

**U.S. Department of Labor**

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**Issue Date: 27 December 2011**

**CASE NO.: 2011-LDA-00048**  
**OWCP NO.: 02-191544**

*In the Matter of:*

**HOWARD OVERTON,**  
*Claimant,*

v.

**SERVICE EMPLOYEES INTERNATIONAL, INC.,**  
*Employer,*

*and*

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

**APPEARANCES:**

Gary B. Pitts, Esquire  
For the claimant

Kenneth M. Simon, Esquire  
For the employer/carrier

**BEFORE:** DONALD W. MOSSER  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding arises from a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651 *et seq* (hereinafter referred to as the Act). This case was referred to the Office of Administrative Law Judges on October 20, 2010.

Following proper notice to all parties, a formal hearing was held on March 3, 2011 in Tampa, Florida. Exhibits of the parties were admitted in evidence at the hearing pursuant to 20 C.F.R. § 702.338 and the parties were afforded the opportunity to present testimonial evidence.<sup>1</sup> I kept the record open following the hearing for the parties to submit post-hearing evidence<sup>2</sup> and briefs.

The findings of fact and conclusions of law set forth in this decision are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered.

### *ISSUES*

The principal issue for decision involves the nature and extent of claimant's disability since September 4, 2009. However, the resolution of the case requires consideration of the underlying questions of whether the claimant has reached maximum medical improvement from his injuries, and if so, whether the claimant is able to return to his usual employment with the employer and whether he is entitled to medical benefits under Section 7 of the Act.<sup>3</sup>

### *FINDINGS OF FACT*

#### *Background*

Claimant is a sixty-two year old man. He graduated from high school and was immediately drafted by the U.S. Marine Corps. Instead, he volunteered for the U.S. Air Force and entered that branch of the military on June 3, 1968. Mr. Overton served in Viet Nam in supply and logistics from late 1969 to early 1971. This service exposed him to multiple traumatic situations such as being attacked while driving his truck alone away from the base and witnessing other soldiers being wounded and killed from mortar attacks. This caused him to experience some post traumatic stress syndrome symptoms which subsided after leaving Viet Nam. He retired from the military in 1993, after more than twenty-four years of service. (Tr. 15-17).

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<sup>1</sup>References to ALJX, CX, and EX pertain to the exhibits of the administrative law judge, claimant, and employer, respectively. The transcript of the hearing is cited as Tr. and by page number.

<sup>2</sup>CX 1-12 and EX A-I were admitted at the hearing, as were ALJX 1-5. Claimant on March 30, 2011 submitted records of the Veterans Administration, which are marked as CX 13. Employer/carrier filed the depositions of Drs. Hector Cases and Thomas Newman by letter dated August 11, 2011 as EX J and K, respectively. Since these documents were submitted pursuant to the agreement of the parties, **IT IS HEREBY ORDERED** that CX 13 and EX J and K are admitted in evidence.

<sup>3</sup>A motion to dismiss entitlement of the employer/carrier to Section 8(f) relief was filed by the Director, Office of Workers' Compensation Programs on January 19, 2011 based on the absolute defense under 20 C.F.R. § 702.321. Since the employer/carrier has not raised the Section 8(f) issue before me, the Director's motion is moot.

Mr. Overton became an over-the-road truck driver in 1969 and worked for several companies driving big rigs throughout the United States. After the attack on the World Trade Center on September 11, 2001, he unsuccessfully attempted to reenlist in the military. He subsequently decided he could best serve his country by driving trucks in support of the Army in Iraq. (Tr. 18). He was hired by Service Employees International, Inc. (hereinafter SEI or employer) on December 19, 2006 and arrived at the Anaconda Military Base in Iraq two days later. Initially, he worked as a truck driver hauling fuel, construction equipment, military vehicles and supplies in convoys escorted by the military. (Tr. 19, 31-33). He worked twelve hours a day, seven days per week. (Tr. 21). In addition to driving the trucks, the drivers loaded and down loaded them, which involved physical lifting. (Tr. 31, 34). They also were required to occasionally change a flat truck tire which weighed about 300 pounds. (Tr. 48). Additionally, the drivers were required to wear heavy protective armor vests and helmets, making it difficult to climb up and in the vehicles. (Tr. 34, 46). Mr. Overton estimated that his protective gear weighed between sixty and sixty-five pounds. (Tr. 48).

