved as a result of treatment. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. The diagnosis continued as cervical spondylosis without myelopathy, degeneration of cervical intervertebral disc, and cervicgia. Medication was continued.

1/26/10 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He reported still having problems with concentration and has to focus to produce words. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. He reported increased stress with teenage daughter and hospitalization of his mother. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. He has been unable to wean himself off Methadone. Methadone was discontinued, Effexor increased and Oxycodone changed to Percocet.

2/23/10 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He reported Percocet keeps him awake at night and Effexor makes him feel down and not wanting to do anything. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Effexor was decreased and Oxycodone was restarted to replace Percocet.

3/9/10 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Oxycodone and Effexor were discontinued, Lyrica was continued and Opana and Lexapro were started.

4/6/10 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Opana was decreased to three times per day. He continued the Claimant as unable to work.

5/3/10 Cervical x-rays revealed moderate degenerative changes mainly at C4-5, C5-6 and C6-7. Skull base was within normal limits.

5/4/10 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and right side of back as well as headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. He continued the Claimant as unable to work.

6/1/10 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Opana was increased. A cervical MRI was ordered. He continued the Claimant as unable to work.

7/1/10 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Medication was continued.

7/29/10 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He

reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Lexapro was increased and a functional capacity evaluation was ordered. He continued the Claimant as unable to work.

8/26/10 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He reported his car had broken down and increased stress which increased pain. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Dr. Reynolds requested an EMG and cervical MRI to help determine whether maximum medical improvement has been reached. Prescriptions for Opana, Lexapro and Lyrica were renewed.

9/1/10 Dr. K. Reynolds reported the Claimant as unable to work.

9/23/10 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He reported staying active by trying to work on cars and mow his lawn. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal.

10/12/10 A functional capacity evaluation was completed and reported as indicating maximum and reliable effort demonstrated. There were no difficulties with sitting but difficulty with shoulder to overhead lifting of 37 pounds. His physical abilities were classified within the medium exertional level.

10/13/10 Cervical MRI revealed vertebral body alignment and height maintained. Broad-based disc osteophyte complex with foraminal narrowing was identified at the C3-4 through C6-7 levels. Bilateral maxillary mucous retention cysts were reported. Cervical degenerative disc disease most pronounced at C6-7 where there was severe bilateral foraminal narrowing was the reported impression.

10/21/10 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Examination revealed normal attention span and ability to concentrate with normal fund of knowledge. Upper extremity strength and sensation were normal. Dr. Reynolds reported the Claimant at maximum medical improvement with limitations as set forth in detail in the functional capacity evaluation. Dr. Reynolds "suggest(ed) a neurological assessment if patient is to be cleared to be able to drive a vehicle commercially." He released the Claimant to work with lift restrictions at less than 20 pounds, maximum and frequent lifting and/or carrying object weighing up to 10 pounds, and sitting with a degree of pushing and pulling of arm and leg controls. He recommended the Claimant work with a vocational case manager.

11/22/10 Dr. K. Reynolds reported the Claimant's work restrictions at the "moderate" work level lifting 20 pounds maximum, frequent lifting and/or carrying object weighing up to 10 pounds, and sitting with a degree of pushing and pulling of arm and leg controls.

12/20/10 The Claimant was seen in follow-up by Dr. K. Reynolds for neck pain radiating into the arms and headaches. He reported being active 16 hours a day with an average of 4 hours of broken sleep at night. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Hypersomnia and insomnia were not present. Dr. Reynolds reported cervical flexion normal with "globally decreased ROM in cervical region" and pain on left rotation and extension. Tenderness in the cervical facet joints, upper trapezius areas and occipital nerves was noted. Posture and gait were normal. Attention span was normal and ability to concentrate was listed as grossly intact. Upper extremity strength and sensation were normal. Medication and home exercise were continued. The Claimant was restricted to moderate work with restrictions of lifting no more than 20 pounds, could frequently lift and/or carry 10 pounds, and could sit with a degree of pushing and pulling of arm and leg controls.

1/13/11 The Claimant was seen in follow-up by Dr. K. Reynolds for complaints of head, neck and bilateral arm pain. He reported decreased memory, change in sleep pattern, depression, inability to concentrate and moodiness. Physical examination revealed neck pain with extension and rotation to the left with global decrease in range of motion. Tenderness in the cervical facet joints, upper trapezius areas and occipital nerves was noted. Neurological and motor examination was intact. Continued medication and exercise were ordered.

October 12, 2010, Functional Capacity Evaluation (CX 17; EX 39)

The Claimant completed a functional capacity evaluation on October 12, 2010. He reported “pins & needles pain in the cervical spine [and] bilateral pain with supine lying [at night].” The physical therapist reported the Claimant “demonstrated reliable and at maximum effort consistent with a Medium Physical Demand Level.” He had demonstrated no problems sitting for approximately 100 minutes. There was range of motion limitations with extension, lateral bending and rotation activities. Cervical pain was increased when lifting 37 pounds overhead from shoulder level. The therapist noted that the Claimant presented “with rounded shoulders, forward head posturing and severe thoracic kyphosis” and that such positioning “would also be an exacerbating factor in his complaints of cervical spine pain.” Various testing sequences were stopped on complaints of increased heart rate. The physical therapist recommended limiting overhead reaching to a frequent basis with no limitation on forward reaching and limiting carrying to 67 pounds, overhead lifting to 37 pounds, and shoulder high lifting to 72 pounds. The physical therapist indicate that no job descriptions were provided for comparison but that the Claimant’s abilities were compared to the Dictionary of Occupational Titles for “Truck Driver in any industry (905-663-014) which is classified as Medium PDL.”

August 30, 2011, Labor Market Survey Report (EX 42)

N. Perales, MS, CRC, submitted a labor market report for an area in Michigan within 25 miles of where the Claimant then lived as well as overseas work. Her report was based on a February 8, 2011 vocational assessment report by R. Norris, MS, CRC, and review of the October 12, 2010 functional capacity evaluation. She noted the vocational assessment showed the Claimant with “a Class A CDL with all endorsements, reliable transportation, support from family and friends in his local area, familiarity with his local market, high school diploma, one semester of college work, honorable discharge from military service, work experience as a manager, driver, owner-operator, service advisor, and his ability to work at the medium PDL.” She indicated the functional capacity evaluation indicated that the Claimant “is capable of full time duties at the medium physical demand level (PDL) with noted lifting abilities of thirty-seven (37) pounds overhead on an occasional basis, floor to waist lift of up to 115 pounds on an occasional basis, and reaching forward on a frequent basis.”

Ms. Perales opined that the Claimant could perform the 11 identified local area jobs listed which were in the \$7.75 to \$22.30 per hour salary range, which would generate between \$16,120 to \$46,380 annual income, and could perform the 7 identified overseas jobs.

Local full-time area jobs within 25 miles of residence at time of survey⁵:

⁵ This Administrative Law Judge finds that the position of “Automotive Parts Packer” is not suitable alternate employment because the described 50 pound lifting and moving exceeds medical vocational restrictions on

Job Title	Hourly Pay Rate	Annual Equivalent
Warehouse Order Selector	\$12.50 - \$16.10 after 18 months	\$26,000 - \$33,488
Bus Driver	\$11.24	\$23,379
Warehouse Manger	\$11.00 - \$13.00	\$22,880 - \$27,040
Taxi Cab Driver		\$26,000 - \$41, 600
Local Tractor Trailer Driver	\$18.76 - \$20.43	\$39,020 - \$42,494
Assistant Store Manager (sporting goods)	\$17.22 - \$22.30	\$35,820 - \$46,380
Assistant Store Manager (Dollar Tree)	\$17.22 - \$22.30	\$35,820 - \$46,380
Dispatcher (freight line)	\$16.62 - \$21.84	\$34,560 - \$45,430
Passenger Van Driver	\$8.00 - \$8.50	\$16,640 - \$17,680

Overseas employment identified:

Job Title	Location	Wage Rate	Annual Income
Warehouse Shift Manager	Jeddah, Saudi Arabia	\$3,840/month	\$46,080
Deliver Driver (light vehicle)	Dubai, UAE	\$1,568/month - \$2,658/month	\$18,816 - \$31,896
Driver (passenger van)	Abu Dhabi, UAE	\$2,200/month - \$2,863/month	\$26,400 - \$34,356
Driver (rental car lot)	Al-Futtaim, UAE	\$1,200/month – \$2,000/month	\$14,400 - \$24,000
Store Keeper (manager)	Saudi Arabia	\$1,660/month - \$2,747/month	\$19,920 - \$32,964
Junior Storekeeper	Dubai, UAE	\$1,340/month - \$1,863/month	\$16,080 - \$22,356

Earnings Records (CX 6, 7, 10; EX 2, 6, 26, 27, 36, 37)

On December 7, 2006 the Claimant entered into an employment agreement with the Respondent to work as a Heavy Truck Driver in Iraq/III Corps area. The terms of the contract provided for a base salary of \$3,000.00 per month for 40-hour work weeks augmented by overtime at a straight scale of \$17.31 per hour, a foreign service bonus of \$150.00 per month, a work area differential of \$1,050.00 per month, hazard/danger pay of \$1,050.00 per month, employer provided housing and meals, and paid holidays if not worked. The foreign service bonus was described as “a financial incentive for employee to accept foreign assignment and to encourage employee to remain at the foreign location.” The work area differential “recognizes work area hardship, weather extremes, or severe cultural or sociological differences.” Under the employment agreement “the duration of employee’s assignment is anticipated to be approximately 12 months. There is no minimum guaranteed duration of employment.”

lift/carry; and that the described “Delivery Route Driver” is not suitable alternate employment because of the restrictions on overhead reach limits the ability to trouble-shoot and refill food and beverage machines.

The Social Security earnings records indicate that the Claimant worked for Vitran Express, Inc., d/b/a PJAX Inc., out of Gibsonia, Pennsylvania, for at least the five years immediately preceding work for Respondent. During that time the Claimant worked as a truck driver and earned \$36,225.89 in 2006; \$42,055.22 in 2005; \$44,631.38 in 2004; \$39,712.03 in 2003; and \$33,940.46 in 2002.

For the period from December 19, 2006 through November 2007, Respondent paid the Claimant a total of \$76,828.76 for work in Iraq.

Department of Labor Forms (CX 2, 3,8, 9; EX 1)

The Claimant's LS-203 "Employee's Claim for Compensation" dated November 9, 2007 and amended LS-203 dated May 8, 2009, indicate the date of injury as October 23, 2007 with pay stopping at 11:59 PM, November 1, 2007.

The Respondent's LS-206 "Payment of Compensation without award" indicates the Claimant was injured on October 23, 2007 and began a period of disability on November 1, 2007. It also indicates that voluntary payment of disability compensation began effective November 2, 2007 at the disability compensation rate of \$984.99 per week based on an average weekly wage of \$1,477.48. The first payment was made on November 29, 2007.

The Respondent's LS-202 "Employer's First Report of Injury" indicates that the Claimant was injured on October 23, 2007 and that "On 24-Oct-07 at 0400 hrs KBR Safety and Medic responded to a call that a TTM Heavy Truck Driver was injured while on convoy. It was reported that Driver #1 had driven off the bridge 3.2 km South of Camp Fallujah. It is uncertain what caused the truck to veer hard left and bounce off barriers, through the railing and drop about 30 feet on the embankment of the river. Further investigation revealed that the employee's drivers licenses have ... [no further entry]" The nature of injury was listed as "Contusion // Multi Body Parts."

October 22, 2011 Final Disposition of Georgia Criminal Court (EX 42)

This exhibit reflects that the Claimant was convicted of a felony offense by a jury. He was and sentenced to be incarcerated for a total of ten (10) years and to pay \$2,219.00 in court costs and \$32.00 in probation fees. He was granted credit for time served and permitted to serve the last five (5) years of the sentence on probation if certain conditions were satisfied.