### ***Work-related Accident***

Mr. Overton was promoted to convoy commander in August of 2008. (Tr. 19, 31). This position required him to occasionally perform the same duties as the drivers, but sometimes he would be assigned a driver for his truck. His additional responsibilities included attending briefings and communicating with the military about such things as reports, routings, and loads. He drove or was a passenger in the first truck of the convoy, immediately behind the military escort vehicle. (Tr. 19-20, 32-33).

Claimant was a passenger in the lead truck just past midnight on September 4, 2009, when the truck was hit on the right side by an improvised explosive device (IED). The damage caused by the explosion was mainly on the right side of the vehicle, but the bulletproof windshield also was cracked and there were holes in the fuel tank. After continuing on for about a mile, they stopped to check the status of damage and the rest of the trucks and personnel. Despite the fuels leaks, they decided to proceed on another mile to the nearest military facility. There they assessed the damage and prepared the necessary reports before being allowed to return to their base in Baghdad. (Tr. 22-23).

### ***Initial Medical Care***

Mr. Overton initially did not think he had any injuries from the explosion other than experiencing some burning sensation in his mouth. (Tr. 23). The employer's medical personnel checked the claimant on his return to Baghdad and noticed that his ear was swollen. Mr. Overton was told to not work on the following day. However, when he went to bed and laid his head down "the room started going around in a circle" and he felt like he was upside down. (Tr. 24-25). The following day he had pain in the base of his neck, a sore throat and was experiencing problems with his ears. (CX 1, p.4). He apparently was sent to Dubai before returning to this country for treatment, where an audiogram conducted on September 9, 2009 showed mild bilateral sensorineural hearing loss (SNHL). (CX 1, p.4). SEI reported the nature of the claimant's injuries on September 4, 2009 as irritation of multi body parts, sore throat, tinnitus, post traumatic stress syndrome (PTSD) and insomnia. (CX 4; EX A).

### ***Medical Evidence***

SEI authorized Dr. Lance R. Meyerson, who is an ENT/otolaryngology specialist, to examine the claimant on September 18, 2009. The physician reported the claimant's medical history, physical findings from his examination and had an audiogram conducted by an associate. He diagnosed a mild sensorineural hearing loss, subjective tinnitus and cervicalgia. He recommended a MRI on the spine for the claimant's "traumatic whiplash injury to his neck" as well as anti-inflammatory, prescription pain medication and some steroids. For the claimant's hearing loss and tinnitus, he recommended follow-up audiograms and hearing protection options. (CX 1, pp. 1-11).

On September 29, 2009, a magnetic resonant imaging test (MRI) without contrast was conducted on the claimant's cervical spine for his complaint of neck pain. Of particular importance, Dr. David J. Germain, a board certified radiologist, interpreted the test as showing: (1) advanced degenerative changes at C5-6 with disc space narrowing, and; (2) moderate degenerative changes at C6-7, including disc space narrowing and osteophyte formation. (CX 1, pp. 13-14).

Dr. Meyerson conducted a follow-up examination of the claimant on October 5, 2009. He reported the claimant complained of worsening of the ringing in his ears following the MRI, as well as nausea and equilibrium problems. The audiogram again showed a mild hearing loss. The physical findings from the exam pertinently included essentially normal ears and a normal neck. His diagnoses were the same as reported on September 18, 2009. He recommended the claimant protect his ears from loud noises and a follow-up audiogram in one year. He explained to the claimant there is no specific treatment for tinnitus. He recommended the claimant see Dr. Geoffrey Cronen, an orthopedist, for his neck disc abnormalities. He reported that he believed most of the claimant's symptoms were secondary to the trauma. (CX 1, pp. 15-16).