The exhibit infers that the Claimant is currently incarcerated in the Georgia state penal system. No release date is indicated.

DISCUSSION

1. *The Claimant has established by a preponderance of the evidence that he suffered a closed head injury / traumatic brain injury on or about October 23, 2007, that is covered under the Defense Base Act.*

When establishing his prima facie case that he suffered an injury arising out of and in the course of employment, the claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; but must show at least that working conditions existed which could have caused the harm. *U.S. Industries/Federal Sheet Metal, Inc. v Director, OWCP (Riley)*, 455 US 608 (1982) Under Section 20 of the Act, once the claimant has established a prima fascia case, in the absence of substantial evidence to the contrary, the claimant is entitled to the presumption that the claim presented comes within the provisions of the LHWCA (§ 920(a)) and that sufficient notice of the claim has been given (§ 920(b)).

Once entitlement to these presumptions is established, the employer has the burden to demonstrate with substantial countervailing evidence that the injury was not caused by the claimant's employment. *Swinton v J. Frank Kelly, Inc.*, 554 F.2d 1075 (D.C. Cir. 1976) *cert denied* 429 US 820 (1976). In establishing the lack of casual nexus, the employer must produce facts, not speculation or mere hypothetical probabilities, to overcome the presumption of compensability. See *Dearing v Director, OWCP*, 27 BRBS 72 (CRT) (4th Cir. 1993) unpublished; *Dewberry v Southern Stevedoring Corp.*, 7 BRBS 322 (1997), *aff'd mem.*, 590 F.2d 3312 (4th Cir. 1978); *Shaller v Cramp Shipbuilding & Drydock Co.*, 23 BRBS 140 (1989) finding § 20(b) applies to § 12 of the Act notice requirements; *Bivens v Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990)

The uncontradicted testimonial evidence, submitted photographs and Respondent's LS-202 establish that the Claimant was a heavy truck driver in convoy to Camp Fallujah, Iraq, when the tractor trailer rig he was driving veered left, went through bridge railing and crashed, tractor first, into a river bank 30 feet below the bridge. The Claimant climbed back to the bridge roadway without assistance and was initially treated by a convoy medic to stop bleeding before entering a convoy vehicle for transport to Camp Fallujah and then back to his home base of operations. The Claimant testified that his helmet chin strap broke and the helmet "smashed up" the right side of his face. He also reported he smashed the dashboard, steering wheel and controls with his hands and legs and sustained contusions to both hands and chest; cuts and bruises over his legs, knees, hands and arms; facial fractures; and a concussion.

No records of medical treatment for the October 23, 2007 injuries prior to the Claimant's return to the United States were submitted for consideration. Those medical records submitted for the period beginning November 14, 2007 indicate that the Claimant was treated for a deviated nasal septum with 80% left nasal obstruction and hypertrophied right inferior turbinate; left-sided maxillary sinus disease, ethmoid disease and frontal sinus disease; cervical disc disease; cervical facet arthropathy; cervical spondylosis with multilevel foraminal narrowing; subacute lesion of the C6 nerve root; cervicogenic headaches into the occipital and temple regions bilaterally.

The Claimant first reported problems with long and short term memory, concentration, ability to focus, sensitivity to noise and dreams of the vehicle accident to Dr. J.S. Grewal on December 12, 2007, during his evaluation for cervical pain radiating into his occipital and temple regions. In the course of treatment a neurological consult was ordered. Dr. K.R. Kristl conducted the neurological consult on January 21, 2008. He reported that the Claimant “has signs and symptoms of significant closed head injury” for which he ordered an MRI scan, EEG and neurological testing. He also ordered an EMG of the upper extremities to evaluate the extent of the cervical spine injuries.

The neuropsychological testing was completed by psychologist P.W. Marcellari in March 2008. The psychologist considered the neuropsychological tests valid and without signs of malingering or symptom exaggeration. He opined the results of the tests administered indicated “a pattern of resolving diffuse cerebral dysfunction with more specific right hemispheric impairment.” The objective neuropsychological testing of the Claimant less than five months after the vehicle he was driving crashed into a river bank after falling 30 feet from a bridge in Iraq revealed “a pattern of resolving diffuse cerebral dysfunction with more specific right hemispheric impairment.”

On November 18, 2008, the Claimant reestablished a doctor-patient relationship with his family physician prior to his work with Respondent, Dr. S.E. LePor. Dr. LePor reported his examination of the Claimant revealed a cognitive decline since the head injury in Iraq which appeared to be stable. He diagnosed post-traumatic stress disorder without further explanation and recommended the chronic pain be addressed by pain management and a neurological consult. He continued to list cognitive disorder, chronic pain and post-traumatic stress disorder as diagnoses when he saw the Claimant in April and June 2009. There are no records from Dr. LePor after June 8, 2009.

Dr. Reynolds began pain management for the Claimant on December 29, 2008. He indicated only in the December 29, 2008 medical notes that the Claimant had a traumatic brain injury as a result of the motor vehicle accident but has not been under the care of a psychiatrist or psychologist for post-traumatic stress disorder. All of Dr. Reynolds subsequent examinations of the Claimant indicated the Claimant had a normal attention span and ability to concentrate with a normal fund of knowledge. He did not explain how he concluded the Claimant had suffered a traumatic brain injury or post-traumatic stress disorder.

In view of the foregoing, the Claimant has established a prima facie case that he sustained closed head injury / traumatic brain injury when the tractor-trailer he was driving in the course of his employment crashed into a river bank 30 feet below a bridge enroute to Camp Fallujah, Iraq.