Mr. Overton was examined by Dr. Cronen and his assistant on the following day. Pertinent symptoms, histories and findings from the physical exam were recorded and cervical x-rays of the spine were conducted. The x-rays revealed moderate to severe degenerative changes at C5-6 and C6-7. Bilateral stenosis was noted at C5-C6 and around the spinal cord. The physician's diagnoses therefore included cervical stenosis, degenerative disc disease and cervical spondylosis. Dr. Cronen recommended a referral for physical therapy for the claimant's neck pain. He also reported the claimant had not reached maximum medical improvement from his work-related cervical problems, but anticipated Mr. Overton would following his referred physical therapy. (CX 1, pp. 17-21).

The claimant returned to Dr. Cronen for a follow-up examination on November 11, 2009. He complained to the physician that he had intermittent pain in his neck and the back of the head when walking that was improving with physical therapy, but no pain at rest. He also noted that his tinnitus appeared to be getting worse. Dr. Cronen's physical examination of the claimant

produced no new findings. The physician stated that the claimant should continue his physical therapy and consider an exercise program. He also stated that he believed Mr. Overton may benefit from a pain management evaluation to consider epidural steroid injections or other comparable treatment for his lingering pain. He suggested a referral to a neurologist for medications for his continuing tinnitus. He concluded Mr. Overton had not reached maximum medical improvement. (CX 1, pp. 23-27).

Mr. Overton was next referred to Dr. Hector J. Cases, who is board certified in neurology and pain management. This physician first examined the claimant on December 10, 2009 for complaints of neck pain, numbness in both hands and arm pain, ringing in the ears associated with dizziness and nausea and depression, anxiety, loss of sleep and flashbacks. (CX 1, p. 12; EX J). He noted the pertinent historic information, reviewed the results from the September 29, 2009 MRI, and conducted a full neurological examination which showed sensory loss in the claimant's hands that he attributed to the C6-7 abnormalities. He also found a severe loss of range of motion of the cervical spine associated with cervical facet joints and cervical muscular structures. Dr. Cases diagnosed: (1) cervical facet joint median pain, cervical radiculitis or radiculopathy, cervical muscle spasm or myofascial pain syndrome; (2) prior history of vertigo and hearing loss; and (3) history of flashbacks and possibly PTSD involving combat situations. He ordered an upper extremity EMG nerve conduction study and recommended cervical facet joint injections for the neck pain. He also recommended physical therapy, as well as prescription pain medication and muscle relaxants, for the claimant's neck complaints. He referred him to Dr. Loren Bartels for the vertigo and hearing loss and recommended a psychiatric evaluation for the possible PTSD. (EX J, pp. 7-12).

Dr. Cases next examined the claimant on January 8, 2010 and his diagnostic impressions and recommendations remained essentially unchanged. He reported the nerve conduction study showed chronic bilateral cervical radiculopathies. However, he did note that the claimant had successfully undergone a series of cervical injections and showed gains from his physical therapy both of which had resulted in no pain in his neck, but some continued pain in his arms. The physician also reported the claimant's worst problem was his dizziness and that he continued to experience some tingling and numbness of both upper extremities. He added that the claimant was to be evaluated by Dr. Bartels for the dizziness and the Veterans Administration (VA) for PTSD. Dr. Cases finally noted the claimant cannot work because of his positional vertigo. (CX 1, pp. 36-38).

Claimant was evaluated by Dr. Bartels on January 19, 2010 for his bilateral tinnitus, and vertigo/imbalance. After reporting the findings from his review of the history, systems, physical examination, and audiogram, the physician pertinently noted that the claimant's hearing loss was not noise-blast induced but more likely functional. Dr. Bartels stated that testing showed no nystagmus, but that the delayed onset dizziness may indicate some utricular dysfunction. He suggested a follow-up full audio vestibular evaluation. (CX 1, pp. 39-42).

A psychiatric evaluation of the claimant was conducted by Dr. Kirti J. Pandya on February 12, 2010 on a referral from the carrier for the purpose of ruling out post traumatic stress syndrome. After recording and considering pertinent historical information and test results, Dr. Pandya concluded Mr. Overton has some depression and anxiety symptoms which are related to

the September 4, 2009 explosion. He noted, however, that the claimant does have chronic adjustment problems which have been temporarily exacerbated. With respect to PTSD, the physician stated it was difficult to diagnose, but based on the claimant's complaints he possibly had PTSD, which he described as essentially not severe. Dr. Pandya recommended short-term treatment with anti-anxiety or anti-depressant medications. He anticipated the claimant should be at maximum medical improvement in six months. (CX 1, pp. 43-51).

Dr. Bartels again evaluated the claimant on February 22, 2010. After reporting the findings from this examination, the physician concluded the claimant had reached maximum medical improvement and could return to work as a truck driver from a vestibular status perspective. In support of this conclusion, Dr. Bartels reported the claimant had a zero percent impairment for hearing loss and tinnitus. Although he estimated the claimant's vestibular impairment at 5-10 percent from objective findings, he expected it to be at a reasonable functional level with some physical therapy. (CX 1, pp. 53-56).

On March 5, 2010, Dr. Cases completed a work status report in which he diagnosed cervical spondylosis or facet joint pain and cervical radiculitis/radiculopathy. He concluded the claimant could return to his regular work as a truck driver in Iraq based on the neck pain standpoint. He also gave the claimant a 7% disability rating based on the American Medical Association guidelines, which he described as a pinched nerve. (CX 1, p. 58; EX J, pp. 20-21). However, the physician acknowledged that he did not completely understand the work the claimant was performing in Iraq when he was injured. (EX J, p. 20).

Lori Cohen, Ph.D. interviewed Dr. Pandya by telephone and on March 16, 2010 sent the physician her version on Dr. Pandya's findings from the February 12, 2010 psychiatric evaluation of the claimant. (CX 1, pp. 59-60). She asked Dr. Pandya to confirm by signing the document that she would clear the claimant to return to work, although she would agree to treat him pharmacologically, noting that he does not suffer from any psychiatric impairment that would prohibit him from re-engaging in his occupational duties. She also asked Dr. Pandya to confirm that although the claimant could benefit from further treatment for his pre-existing psychiatric maladjustment difficulties, the evaluation did not yield compelling data to support an impairing psychiatric condition, including PTSD. Dr. Pandya signed the document on March 23, 2010. (CX 1, pp. 59-60).

Claimant was evaluated at the Veterans Administration Medical Center, Tampa, Florida on March 23, 2010 by clinical psychologist Kevin L. Croswell. After considering the claimant's historical information and conducting an interview of Mr. Overton, Dr. Croswell found the claimant displayed several PTSD symptoms. His principal diagnosis was PTSD, chronic, combat and warzone-related (Viet Nam and Iraq), major depressive disorder, single-episode, moderate. Dr. Croswell's treatment plan was trauma processing therapy for three to six months to educate the claimant about PTSD and options to resolve it. (CX 1, pp. 61-69).

Dr. Cases prepared another work capacity evaluation on April 19, 2010 regarding the claimant's chronic neck pain. He indicated the claimant had reached maximum medical improvement on that date. However, he placed greater work restrictions on the claimant than he had on March 5, 2010. Dr. Cases indicated the claimant would be limited to four hours of

reaching, reaching over his shoulder, twisting, bending/stooping and operating a motor vehicle. He also limited Mr. Overton's work involving pushing, pulling and lifting to four hours and no more than fifteen pounds. (CX 1, p. 70). This physician's treatment notes did not indicate the reason he changed the work restrictions between March and April; however, the claimant testified that the physician changed the restrictions because Mr. Overton discussed his work restrictions with him. (EX J, p. 28; Tr. 37-38). Dr. Cases also acknowledged during his deposed testimony on June 15, 2011 that he referred the claimant to VA psychiatry for his PTSD and would defer to the expertise of the VA regarding that condition. (EX J, pp. 28-29).