To contradict the presumptions under §920 of the LHWCA that the Claimant sustained a closed head injury / traumatic brain injury as a result of work conditions occurring on October 23, 2007, Respondent introduced medical records that the Claimant’s February 2008 routine brain MRI revealed no intracranial pathology. Respondent’s counsel argued that the neuropsychological examination did not reveal significant cognitive dysfunction and that the Claimant was magnifying or feigning physical and mental problems; but the report of psychologist P.W. Marcellari who conducted and interpreted the neuropsychological testing stated findings exactly

opposite of counsel's representation. Additionally, Respondent's counsel argues that the Claimant's traumatic brain injury and post-traumatic stress disorder are not related to the October 23, 2007 vehicle accident and that the Claimant suffered from headaches and psychological issues prior to working for the Respondent. However, Respondent has not introduced evidence of preexisting medical conditions or well reasoned medical opinions contradictory of the medical opinions of neurologist Dr. K.R. Kristl or psychologist P.W. Marcellari.

After deliberation on the evidence of record, this Administrative Law Judge finds that the Claimant has established by a preponderance of the evidence that he suffered a closed head / traumatic brain injury on October 23, 2007 that arose out of and in the course of his employment as a heavy truck driver in Iraq for the Respondent.

2. *The Claimant has failed to establish that he suffered a psychological injury, or worsening of a pre-existing psychological condition, arising out of the October 23, 2007, events, including post-traumatic stress disorder.*

While the treating physicians have linked the Claimant's "resolving cognitive disorder" to his closed head injury and medication regimen, Dr. LePor and Dr. Kristl have also mentioned post-traumatic stress disorder in their medical records.

The Diagnostic and Statistical Manual of Mental Disorders, 4th ed. (DSM-IV) is a non-legal psychiatric diagnostic authority that may be used as a reference when evaluating the credibility and weight to be given a medical opinion involving a psychiatric impairment. When making a legal determination of the existence of a psychiatric injury, the Administrative Law Judge is not required to use the DSM-IV in assessing the existence of a psychiatric injury. *ITT Industries, Inc. v. S.K. [Kamal]*, 2011 WL 798464, *11 (S.D. Tex. Mar. 1, 2001) The strict use of the criteria within the DSM-IV to make a legal determination of the existence of a psychiatric injury has been cautioned against by the U.S. Supreme Court in *Clark v. Arizona*, 548 US 735 (2006) and has been described by the U.S. Court of Appeals as a course of action that would take the determination of a compensable injury away from the courts and surrender it to mental health experts. See *Kamal* at *12 citing *U.S. v. Long*, 562 F.3d 325, 332-333 (5th Cir. 2009) The DSM-IV, in Appendix B, specifically excludes an acquired cognitive disorder which "occurs as a consequence of a closed head injury of sufficient severity to produce a significant cerebral concussion" after head trauma has occurred as a category of psychological mental health impairment.

The first indication that post-traumatic stress disorder (PTSD) may be an issue with the Claimant was first reported by neurologist Dr. K.R. Kristl on January 21, 2008. In his summary report Dr. Kristal indicated the Claimant reported losing control of his truck, driving off a bridge in Iraq, falling approximately 30 feet while restrained and wearing a flak jacket, and having difficulty with concentration and word finding. Dr. Kristl reported the Claimant's spouse as indicating "some personality changes." Dr. Kristl added in the background summary, "He has some Posttraumatic Stress Disorder symptoms reliving the truck accident and such, as well." Dr. Kristl did not list his impression, assessment or diagnosis separately in his report; but, he did end his report with a paragraph indentifying a course of treatment for "significant closed head

injuries” and “cervical spine injuries.” Dr. Kristl did not mention post-traumatic stress disorder in any of his subsequent medical record entries. Dr. Kristl did not provide any explanation for why he included the sentence of post-traumatic stress disorder symptoms in the lead background paragraph of his January 21, 2008 report. After review of all Dr. Kristl’s medical entries regarding the Claimant, this Administrative Law Judge finds that Dr. Kristl’s entry concerning post-traumatic stress disorder is not a documented, well-reasoned medical opinion. Accordingly, his comment on post-traumatic stress disorder is given no weight.

On two occasions in March 2008, clinical neuropsychologist P.W. Macellari, Ph.D., met with the Claimant and conducted neuropsychological testing of the Claimant. In his April 25, 2008 report, Mr. Macellari described the Claimant’s October 23, 2007 tractor-trailer crash in three sentences of background information. Despite detailed clinical testing and interaction with the Claimant, he did not include post-traumatic stress disorder as a diagnosis in his report.

On November 18, 2008, Dr. S.E. LePor examined the Claimant on his desire to re-establish a patient-doctor relationship. The examination was within normal limits. Dr. LePor reported the Claimant had a cognitive disorder that appeared stable and had chronic pain for which he ordered pain management and neurosurgery consults. In the “Referral Information” form completed by a nurse, the referral by Dr. LePor for the pain management consult, was listed the diagnosis “PTSD” without any explanation of why that diagnosis appeared on the form, what was considered before “PTSD” was placed on the referral form, and what medical personnel made the determination of “PTSD.” In view of the foregoing, no weight is given to the “Diagnosis: PTSD” set forth on the November 18, 2008 referral form for pain management.

On December 29, 2008, pain management physician Dr. K. Reynolds saw the Claimant based on the referral by Dr. LePor. Dr. Reynolds indicated that the Claimant had not been treated by a psychiatrist or psychologist for post-traumatic stress disorder. He did not include post-traumatic stress disorder in his own diagnoses and did not further refer to post-traumatic stress disorder in subsequent medical entries during his treatment of the Claimant. The proper inference to be drawn is that Dr. Reynolds saw the Claimant based on the November 18, 2008 referral to pain management from Dr. LePor’s office and that the thought of PTSD was presented to Dr. Reynolds solely as a result of the referral form entry “Diagnosis: PTSD.” Accordingly, Dr. Reynolds’ entry on PTSD is given no weight.

During the hearing EX 35 was reserved for Respondent’s evidence related to an employer provided psychiatric evaluation by Jeffery Walker, Ph.D.. EX 34 was listed as the curriculum vitae of Mr. J. Walker. However, Respondent’s counsel did not submit either EX 34 or EX 35 for consideration as evidence.⁶

After deliberation on the evidence of record, this Administrative Law Judge finds that the Claimant has failed to establish that he suffered a psychological injury, or worsening of a pre-existing psychological condition, arising out of the October 23, 2007, events, including post-traumatic stress disorder.