Claimant was admitted to the VA Medical Center from August 16, 2010 to September 24, 2010. The principal reasons for his admission were traumatic brain injury evaluation and treatment. However, other concerns on admission included dizziness/loss of balance, headaches/cervicalgia, nausea, vision, hearing/tinnitus, numbness/tingling, cognitive/fatigue, and emotional/PTSD. Treatment included physical, pool and occupational therapies, general medicine including various tests, medications, and specialized psychiatric. According to Dr. Bryan P. Merritt, the claimant was discharged following this comprehensive treatment with a variety of prescribed medications and instructions to follow his exercise program, and to contact the pain program, if needed. The discharge diagnoses pertinently included mild traumatic brain injury/post concussion syndrome from the IED explosion, headaches related to the concussion/IED explosion, PTSD, sleep apnea, and tinnitus. (CX 13, pp. 1-9).

Dr. Thomas M. Newman, who is board certified in neurology, examined the claimant on January 10, 2011 regarding the claimant's complaints of neck pain, headaches and dizziness. This physician found the claimant had no neurological abnormalities, no inner ear dysfunction, no vertigo and no abnormal mental problems. (EX K, pp. 8-10). He said he reviewed some medical records from the VA of September 2, 2010, which showed a diagnosis of mild traumatic brain injury or post-concussion syndrome, as well as PTSD. He acknowledged the claimant suffers from some psychological and psychiatric problems and that he would defer to a psychiatrist from that standpoint. (EX K, pp. 10-12).

Claimant testified that he still is bothered by multiple medical problems. He stated he cannot drive because he is concerned about his dizziness and headaches, although the cervical injections and medication that he has received from the VA have lessened some of these symptoms. Mr. Overton testified that he has been bothered by ringing in his ears (tinnitus) since the work-related accident. However, he acknowledged that his thirty-eight day hospitalization in August and September of 2010 for pain management has given him some relief. He still visits the VA clinic twice a week for treatment. The physicians there have been unable to tell him whether his medical problems are short-term or long-term. (Tr. 25-29, 34, 35, 40-45).

Mrs. Overton now drives because of the claimant's concern about his ability to drive due to his medical problems. Claimant has unsuccessfully attempted to find some work. (Tr. 53-55).

### ***Compensation and Average Weekly Wage***

Mr. Overton filed the claim involved in this case on November 23, 2009. (CX 2). An amended claim was filed on April 1, 2010. (CX 3). Employer had filed its first report of the

injury, Form LS-202, on September 10, 2009. (CX 4). Claimant was paid compensation without an award by the employer/carrier for temporary total disability under the Act from September 7, 2009 to March 22, 2010 at the rate of \$1,200.62 per week, based on an average weekly wage of \$1,905.75, totaling \$33,617.36. (CX 5, 7). Employer/carrier filed its notices of controversion of the claim on March 16, 2010 and September 10, 2010. (CX 6, 8). The parties stipulated that the claimant's average weekly wage for purposes of computing compensation under the Act is \$1,905.75. (ALJX 5). Employer/carrier paid the claimant's medical expenses except for the psychological condition or pain management. (ALJX 5).

## ***CONCLUSIONS OF LAW***

### ***Nature and Extent of Disability***

The parties initially disagree on the question of whether the claimant is totally disabled from returning to his previous employment with SEI. Employer/carrier primarily contends that the medical opinions of Drs. Cases, Bartels and Newman support the conclusion that Mr. Overton is able to return to his regular truck driving job. Claimant maintains he is totally disabled on a permanent basis due to his multiple medical problems.

Under the Act, "disability" is defined as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). Generally, disability is addressed in terms of its extent, total or partial, and its nature, permanent or temporary. A claimant bears the burden of establishing both the nature and extent of his disability. *Eckley v. Fibrex and Shipping Co.*, 21 BRBS 120, 122 (1988); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985).

The extent of disability is an economic concept. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). Thus, in order for a claimant to receive an award of compensation, the evidence must establish that the injury resulted in a loss of wage earning capacity. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 776 F.2d 1225, 1229 (4th Cir. 1985). To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. "Usual" employment is the claimant's regular duties at the time that he was injured. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982).

A physician's opinion that his patient's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Authority*, 21 BRBS 248 (1988); *Lobue v. Army & Air Force Exchange Service*, 15 BRBS 407 (1984). Even a claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982). Regarding such complaints, it is well-settled that the judge is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459 (1968); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165, 167 (1989).

I find the medical evidence clearly proves that because of the work-related injuries suffered by the claimant that he is not capable of returning to work at SEI and performing his truck convoy commander duties, assuming the position is still available. I base this conclusion in part on Dr. Cases' work capacity evaluation on April 19, 2010, which details the claimant's work restrictions because of his neck pain. In reaching this conclusion, I find this physician's March 5, 2010 opinion that the claimant could return to his over-the-road truck driving in Iraq with no limitations was not based on a thorough understanding of the physical requirements of that job. Not only was Mr. Overton required to work up to twelve hours per day, seven days per week, he also had to wear heavy protective gear which made it difficult to get in and out of the trucks. Also, the drivers sometimes had to load and unload the trucks, as well as occasionally change heavy tires on the trucks. Thus, I believe Dr. Cases' work restrictions of April 19, 2010 are more realistic of the claimant's physical abilities from an orthopedic and neurological perspective. These restrictions, by themselves, are sufficient to meet the claimant's burden of proving he is unable to return to his previous work for SEI. Moreover, I find the claimant's lingering problems with headaches, dizziness and PTSD symptoms also preclude him from returning to such a hazardous job. Thus, I find that claimant has successfully shown a *prima facie* case of total disability since the date of his work-related accident on September 4, 2009.

I acknowledge that the neurologist who evaluated the claimant for the employer/carrier on January 10, 2011, Dr. Newman, essentially found there was nothing wrong with the claimant. He opined that Mr. Overton has no neurological abnormalities, no inner ear dysfunction, no vertigo and no abnormal mental problems. Perhaps this was correct in 2011, except for his opinion regarding the claimant's neurological condition. In that regard, I must afford more weight to the opinion of Dr. Cases who had treated the claimant over a significant period of time. Thus, I find Dr. Newman's opinion is not sufficient rebuttal evidence on the question of whether the claimant is totally disabled under the Act from an orthopedic or neurological standpoint. It is true that Dr. Newman's opinion regarding the claimant's vertigo and hearing loss are supported by the opinion of Dr. Bartels. On the other hand, Dr. Newman did defer to more qualified physicians on the claimant's psychological, psychiatric and PTSD problems.

I agree that Dr. Bartels' opinion supports the conclusion that the claimant can return to work from a vestibular standpoint. This otolaryngologist found on February 10, 2010 that Mr. Overton had zero percent impairment from tinnitus and hearing loss, the latter of which he attributed to some utricular dysfunction rather than noise-induced. However, this opinion is not sufficient to rebut the presumption that the claimant cannot return to his usual job with SEI because of his neurological and other medical problems.

All of the physicians who diagnosed Mr. Overton with PTSD attributed this condition to the September 4, 2009 explosion. As to be expected, the neurologists deferred on the status of this condition to the physicians specializing in psychiatric and psychological disorders. In February 2010, psychiatrist Dr. Pandya attributed the claimant's PTSD to the work-related accident, but opined that Mr. Overton's condition was not severe and should reach maximum medical improvement in six months. Although a consulting psychologist to the carrier cast a different light on Dr. Pandya's report in a memorandum regarding her interview of the psychiatrist in the following month, I afford this memorandum little weight because Dr. Pandya

had no reason to change his prior opinion as he had not examined or treated the claimant since February 12, 2010.