⁶ Respondent’s counsel’s reference to EX 35 in his post-hearing brief was not considered as evidence.

3. *The Claimant has failed to establish he is entitled to psychological and psychiatric medical benefits under §907 of the Longshore and Harbor Workers' Compensation Act for psychological or psychiatric impairment.*

As noted above, the Claimant's cognitive disorder as a result of closed head injury / traumatic brain injury is not considered a psychological or psychiatric condition in the medical community under the DSM-IV and the Claimant failed to establish that he suffered a work-related psychological or psychiatric injury or worsening of a pre-existing psychological or psychiatric condition under the Act. Accordingly, the Claimant is not entitled to psychological and psychiatric medical benefits under §907 of the LHWCA for psychological or psychiatric impairment.

4. *The Claimant's average weekly wage on October 23, 2007 was \$1,691.20 per week, which yields a disability compensation rate of \$1,127.47 per week.*

Under the Act, disability compensation is based upon the average weekly wage of the disabled employee at the time of the injury. If the injured employee has worked in the same employment for substantially the whole year preceding his injury, the average weekly wage is computed in the manner set forth in § 910(a) of the LHWCA; see *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981), *aff'd mem.* 710 F.2d 615 (9th Cir. 1999). If the injured employee did not work in the same employment for substantially the whole year preceding his injury and evidence is submitted for consideration demonstrating the wages of similar employees working the same or similar employment for substantially the whole year preceding the date of injury in the same or neighboring location, the average weekly wage is computed in the manner set forth in § 910(b) of the LHWCA; see *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025 (5th Cir. 1998); *Harrison v Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). If neither sections can reasonably and fairly be applied, the average weekly wage is computed in the manner set forth in § 910(c) of the LHWCA; see *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294 (5th Cir. 2000).

The Claimant was hired by the Employer on December 7, 2006, and went into a pay status on December 16, 2006 when he was "wheels-up" for assignment in Iraq. He was injured on October 23, 2007 and continued in a pay status through November 1, 2007, inclusive. The Respondent began to voluntarily pay the Claimant disability compensation starting on November 2, 2007. Therefore the Claimant did not work for the Employer substantially the whole year preceding his injury. Accordingly, the provisions of §910(a) cannot be applied in this case.

There was no evidence submitted for consideration demonstrating the wages of similarly situated employees working the same or similar employment in Iraq, or neighboring location, for substantially the whole year preceding the October 23, 2007 injury date. Work within the United States is not considered "a neighboring location" in this case. Accordingly, §910(b) of the Act may not be used to compute the Claimant's average weekly wage.

The object of § 910(c) is to establish a sum that reasonably represents the injured employee's annual earning capacity at the time of the injury and the potential of the individual to earn such income. *K.S. [Simons] v. Service Employees International, Inc.*, 43 BRBS 18 (2009), *aff'd on recon, en banc*, 43 BRBS 136 (2009); *Proffitt v. Service Employers International, Inc.*, 40 BRBS

41 (2006); *Bath Iron Works Corp. Co. v. Preston*, 380 F.3d 597 (1st Cir. 2004); *Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991). “In addition, post injury events, such as decreased work opportunities or wages, generally are irrelevant to the calculation of a claimant’s average weekly wage” and should not inure to the benefit of the employer. *Proffitt*, *infra*, at page 45, and the cases cited therein. See also *Patton v. Brown & Root Services*, BRB No. 07-0615 (Nov. 28, 2006) *unpub*, for examples of factors to be considered. Under appropriate circumstances of a one-year contract for work overseas in a hostile, dangerous environment in return for higher wages, a “claimant’s average weekly wage must be based on the higher wages earned in the job in which he was injured ... particularly since those wages were the primary reason for [a claimant] accepting employment under [existing] dangerous working conditions.” *K.S. [Simons]*; see also *J.C. v. Service Employees International, Inc.*, BRB No. 06-0401 (Jan. 29, 2008) *unpub*, rejecting the concept of “blending” stateside income with income earned in Iraq immediately prior to injury and holding that “Claimant’s average weekly wage must be calculated based solely on his overseas earnings in order to reflect his earning capacity in the employment in which he was injured.”

In *K.S. [Simons]* the Benefits Review Board, on reconsideration, stated that a claimant’s average weekly wage under the Defense Base Act is not “in every DBA case ... derived solely from overseas earnings.”⁷ The Board endorsed the factors considered in *Proffitt* and stated that the relevant factors to consider in determining whether the average weekly wage should be based on the overseas earning to include (1) payment by the employer to claimant of substantially higher wages to work overseas than he earned stateside, (2) claimant’s employment entailed dangerous working conditions, and (3) claimant is hired to work full-time under a one year contract. *K.S. [Simons]*; *Proffitt*; also *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011)

In this case the Parties entered into an employment contract which provided for a base salary of \$3,000.00 per month for the first 40 hours of weekly work performed with overtime being paid for additional hours of work at the straight time rate of \$17.31 per hour; a foreign service bonus of 5% of base salary (\$150.00 per month) as a financial incentive to accept a foreign assignment and remain at the foreign location; a work area differential of 35% of base salary (\$1050.00 per month) to recognize work area hardship, weather extremes, or severe cultural or sociological differences; and hazard pay of 35% (\$1050.00 per month) based on assignment location. The employment agreement also provided the Claimant with necessary transportation, housing and meals. The expressed expected duration of the employment agreement was twelve months. Under the circumstances of this case, the Claimant’s average weekly wage is determined solely on the compensation provided by the Employer under the existing employment contract for the Claimant’s services as a heavy truck driver in Iraq.

During the period from December 19, 2006 through November 1, 2007 the Respondent paid the Claimant \$76,828.76 in compensation for work performed. The period from December 19, 2006 through November 1, 2007, inclusive, is a period of 45-3/7 weeks. This equates to an average weekly wage of \$1,691.20 and yields a compensation rate of \$1,127.47 per week. This is less than the maximum compensation rate payable under §906(b) of the LHWCA based on the date of injury, October 23, 2006, which is \$1,160.36.

⁷ The Board indicated that the sole use of overseas earnings to establish average weekly wage may not be appropriate if the employment period is set or anticipated to be for less than one year.

5. *The Claimant is entitled to temporary total disability benefits for the period from November 2, 2007 through October 20, 2010, inclusive, at the disability compensation rate of \$1,127.47 per week.*

The Parties have stipulated that the Claimant is entitled to temporary total disability compensation benefits based on the October 23, 2007, work-related injuries for the period from November 2, 2007 through October 20, 2010 and that the Claimant reached maximum medical improvement on October 21, 2010. As found above, the Claimant's average weekly wage at the time of injury was \$1,691.20, which yields a compensation rate of \$1,127.47.

In view of all the foregoing, the Claimant is entitled to temporary total disability benefits for the period from November 2, 2007 through October 20, 2010, inclusive, at the disability compensation rate of \$1,127.47 per week.

6. *The Claimant is entitled to permanent total disability benefits for the period from October 21, 2010 through August 29, 2011, inclusive, at the disability compensation rate of \$1,127.47 per week.*

The parties have stipulated that Claimant reached maximum medical improvement on October 30, 2007. Consequently, disability before that date is classified as temporary disability and disability on and after that date is classified as permanent disability.

To be awarded "total" disability benefits, a claimant must first demonstrate his inability to return to his former job because of his work-related injury. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 380 (4th Cir. 1994); *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 800 (4th Cir. 1999) If the claimant establishes his prima facie case that he is unable to return to his usual employment, the burden shifts to the employer to demonstrate the availability of suitable alternative employment for the claimant in order to avoid a finding that the disability is a "total" disability under the LHWCA. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP (Chappell)*, 592 F.2d 762, 765, 10 BRBS 81, 83 (4th Cir. 1979). To satisfy this burden an employer may either itself make available to the injured employee suitable alternative employment or present evidence demonstrating that suitable alternative employment is available to the injured worker in the relevant labor market *Norfolk Shipbuilding and Dry Dock Co. v. Hord*, 193 F.3d 797, 800 (4th Cir. 1999). To make the latter showing, the employer must demonstrate that a range of jobs exists that is reasonably available and can realistically be secured and performed by the disabled claimant. If this is done, then the economic loss incurred by the claimant may establish "partial" disability. If the employer establishes that suitable alternative employment is available through employment with other potential employers, the claimant may show that he diligently tried and was unable to secure appropriate employment such that a finding of "total" disability would be appropriate. Whether the work is suitable usual employment or suitable alternate employment is determined by comparing the employee's medical restrictions with the requirements of the employment position.

Here the Parties have stipulated that the Claimant was entitled to temporary total disability benefits from November 2, 2007 through October 20, 2010, thus establishing entitlement to total disability compensation benefits.

Respondent's counsel has submitted EX 42, Ms. M. Perales' August 30, 2011, "Labor Market Survey Report" to establish that there is suitable alternate employment that the Claimant could perform within his medical-vocational work restrictions arising out of the October 23, 2007 work-related injuries. Ms. Perales based her findings on the October 12, 2010 functional capacity evaluation endorsed by Dr. K. Reynolds on October 21, 2010 with the caveat that the Claimant should undergo "a neurological assessment if patient is cleared to be able to drive a vehicle commercially." In his subsequent December 2012 and January 2011 medical entries Dr. Reynolds continued to report limitation in cervical rotation and neck pain with left cervical rotation and cervical extension. There is no evidence of a neurological assessment as recommended by Dr. Reynolds on October 21, 2010.

In evaluating the jobs identified as suitable alternate employment by Ms. Perales, this Administrative Law Judge finds that performance of the listed taxi, tractor-trailer, bus, delivery van and passenger vans on a full-time basis would require cervical extension and rotation on a frequent basis and that such a vocational requirement has not been medically approved by treating physicians in this case and is still pending evaluation with a neurological assessment specifically recommended by Dr. Reynolds if the Claimant was to be cleared to drive a commercial vehicle. Additionally, Ms. Perales has failed to address the effect, if any, of the Claimant's medication regimen on the ability to drive commercial vehicles⁸. Accordingly, this Administrative Law Judge finds that the alternate employment involving driving commercial vehicles are not suitable alternate employment in this case at this time. The remaining jobs of warehouse order selector, assistant store manager (2) and dispatcher existing in the geographical area of the Claimant at the time of the labor market survey are suitable alternate employment.

In view of all the foregoing, this Administrative Law Judge finds that suitable alternate employment existed for the Claimant as of August 31, 2010 and that the period of "total" disability ended on August 29, 2010. Accordingly, the Claimant is entitled to permanent total disability benefits for the period from October 21, 2010, through August 29, 2011, inclusive, at the disability compensation rate of \$1,127.47 per week

7. The Claimant is entitled to permanent partial disability benefits from August 30, 2011 and continuing at the disability compensation rate of \$640.48 per week.

As discussed above the Employer has established suitable alternate employment for the Claimant for the period commencing August 30, 2011. Claimant, therefore, is only entitled to disability compensation benefits for his proportionate economic loss from his pre-injury wages to the entry-level jobs found to be suitable alternate employment.

As discussed above Claimant's average weekly wage at the time of the October 23, 2007, work-related injuries was \$1,691.20. Ms. Perales several non-driving jobs the Claimant would be able

⁸ On November 2, 2009, Dr. Reynolds cautioned the Claimant not to drive while taking the prescribed medications Oxycodone, Effexor, Lyrica and Methadone.

to perform in his local area, all were 40-hour per week, entry level positions. The overseas jobs in the non-danger zones of Saudi Arabia and the United Arab Emirates are not considered to be in the Claimant's reasonable local area as of August 30, 2010, and are not considered suitable alternate employment.