The records of the Veterans Administration are the only other medical evidence regarding the claimant's PTSD. On a referral from Dr. Cases, a clinical psychologist at that medical center evaluated Mr. Overton on March 23, 2010 and principally diagnosed PTSD attributable to the claimant's experiences in Vietnam and Iraq. Dr. Crosswell recommended a treatment of trauma processing therapy for three to six months. The VA records also document the claimant's hospitalization for over a month later in 2010 for evaluation and treatment of Mr. Overton's traumatic brain injury. This evidence corroborates the claimant suffered from PTSD, as well as other symptoms relating to mild traumatic brain injury or post-concussion syndrome. I find that there is nothing in the VA records that suggests the claimant is capable of returning to his previous hazardous work for SEI in Iraq.

In conclusion on the initial issue, I find the claimant has established a *prima facie* case of total disability under the Act. Moreover, the medical evidence relied on by the employer/carrier on this issue is not sufficient to prove that the claimant is not totally disabled from performing his previous job with SEI. Thus, the next issue to address is whether the claimant's total disability is permanent in nature or temporary. Claimant and employer/carrier also disagree on this question with the claimant arguing for the former. SEI argues Mr. Overton's condition is temporary in nature because of his continuing problems with headaches, dizziness and vertigo.

Courts have devised two legal standards to determine whether a disability is permanent or temporary in nature. Under the first test, a disability will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement (MMI). *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). Under the second test, a disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

In the present case, there essentially are two conditions which must be addressed on the permanency issue: the claimant's orthopedic or neurological injury; and, the other symptoms relating to his traumatic brain injury and PTSD. Concerning the former, Dr. Cases first concluded the claimant reached maximum medical improvement from his neck injury on March 5, 2010. However, he changed the claimant's restrictions on April 19, 2010 and concluded Mr. Overton reached maximum medical improvement on that date. I find the April 19, 2010 date should be accepted for purposes of the claimant's neck injury as the totality of the evidence indicates the physician seemed to have a better understanding on that date of the physical requirements of the claimant's previous job. I find the work restrictions imposed by Dr. Cases on that date are more consistent with the evidence as to the claimant's ability to perform his previous work from an orthopedic or neurological perspective.

The inquiry as to the nature of the claimant's disability does not end with the conclusion regarding Mr. Overton's neck injury. I find he was still unable to return to work on April 19,

2010 because of his continuing problems with his PTSD, headaches, vertigo and dizziness, all of which the physicians concluded were due to the September 4, 2009 explosion. Employer/carrier maintains the claimant's disability is still temporary in nature because Mr. Overton is still alleging that he has headaches, vertigo and dizziness. Although the employer/carrier does not want to admit it, the medical evidence also clearly establishes that the claimant's PTSD symptoms have continued to bother him.

Of all the conditions suffered by the claimant due to the IED explosion, Dr. Bartels established that as of February of 2010 Mr. Overton's vestibular problems, including his tinnitus, were approaching a functional level. It also is obvious from the evidence that the claimant's problems with dizziness and headaches were beginning to become more stable later in that year after the injection and medication therapy. Although the record does not contain an opinion from either a psychiatrist or psychologist that the claimant's PTSD or psychological problems had reached maximum medical improvement, Dr. Pandya also opined in February 2010 that such a level of improvement of the mild PTSD symptoms should be reached in six months.

The most recent VA records regarding Mr. Overton's discharge from the hospital on September 24, 2010 clearly indicate that the claimant's extensive treatment at that facility had produced promising results. Indeed, he was discharged on a variety of prescription medications and with instructions to contact the pain clinic, if needed. Surely, this is an indication that the claimant's symptoms from his multiple problems relating to his work-related accident had begun to stabilize. I reiterate that Dr. Newman found in January of 2011 that the claimant had no abnormalities at that time. Even the claimant acknowledged at the March 3, 2011 hearing that his pain and dizziness were better, although he continued to seek treatment on a regular basis from the VA. Therefore, I find that the claimant's hospitalization in August and September of 2010 was a turning point in his treatment for his headaches, dizziness and PTSD. I further find that the claimant reached maximum medical improvement from all of these problems upon his discharge from the hospital on September 24, 2010, as his symptoms had begun to stabilize after a lengthy period of time or would continue at that level for an indefinite period of time. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

Once the claimant establishes a *prima facie* case of total disability, the burden shifts to employer to establish suitable alternate employment. An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Turner*, 661 F.2d at 1038; *see also Lentz v. Cottman Co.*, 852 F.2d 129 (4th Cir. 1988); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Despite his continuing symptoms, the claimant has attempted to no avail to obtain another job. As his condition improves, I am confident, given his work ethic, that he will be successful in returning to the work force in some capacity. However, there is no evidence in this record proving there is suitable alternative employment that Mr. Overton could obtain at this time through due diligence. Therefore, he is entitled to continuing permanent total disability compensation under the Act until it is shown that there is suitable alternative work available to him.

For the above stated reasons, I find the claimant is entitled to temporary total disability compensation under Section 8(a) of the Act from September 4, 2009 until he reached maximum

medical improvement from all of his work-related injuries on September 24, 2010. He also is entitled to total permanent disability compensation under Section 8(b) of the Act from September 24, 2010 until the present and continuing because the employer/carrier has not produced any evidence that there is suitable alternative employment available to the claimant.

### ***Compensation***

Compensation for temporary or permanent total disability is based on the claimant's pre-injury "average weekly wage." See 33 U.S.C. §§ 908 and 910. The compensation rate for permanent total and temporary total disability is two-thirds of his average weekly wage under Sections 8(a) and (b), respectively. 33 U.S.C. § 908(a) and (b). The parties agree that claimant's average weekly wage at the time of his injury was \$1,905.75. Therefore, the claimant is entitled to temporary total disability and permanent total disability benefits at the weekly rate of \$1,200.62. Compensation for permanent total disability is adjusted annually under Section 10(f) of the Act.

### ***Medical Expenses***

Section 7(a) of the Act provides "[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). In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. See 20 C.F.R. § 702.402.

Employer/carrier has paid all of the claimant's medical expenses other than those relating to treatment for post traumatic stress disorder and pain management. However, there is no question that the claimant's PTSD symptoms, as well as his problems with pain, are due in part to the work-related IED explosion on September 4, 2009. It therefore follows that the employer/carrier is required under Section 7 to pay the claimant's future reasonable and necessary medical expenses or treatment for his PTSD and any pain management.

### ***Attorney Fees***

No award of attorney's fees for services to the claimant is made herein since no application for fees has been made by the claimant's counsel. Counsel is hereby allowed twenty business days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the claimant, must accompany the petition. The parties have twenty business days following the receipt of such application to either resolve this issue or for the employer/carrier to file objections. The Act prohibits the charging of a fee in the absence of an approved application.

***ORDER***

Based on the above findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that employer, Service Employees International, Inc., or its carrier, Insurance Company of the State of Pennsylvania, is liable to the claimant for the compensation listed below as a result of the claim involved in this proceeding.

(1) Temporary total disability compensation under Section 8(b) of the Act from September 4, 2009 to September 24, 2010, in the amount of \$1,200.62 per week based on an average weekly wage of \$1,905.75.

(2) Permanent total disability compensation under Section 8(a) of the Act from September 24, 2010 and continuing in the amount of \$1,200.62 per week based on an average weekly wage of \$1,905.75, with appropriate annual adjustments under Section 10(f) of the Act.

Employer/carrier shall pay appropriate penalties under Section 14(e) of the Act for any underpayment of compensation. Employer/carrier also shall pay interest on all of the above sums determined to be in arrears as of the date of service of this Order at the rate applicable under 28 U.S.C. § 1961. Employer/carrier is entitled to credit for any disability payments already paid to claimant under the Act. The specific computations of the award, penalties and interest shall be administratively performed by the district director.

Employer/carrier also shall continue to be responsible under Section 7 of the Act for all reasonable and necessary medical expenses relating to claimant's injuries on September 4, 2009, including his resulting post traumatic stress disorder symptoms and problems with pain management.

**A**

**DONALD W. MOSSER**  
**Administrative Law Judge**