The warehouse order selector position paid \$26,000 to \$33,488 annually. The sporting goods store assistant manager position paid \$35,820 to \$46,380 annually. The Dollar Tree assistant store manager paid \$35,820 to \$46,380 annually. The freight dispatcher position paid \$34,560 to \$45,430 annually. Accordingly, the vocational evidence establishes suitable alternate employment in the range of \$33,050 to \$42,919 annually, which is a weekly wage range of \$635.58 to \$825.37 per week. When the Claimant's work history and acquired skills and abilities are compared to the described positions, this Administrative Law Judge finds that it is reasonable that the Claimant would be hired in the mid-range of the described wage range and not at the entry level range, which would equate to a weekly average wage for suitable alternate employment of \$730.48 per week. Accordingly, the Respondent has established that the Claimant has suffered an economic loss of \$960.72 per week (\$1,691.20 per week – \$730.48 per week) due to his permanent partial disability arising out of his October 23, 2007 work-related injuries.

It is specifically noted that the Claimant is currently unable to perform suitable alternate employment since the fall of 2011 due to his incarceration in the Georgia state prison system for a felony conviction which resulted in a sentence to a minimum period of five years. Since the inability to perform suitable alternate employment is the result of the Claimant's personal actions and felony conviction, such inability does not impact on the existence of suitable alternate employment in this case.

In view of all the foregoing, the Respondent has established that the Claimant is entitled to only permanent partial disability compensation from August 30, 2011 and continuing at the disability compensation rate of \$640.48 per week [$(\$1,691.20 \text{ per week} - \$730.48 \text{ per week}) \times 2/3$].

8. *The Claimant has been underpaid for total disability compensation voluntarily paid by Respondent for the period November 2, 2007 through August 29, 2011, inclusive, in the amount of \$142.48 per week.*

The Respondent has controverted the average weekly wage due the Claimant. The Respondent's LS-206 indicates that the Respondent has been paying the Claimant disability compensation benefits commencing on November 2, 2007 at the rate of \$984.99 per week based on an average weekly wage of \$1,477.48. As found above, the Claimant's average weekly wage at the time of injury was \$1,691.20 which yields a disability compensation rate of \$1,127.47. The correct total disability compensation rate commencing on November 2, 2007 is \$142.48 per week more than the disability compensation rate paid to the Claimant. Accordingly, the Claimant has been underpaid for total disability compensation at the rate of \$142.48 per week for the period November 2, 2007 through August 29, 2011, inclusive.

9. *The Claimant has been overpaid for permanent partial disability compensation voluntarily paid by Respondent for the period beginning August 30, 2011 in the amount of \$344.51 per week.*

As noted above, the Claimant is entitled to permanent partial disability benefits from August 30, 2011 and continuing in the amount of \$640.48 per week. Since the Respondent has continued to pay the Claimant at the rate of \$984.99 per week, the Claimant has been overpaid permanent partial disability compensation at the rate of \$344.51 (\$984.99 per week - \$640.48 per week) per week since August 30, 2011. The Respondent is entitled to a credit for the amount of disability compensation overpaid in this case.

10. *The Claimant has failed to establish that he is entitled to reimbursement for cervical injections purportedly ordered by ordered by Dr. K. Reynolds.*

Section 7(a) of the LHWCA provides that “[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.” 33 U.S.C. § 907(a) (2006). The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer they must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care should also be appropriate for the injury. 20 C.F.R. § 702.402 (2008).

Claimant’s counsel submits that the Claimant testified that his physician “wants to perform cervical injections in the hope that he would be able to reduce the narcotic medication” and that the Claimant told Dr. Kelly during a June 24, 2009 evaluation “that Dr. Reynolds had discussed performing cervical injections ... [but that Dr. Kelly] would recommend an updated cervical MRI and a repeat EMG before he could make further recommendations, though he stated ‘future treatment may involve some further injections depending on the findings on the cervical MRI and EMG nerve conduction studies.’”

In this case, the Claimant has established a work-related injury to the cervical spine that limits his cervical range of motion and resulted in cervicogenic headaches into the occipital and temple regions bilaterally. The treating physician, Dr. LaPor, referred the Claimant to Dr. Reynolds for pain management. Dr. Reynolds treated the Claimant over an extended period of time with prescribed oral medication and physical therapy. There is no indication by Dr. Reynolds that he ordered cervical injections for treatment of the Claimant’s work-related cervical injuries or related pain; only that he prescribed physical therapy and a medication regimen. Additionally, the billing records from Dr. Reynolds fail to disclose any billing related to cervical injections.

In view of the foregoing, the Claimant has failed to establish that the Employer is liable for cervical injections ordered by Dr. Reynolds.

11. *The Respondent has failed to establish entitlement to §908(f) relief.*

By §908(f)(1) of the LHWCA an employer may limit its liability for the payment of permanent disability compensation if the employer establishes that the work-related “injury for which it has

responsibility would not have resulted in total permanent disability but for the presence of claimant's preexisting condition of which it was aware." *Universal Marine Corporation v. Moore*, 126 F.3d 256, 265 (4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 185 (4th Cir. 1993) In cases where the claimant has not retired, the preexisting injury must have been "manifest" to the employer prior to the work-related injury that is the basis for the claim for total disability compensation. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982); *Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644 (4th Cir. 1983); *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548 (4th Cir. 1991)

"The manifestation requirement places on the employer the burden of showing that at the time of hiring or during the period of employment the employee suffered from some existing medical disability or handicap that predated any occupational injury. It is not required that the employer had actual knowledge of the pre-existing condition, only that the knowledge of the pre-existing condition be available to the employer when the period of employment begins or at some point during the period of employment, for example from medical records." *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 550 (4th Cir. 1991) A "post-hoc" diagnosis, even if based on medical records in existence prior to the occupational injury, is insufficient for meet the "manifest" requirement. *Cardill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353 (1984)

In order for a "pre-existing permanent partial disability" to exist there has to be more than a past medical condition. "The mere fact of past injury does not itself establish disability. There must exist, as a result of that injury, some serious, lasting physical problem" amounting to a vocational disability or handicap. *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 453 (4th Cir. 2003) citing Judge Scalia in *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222 (D.C. Cir 1985) Where an employee has successfully returned to full and unrestricted work following the underlying event(s) alleged by the employer as the basis for the "pre-existing permanent partial disability," such return to work may strongly suggest that the employee was not suffering from a partial disability related to such alleged event(s). *Cherry* at 453 It is specifically noted that the "previous disability" need not arise out of an employment-related injury. *Lawson v. Suwanee Fruit & S.S. Co.*, 336 US 198 (1949) However, there need "be a serious lasting condition that could motivate an employer to discharge the employee due to increased risk of compensation liability." *Devor v. Department of the Army*, 41 BRBS 77, 81 (2007) citing *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602 (3rd Cir. 1976); see also *John T. Clark & Son of Maryland, Inc. v. Benefits Review Board, DOL*, 621 F.2d 93 (4th Cir. 1980) and *Maryland Shipbuilding and Drydock Co. v. Director, OWCP*, 618 F.2d 1082 (4th Cir. 1980)

In this case the Respondent has failed to establish that the Claimant suffered from a pre-existing medical condition that imposed "a serious lasting condition that could motivate an employer to discharge the employee due to increased risk of compensation liability" prior to the October 23, 2007 work-related injuries and has failed to establish that the medical-vocational restrictions placed upon the Claimant due to the October 23, 2007 are greater due to a pre-existing limiting condition. Accordingly, the Respondent is not entitled to relief under §908(f) of the LHWCA.

CONCLUSION AND FINDINGS OF FACT

After deliberation on all the evidence of record, including post-hearing briefs of counsel, this Administrative Law judge finds:

1. The Claimant suffered a work-related injury to his right side, a right-side facial fracture, a closed head injury (traumatic brain injury) with resulting cognitive disorder, injury to his cervical spine, and injuries to his back, cheek, hands and left side on October 23, 2007, while performing assigned duties as a heavy truck driver when his tractor trailer went off a bridge in Iraq and crashed in the river bank below the bridge.
2. The Claimant has failed to establish that he suffers from a psychological impairment as a result of the October 23, 2007, tractor-trailer crash from the bridge in Iraq.
3. The Claimant has failed to establish that a pre-existing psychological condition was aggravated, accelerated, or worsened as a result of the October 23, 2007, tractor-trailer crash from the bridge in Iraq.
4. The Claimant's October 23, 2007, work-related physical injuries arose out of and in the course of his employment with Respondent Employer pursuant to a government contract within the scope of the Defense Base Act.
5. An Employer / Employee relationship existed on and at the time of the physical injuries.
6. The Employer was advised of the injury on October 23, 2007.
7. The Claimant suffered no economic loss until November 2, 2007.
8. Notice of Controversion was filed by the Employer on June 16, 2009 and June 7, 2010.
9. An informal conference was held on May 19, 2010.
10. The Claimant is entitled to temporary total disability compensation benefits based on the October 23, 2007, work-related injury from November 2, 2007 through October 20, 2010.
11. The Claimant reached maximum medical improvement on October 21, 2010.
12. The Claimant's average weekly wage on October 23, 2007 was \$1,691.20 which yields a maximum disability compensation rate of \$1,127.47 per week.
13. The Claimant is entitled to temporary total disability compensation at a rate of \$1,127.47 per week for the period from November 2, 2007 to October 20, 2010.
14. The Claimant is entitled to permanent total disability compensation at a rate of \$1,127.47 per week for the period from October 21, 2010 to August 29, 2011.

15. The Claimant is entitled to permanent partial disability compensation at a rate of \$640.48 per week for the period from August 30, 2011, and continuing.
16. The Respondent paid the Claimant total disability compensation for the October 23, 2007, work-related injury at a rate of \$984.99 per week for the period from November 2, 2007 and continuing.
17. The Claimant has been underpaid for total disability compensation at the rate of \$142.48 per week for the period November 2, 2007 through August 29, 2011, inclusive.
18. The Claimant has been overpaid permanent partial disability compensation at the rate of \$344.51 per week since August 30, 2011.
19. The Claimant has failed to establish that he is entitled to reimbursement for cervical injections purportedly ordered by ordered by Dr. K. Reynolds.
20. The Claimant is entitled to necessary and appropriate medical care pursuant to §907 of the LHWCA for his October 23, 2007, work-related injury to his right side, right-side facial fracture, closed head injury (traumatic brain injury) with resulting cognitive disorder, injury to his cervical spine, and injuries to his back, cheek, hands and left side.
21. The Respondent has failed to establish entitlement to §908(f) relief under the LHWCA.

ORDER

It is hereby **ORDERED** that:

1. In accordance with the Act, Employer shall pay Claimant:
 - a. temporary total disability compensation at a rate of \$1,127.47 per week for the period from November 2, 2007 to October 20, 2010;
 - b. permanent total disability compensation at a rate of \$1,127.47 per week for the period from October 21, 2010 to August 29, 2011; and,
 - c. permanent partial disability compensation at a rate of \$640.48 per week for the period from August 30, 2011, and continuing.
2. Employer shall receive credit for any related disability compensation benefits paid to Claimant.
3. Interest at the rate specified in 28 USC § 1961 in effect when this Decision and Order is filed with the District Director shall be paid on all accrued benefits computed from the date on which each payment was originally due to be paid.

4. All monetary computations made pursuant to this Order are subject to verification by the District Director.
5. Employer shall provide such reasonable, appropriate, and necessary medical treatment as the nature of the Claimant's October 23, 2007, work-related injury to his right side, right-side facial fracture, closed head injury (traumatic brain injury) with resulting cognitive disorder, injury to his cervical spine, and injuries to his back, cheek, hands and left side as required pursuant to § 907 of the Act.
6. Within twenty (20) days of the receipt of this Decision and Order, Claimant's attorney shall file a fully itemized and supported fee petition with the Court, and send a copy of same to opposing counsel who shall then have fifteen (15) days to respond with objections thereto.

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ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia