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Issue Date: 24 November 2015

Case No.: 2014-LDA-00243

OWCP No.: 02-241028

In the Matter of

JEFFREY ATHEY,
Claimant,

v.

DYNCORP INTERNATIONAL FZ, LLC./
CONTINENTAL INSURANCE COMPANY c/o CNA,
Employer/Carrier.

Appearances:

Gary B. Pitts, Esq., Pitts & Mills Attorneys at Law, Houston, TX
For Claimant.

Gregory P. Sujack, Esq., Law Offices of Edward J. Kozel, Chicago, IL
For Employer/Carrier.

Before: Pamela J. Lakes
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et. seq*. ("the Act" or "the Longshore Act"), as extended by the Defense Base Act, 42 U.S.C. § 1651, *et. seq*. ("DBA"), brought by Jeffrey Athey ("Claimant") against Dyncorp International FZ, LLC. ("Employer"), as insured by Continental Insurance Company ("Carrier"). The Director of the Office of Workers' Compensation Programs in the U.S. Department of Labor ("Director") is not directly involved in this case, as no claim has been filed for special fund relief under Section 8(f) of the Act, 33 U.S.C. § 908(f).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments made by the parties. Where pertinent, I have made credibility determinations concerning the evidence.

PROCEDURAL HISTORY

This claim arises from the work-related psychiatric injuries allegedly resulting from Claimant's multiple tours in Iraq and Afghanistan between 2005 and 2012, and Claimant's conflicts with his coworkers during his third tour in early 2013. Claimant filed a formal claim timely on August 11, 2013, alleging that "exposure to war zone violence" caused "worsened psychological condition." (CX 2).[1] Employer filed a First Report of Injury, Form LS-202, on May 2, 2013 and filed a Notice of Controversion of Right to Compensation on May 8, 2014. (CX 3, 4). On January 3, 2014, Claimant filed an LS-18 Pre-Hearing Statement. (CX 10). The matter was referred for a formal hearing on January 17, 2014. After the referral, on April 9, 2014, Employer filed an LS-18 Pre-Hearing Statement (CX 11).

On August 5, 2014, a hearing was held before the undersigned administrative law judge in Washington, D.C. Claimant's Exhibits 1 to 14, Employer's Exhibit 1 and ALJ 1 and 2 were admitted. (Tr. 7-10, 54). The record was left open for 60 days so that the parties could submit medical records and witness testimony not previously obtained, specifically Justin Rackley, Carl Fields, Gregory Hudson, and Michael Freeman. (Tr. 6, 88; ALJ 2).[2] In addition, the parties were given 30 days after the record closed to submit post-hearing briefs. (Tr. 88-89). These deadlines were subject to extension by stipulation.

Claimant's post-hearing brief was filed on November 5, 2014. By letter of December 12, 2014, counsel for Employer filed an unopposed Agreed Motion to Allow Record to Remain Open and Allow Withdrawal of Claimant's Brief. Counsel for Employer stated, in pertinent part:

> At the conclusion of the hearing, the court allowed the record to remain open for post-hearing depositions. The depositions have not yet occurred due to scheduling difficulties with the witnesses. While these efforts have been pending, Claimant, through his attorney, submitted his post-hearing brief. The undersigned has spoken with counsel for the Claimant, Mr. Gary Pitts, to discuss this matter. The parties have agreed that the record should remain open another 30 days, or until January 15, 2015 for the submission of the post-hearing depositions. The parties further agree that Claimant should be allowed to withdraw his brief, as the additional evidence for the depositions will require him to amend his brief.

Counsel for Employer failed to submit the additional evidence by the January 15 deadline, and on April 24, 2015, my law clerk contacted the parties to inquire as to the status of the matter. Following up by letter of May 7, 2015, counsel for Employer made an unopposed request that the record remain open, stating: "Due to delays in confirming the depositions of lay witnesses, the parties agree that the record shall be held open until June 12, 2015. Claimant's previous

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[1] As used in this decision, "CX" refers to Claimant's Exhibits; "EX" refers to Employer's Exhibits; and "ALJ" refers to Administrative Law Judge exhibits. "Tr." followed by a page number refers to the transcript of the hearing in this case.

[2] On July 30, 2014, Employer with the agreement of Claimant filed an Agreed Motion Post Hearing Evidence, requesting that the court allow 60 days for post-hearing evidence in order to obtain the testimony of Justin Rackley, Carl James, Gregory Hudson, and Michael Freeman. The motion was granted and admitted into evidence as ALJ 2 at the hearing on August 5, 2014. (ALJ 2; Tr. 6, 88).

submitted brief shall be withdrawn, and the parties will file simultaneous briefs (postmarked) no later than July 13, 2015."

On July 8, 2015, Employer filed the transcripts of the post-hearing depositions of Michael Freeman, admitted as EX 2, and Greg Hudson, admitted as EX 3.[3] EX 2 and EX 3 are hereby ADMITTED and the record is now **CLOSED**. **SO ORDERED**.

As extended, Claimant's revised post hearing brief was timely filed on July 23, 2015; Employer's post hearing brief was timely filed on July 28, 2015; and this case is now ready for decision.

STIPULATIONS/ ISSUES

The following issues are before me:

(1) Compensability/Existence of disability;

(2) Nature and extent of disability;

(3) Average weekly wage;

(4) Entitlement to Section 7 medical benefits, including transportation and prescription reimbursement and choice of physician; and

(5) Attorney's Fees and expenses.

(ALJ 1). At the hearing, the parties stipulated to the date of injury (03/23/13); employee/employer relationship; date employer advised of injury (03/23/13); date notice of Controversion filed; benefits paid (none); and medical benefits paid (none). (ALJ 1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTS

Claimant's Testimony

Claimant was the only witness to testify at the hearing. Claimant was 47 years old at the time of the hearing. (Tr. 14). He finished high school in 1984. (Tr. 15). After high school, he started a small landscaping business which he continued until 2007 and he performed other work intermittently, including work as a security guard. (Tr. 15-16). Claimant also attended community college and studied law enforcement. (Tr. 16).

[3] After the deposition transcripts were submitted, Counsel for Employer further requested that the deadline for closing briefs be extended to July 27, 2015, and those dates were extended by stipulation..

Prior to his employment with Employer, beginning in 2000, Claimant worked in law enforcement, first as a police officer, and from 2002 to April 2007, as a patrol deputy sheriff for Davidson County. (Tr. 17).

In April 2007, Employer hired Claimant to work as an international police liaison officer ("IMPLO") and a trainer for local police forces in Iraq for a period of one year and seven months. (Tr. 17-18). In this role, Claimant would go out to Iraqi police stations and train local police in crime scene investigation, handcuffing, firearms, and management of case files. (Tr. 17). During this time, Claimant was exposed to "a few" mortar attacks on base, but the base "didn't have a lot of injuries." (Tr. 20). There were no attacks to Claimant's convoy in which he was riding or on Claimant personally. (Tr. 58). Claimant also testified that during this time he injured his ankle. (Tr. 39).

After his first tour, for about six months, Claimant worked as a transport deputy as a sheriff in Davidson County. (Tr. 60). From June 2009 until September 2011, Employer hired Claimant for the second time to work for Employer in Iraq training local police forces. (Tr. 22-23). During Claimant's second tour, his convoy was nearly hit by a grenade. (Tr. 26-28). Claimant testified that he believes this occurred "probably towards the middle" of his tour. (Tr. 60). During this tour, Claimant also reported that he drew his gun and was nearly forced to shoot an Iraqi. (Tr. 39). Claimant did not suffer any physical injuries during this incident. (Tr. 28). After his second tour ended, Claimant had difficulty finding employment and his family life was different. (Tr. 36). He wanted to return overseas as he felt he "didn't quite fit in back here." (Tr. 31). During this time, Claimant referred to Iraq as "home." (Tr. 32).

Claimant worked for Employer for a third tour as a trainer for the local police forces in Afghanistan, from October 2012 until Claimant's injury in April 2013. (Tr. 24). Claimant lived at Orgun, where he again trained local police forces. (Tr. 33). During this time, Claimant testified that there was an attack on the base, but Claimant did not recall whether he was on the base at the time of the incident. (Tr. 36). Claimant later clarified that he did not suffer any attacks during his tour in Afghanistan. (Tr. 62).

Over the course of this third tour in Afghanistan, Claimant had disputes with his coworkers and became frustrated with his work. (Tr. 35). Compared to Claimant's prior tours, there was "no structure" and Claimant's co-workers, Mr. Freeman and Mr. Hudson, "were not following the statement of work." (Tr. 68). Claimant testified that he did not have much contact with Afghanis unlike during his prior two tours. (Tr. 67). Claimant testified that he and his coworkers "did not see eye to eye on how to do the jobs." (Tr. 36). As a result, Claimant and his co-workers were constantly arguing and eventually, the co-workers stopped communicating with Claimant. (Tr. 37). Because of this discord, Claimant had difficulty sleeping, was paranoid, and "became a hermit." (Tr. 38). Claimant's insomnia and paranoia was further impacted by reports of insurgents on base. (Tr. 38). Eventually, Claimant contemplated suicide. (Tr. 40). After Claimant revealed his suicidal ideation to Adam Towers, a former co-worker, Mr. Towers reported Claimant to HR. (Tr. 41, 69-70). On March 23, 2013, Claimant was removed of his weapons, and over the next few days, Claimant was under suicide watch by his co-workers, Hudson and Freeman. (Tr. 42-44). Claimant testified that at the time he was not showering, eating, or sleeping. (Tr. 43). On April 1, 2013, Claimant was sent home for "stress due to work

conditions." (Tr. 45; CX 5). Claimant was terminated without cause, meaning that he did nothing wrong. (Tr. 46).

Claimant testified that prior to going to Iraq for the first time he had never seen a psychologist or psychiatrist, nor had he ever been prescribed any medication for stress or insomnia. (Tr. 22).

Claimant was first treated by Ms. Rooks, a counselor, in Afghanistan while still at the base, and briefly after Claimant was sent home using Skype. (Tr. 47, 71). Ms. Rooks referred Claimant to Patti Lyerly of Lyerly Counseling, a "psychological counseling service," in April 2013, where he was diagnosed with PTSD. (Tr. 48, 49). Claimant testified that he has been seeking treatment regularly at Lyerly Counseling from then up to the present time. *Id*. Claimant has also been prescribed Trazadone, Klonopin, and Prozac by Dr. Dimkpa, a psychiatrist. (Tr. 49). As a result of his treatment with Lyerly Counseling and Dr. Dimkpa, Claimant testified that "[he] noticed some improvement." *Id*.

Claimant began working again in July 2013, mowing lawns. (Tr. 51). He began working with the Davidson County Sheriff's Department in August 2013, doing civil work, which he finds "less stressful than doing full-blown patrol work and dealing with criminal[s]…." (Tr. 50, 51). Davidson County has allowed Claimant the flexibility to "pick and choose" which assignments he wanted. (Tr. 52). Claimant made $14.28 an hour From August 2013 to July 2014 and $14.49 from July 2014 to the present. (Tr. 53). Claimant's gross wages between January 2014 and August 1, 2014 were $24,270.40. (Tr. 54). In August or September of 2013, Claimant requalified with his weapon "to have arrest powers." (Tr. 72-73).

Claimant testified that he is doing everything he can to get better, regroup, and go on with life as best as possible. (Tr. 57).

Testimony of Michael Freeman

Michael Freemen was deposed telephonically in connection with this claim on June 17, 2015. (EX 2). Mr. Freeman was employed by Employer as am embedded police mentor from 2008 to 2009; 2010 to 2013; and October 2014 until May 2015. (Freeman Depo. 7-8). In this role, Freeman and the other officers mentored and advised the leadership of the Afghan police "in every aspect of law enforcement ranging from training schedules, patrol schedules, logistics, anything that has to do with law enforcement in general." (*Id*. at 9). Prior to his employment with Employer, Freeman worked as a police officer in in Birmingham and Pelham, Alabama for 17 years. (*Id*. at 8-9).

In the spring of 2013, Freeman was assigned to Forward Operating Base ("FOB") Orgun-E in Afghanistan as an embedded police mentor with Claimant. (*Id*. at 9-10). At Orgun, Claimant and Freeman worked together for about two or three months. (*Id*. at 17). Freeman testified that while working together, Claimant was able to fulfill the requirements and obligations of the position and did not have difficulties doing his job. (*Id*. at 10-11). Freeman denied observing any of his coworkers imposing any stress on Claimant while Claimant was working either in his duties or in any other means. (*Id*. at 11). Freeman also denied that there

was anything going on at Orgun that caused Claimant to suffer emotional or psychological stress, including any caused by his supervisor or by Greg Hudson, a coworker. (*Id*. at 12, 14).

Freedman described the living conditions as "great." (*Id*. at 14). He explained that he and Claimant had individual rooms and shared a living room, which was equipped with a television, internet, heating and air conditioning. (*Id*. at 15).

There were four embedded police mentors at FOB, including Claimant and Freeman. (*Id*. at 19). Freeman testified that he and his coworkers worked on the FOB, and rarely left. (*Id*. at 15-16). He described the Orgun as "very secure" and stated that it had "military force protection." (*Id*. at 16). In terms of their safety on a daily basis, Freeman testified that he experienced attacks or indirect fire infrequently, and that there was nothing ongoing at FOB Orgun that would have caused a person to have stress or anxiety. (*Id*. at 16). Freeman testified that the mentors had few work-related responsibilities during their time in Afghanistan. (*Id*. at 19). Twice a day, every day, for two weeks, the police mentors met with their students, who were Afghan policemen, until the program "fizzled out." (*Id*. at 19-20).

Freeman testified that although he saw Claimant daily, he and Claimant were not close, and that he did not know Claimant well. (*Id*. at 22). He admitted, "you know, [Claimant] and I never were what you would call friends." (*Id*. at 28). However, Freeman, Claimant, and the other police mentors frequently had dinner and sometimes breakfast together and Claimant would engage in conversation with them. (*Id*. at 24, 25). Freeman later clarified that he did not care for Claimant. (*Id*. at 37).

Freeman was aware that Claimant was sent home for making suicidal statements online. (*Id*. at 26). Freeman also observed Claimant during Claimant's suicide watch. (*Id*. at 26). Freeman stated that "it was like it was a joke to him." (*Id*. at 26). Freeman expressed that he was frustrated by having to watch Claimant as the watch prevented him from going on a planned mission. (*Id. at* 27). During the watch, Freeman did not converse with Claimant. (*Id*. at 28). Freeman testified that at the time, he did not believe Claimant was suicidal. (*Id*. at 29). Freeman testified that when Claimant's weapons were taken away, Claimant did not appear to be shocked, and had no response, which Freeman described as "odd." (*Id*. at 32). Freeman, on the other hand, testified that he was surprised that Claimant was on suicide watch because Claimant did not appear to be suicidal to him. (Id. at 33-34). Freeman has no medical training, but encountered suicidal people as a patrol officer. (*Id*. at 34).

Testimony of Gregory Hudson

Gregory Hudson was deposed telephonically on June 23, 2015. (EX 3). Hudson worked for Employer for about six years from 2008 to 2013 as a police advisor, which was also called embedded police officer ("EPM"). (*Id*. at 7). In this role, Hudson went out to train local police departments and in some cases, trained the officers at the bases. (*Id*. at 8). Prior to his employment with Employer, Hudson worked in law enforcement as a police office in Colorado, and later in California. (*Id*. at 7).

Hudson worked with Claimant at Orgun-E in Afghanistan for nearly a year. (*Id*. at 8, 26). Hudson testified that the conditions as Orgun were "very good" compared to other conditions that he has lived in. (*Id*. at 9). He stated: "The camp was at a good location considering the available locations in that area. We had excellent food, services; and eggs made to order every morning; a full kitchen; fresh fruit; special occasions, they brought in excellent food." (*Id*. at 9). Hudson described the living arrangement as a house, which he shared with Claimant and two other officers. (*Id*. at 9). Hudson testified that he was "pretty happy" with the security and that "[he] could rest easily at night." (*Id*. at 10). Hudson testified that during his time at Orgun, he experiencing indirect fire was "very infrequent; and surprisingly infrequent compared to other locations I lived in." (*Id*. at 17). He did not find the work to be stressful and stated that he wished he had learned about it earlier as he would have moved there, or requested to move there, much earlier. (*Id*. at 18).

Hudson testified that while working at Orgun with Claimant, the two had very limited interactions despite sharing a house. (*Id*. at 13). Hudson testified that the conflict between the coworkers and housemates arose from disagreements on how to carry out their work orders:

> Upon arrival—upon arriving to that camp being reassigned there, he had been working on a list of names at all of these stations—which was part of our mission—to get all of . . . the police officers that were assigned to each of the stations, and have -- and report that to our higher-ups.
>
> So when we arrived, we went ahead and took a different path; and wanted to get out to the stations and see what was going on, and formulate a plan that would best suit the local departments—or local stations… .
>
> So, obviously Michael Freeman and I arrived together. And we'd worked prior; and we had success at a prior camp doing this—having this game plan as going out to the station, and seeing what the local stations needed to get them up and running.
>
> And then in return, we would come back; and have some of the information that we gathered from the mission to . . . pass down to [Claimant].
>
> It wasn't a great back and forth. I feel that he wasn't willing to accept us trying to help him—is really what we were trying to do—and it felt kind of shunned off, I guess. So there was very little interaction socially.
>
> When we didn't have a mission on a day, it seemed like he was off doing something; or in his room—really didn't know what he was doing.
>
> And so, over time, we just decided this is what the military wants us to do. . . . and ultimately we're here for them . . . .
>
> When we first got there, like I said, we were there to be a team . . .—and I personally had been elsewhere prior—both Afghanistan and Iraq—with our military counterparts and our counterparts that we lived with—the other mentors, advisors.
>
> And we kind of hit a wall with [Claimant]….

(*Id*. at 13-15). Eventually Claimant and his coworkers stopped communicating altogether, which Hudson found frustrating. (*Id*. at 42-45).

Hudson denied causing stress on Claimant or intimidating him. (*Id*. at 19). Hudson also denied observing any conditions that would have caused Claimant to develop anxiety while working at Orgun. (*Id*. at 21). Hudson testified that he did not observe Claimant demonstrating symptoms of anxiety, based upon his experience, but that Claimant was antisocial:

> He separated himself. [Claimant] wasn't involved or motivated to work with the military. He didn't add to our mission which was what the military wished us to do.
>
> He would seclude himself...at our training oc the camps when we had a class; and very little communication on what his plan or his mission plan is to do.
>
> We all had to plan in advance missions coming up. It was just impossible to get a straight answer or any answer from [Claimant]….He did his own thing….There were no signs of anxiety.

(*Id*. at 21-22). Like Freeman, Hudson testified that the news that Claimant was suicidal and that his weapons needed to be secured came "out of nowhere." (*Id*. at 18, 29). When Claimant's weapons were taken away, Hudson testified that "[i]t appeared that he was making light of it; that it was not genuine." (*Id*. at 31). Hudson testified that he has had medical and psychological training through being a police officer called Crisis Intervention Team or Techniques ("CIT"). (*Id*. at 42, 49).

Medical Opinion of Dr. Spector

On behalf of Employer, Dr. Jack Spector performed a psychological evaluation on Claimant. (EX 1). No curriculum vitae was provided, but it appears from Dr. Spector's letterhead that he is a diplomat in clinical neuropsychology and Board Certified in Professional Psychology. (*Id*. at 1). Dr. Spector prepared an 8 page report dated June 16, 2013, which was based on his review of Claimant's medical records, treatment records, and employment history; and an examination on June 7, 2013.[4] *Id*. Dr. Spector conducted several tests during the psychological evaluation, including the Wesler Abbreviated Scale of Intelligence—Second Edition (WASI—II), Coding and Digit Span subtests of WAIS-IV, Wide Range Achievement Test-Fourth Edition (WRAT-4) (reading subtest), Word Memory Test, Minnesota Multiphasic Personality Inventory-2nd Edition, Trauma Symptom Inventory-Second Edition, Clinical Interview, and behavioral observances. (*Id*. at 1).

Dr. Spector recorded that Claimant worked for Employer as a police advisor from April 2007 to November 2008 in Iraq; in Afghanistan from June 2009 to September 2011; and again in Afghanistan in October 2012 to April 2013. (*Id*. at 2). Claimant reported that his first two contracts in Iraq were "completed without significant complication." (*Id*. at 2). He reported that "the closest he came to being injured was when a mortar round exploded in a parking lot, about 75 yards away, and the next occurred during his second contract when a convoy that included his up-armored Humvee was struck by an improvised explosive device." *Id*. In both of these incidents, Claimant denied suffering significant physical or emotional difficulties." Claimant also denied contact with friendly or enemy KIA or significantly wounded personnel at these or any other times." *Id*. Dr. Spector noted that during Claimant's third tour, he began to

[4] At the hearing, the parties clarified that Dr. Spector's report was incorrectly dated June 12, 2012.

"[experience] significant conflicts with supervisors after he returned from scheduled leave in January 2013. *Id*. Dr. Spector recorded that this conflict during his third tour from January to April 2013, was the precipitating incident to Claimant's emotional complaints:

> He reports that he was discouraged from having direct contact or joint activities with the military personnel with which [Claimant's] team was embedded. He reports that his work was scrutinized and that an adversarial relationship developed with his new front-line supervisors. [Claimant] reportedly resisted this increased level of supervision and became isolated and despondent…He reportedly went on to social media and outside his supervisory chain of command to voice his complaints, aggravating matters further.

Id. Consequently, Dr. Spector observed: "[Claimant] is reported to have behaved unusually, and is described elsewhere as appearing hypervigilant, suspicious, and seemingly stressed." *Id*. In March 2013, Dr. Spector noted that Claimant "made vague suicidal threats," which curtailed his duties and caused his weapons to be confiscated, and in April, he was sent home. (*Id*. at 3).

Dr. Spector noted that despite Claimant's complaints of ongoing symptoms of depression, "[a]s best I could determine from clinical interviews, medical records, and behavior observations, there are no deficits in activities of daily living," such as walking, feeding, grooming, or "no absolute deficits in instrumental activities," such as driving, preparing meals, taking medication, and managing money. (*Id.* at 4). Dr. Spector further noted, "he reports that he is troubled by flashbacks and nightmares but was unable to detail the actual content of these intrusive experiences." *Id*.

Based on his observations, interview, and testing, Dr. Spector made the following conclusions:

> The present evaluation found [Claimant] to be of average intelligence with low average reading skills. Attention skills were intact. There was no evidence of exaggerated cognitive impairment.
>
> In contrast, psychological and personality testing reflected exaggerated complaints of emotional impairment. On the surface, high levels of depression, anxiety, and somatization were reported, as were elevated levels of thought disturbance, suspiciousness, and anger. [Claimant] endorsed nearly every relevant symptom of post-traumatic stress in the absence of documented stressors sufficient to meet diagnostic criteria for this condition.
>
> The incidents that appear to have precipitated [Claimant's] alleged emotional collapse were related to what he describes as an adverse supervisory environment during his third contract tour in Southwest Asia, instead of the near-miss explosions he experienced during his first two tours of duty as a police advisor.

(*Id*. at 6).

Dr. Spector made the following DSM-IV-TR diagnosis:

Axis I: Adjustive disorder with mixed disturbance of emotions and conduct

Axis II: Deferred

Axis III: Ankle injury (high ankle sprain) sustained during service in Iraq

Axis IV: Occupational Problems, Family problems

Axis V: Uncertain, as at least a portion of [Claimant's] emotional complaints and alleged limitations appear to be significantly exaggerated

(*Id*. at 7). Dr. Spector did not explain the testing or the significance of this diagnosis. Dr. Spector opined that while the stress of Claimant's multiple tours in Iraq may have contributed to his diagnosis, "the precipitating incident appears to have been conflicts with new supervisors during his third contracted tour in January-April 2013" and he further noted that there did not appear to be a "history of a pre-existing emotional condition." (*Id*. at 7).

As to Claimant's current treatments, Dr. Spector opined that the treatment to date was at best a controversial treatment of PTSD, even if Claimant is fact met the diagnostic criteria for PTSD. (*Id*.) Dr. Spector opined that Claimant would instead benefit from cognitive therapy and or desensitization therapy and psychiatric intervention for better medication management. (*Id*. at 7). Dr. Spector opined that there were no restrictions on Claimant's ability to work in his prior capacity as a sheriff, but that he would not be suited to return to Afghanistan due Claimant's prior inability to tolerate the "stresses inherent to serving in a war zone" as well as the "level of supervision and scrutiny." (*Id*. at 8).

Treatment Records

Sondra Rooks, DynCorp AMPD Mental Health Program: Claimant was first referred to Sandra Rooks, MA, LPC on March 25, 2013, after revealing to a friend on Facebook that he was "tired of it all." (CX 1). Rooks, whose credentials are not of record, recorded that a friend became concerned and reported it to the chain of command, at which point Claimant's weapons were removed and arrangements were made for Claimant to be transferred to another site. *Id*. Rooks noted that "once he found out he was leaving the site he began to feel better." (*Id* at 1). In Rooks' report, Claimant was noted (by a number assigned on a printed form) to exhibit the following signs and symptoms: mild anxiety, mild low energy, mild psychomotor retardation, mild paranoid ideation, moderate depression, moderate appetite disturbance, and moderate sleep disturbance. *Id*. At the time, Claimant denied suicidal or harm ideation, past or present. *Id*. In the report, Claimant is described as appearing tired and depressed. *Id*. Rooks recorded that Claimant "denies nightmares, cold sweats, jumpiness, etc.—negative assessment for PTSD." *Id*. Rooks did not note any suicidal risk. *Id*. Rooks assessed that Claimant was suffering from Adjustive Disorder. *Id*. Rooks recommended that Claimant have three days relief from current work duties. *Id*.

Claimant continued to see Ms. Rooks almost daily between March 26, 2013 and March 31, 2013.[5] (*Id*. at 2-6). During each of these visits, Rooks recorded that Claimant appeared "clean" and "looks well rested." *Id*. During a visit on March 26, Rooks recorded that Claimant had improved from the previous day and that Claimant "appears to be recovering from the situational stressors now that he is removed from the dynamic there." (*Id*. at 2). In Claimant's next visit on March 27, Rooks recorded that Claimant "appears to be recovering and is able to look at the situation more globally." (*Id*. at 3). Rooks assessed that Claimant "had a difficult time adjusting to the work and social changes at his site given the strong personalities that were new on the team." *Id.* She further noted that he did not have his partner there for support and his supervisor was unavailable at the time when he needed support, and that the situation had gone on for a period of several months." *Id*. Rooks assessed that Claimant was suffering from Adjustive Disorder. *Id*.

On March 27, Rook recorded that Claimant's "mood continues to improve" and that Claimant was "joking, smiling, laughing." (*Id*. at 3). Claimant reported that he "feels much better now that he is out of the situation." *Id*. Rooks assessed that Claimant was suffering from Adjustive Disorder. (*Id*. at 3). Rook recorded that Claimant appeared to be responding well since his removal from the stressful situation and that his "acute response to the stress was debilitation in the short term, but the prognosis for full recovery is good." *Id*. On March 28, Rook recorded that Claimant stated that he "enjoys the work and is looking forward to going to a new site to get back to work" and that his mood is "pretty much" back to normal. *Id*. Rook again noted "the prognosis for full recovery is good." (*Id*. at 4). On March 30, Rooks noted continued improvement in Claimant's mood. *Id*. Rook diagnosed Claimant with "Major Depressive Episode, single and R/O [rule out] PTSD." (*Id*. at 5).

On Claimant's final visit on March 31, Rooks recorded that Claimant's mood was "deteriorating and becoming morbidly depressed again." (*Id*. at 6). Claimant reported that his stress level was "very high" and that his mood was "getting worse." *Id*. Rooks recorded that "the presence of PTSD is a strong possibility and is complicating the depressive episode" but that "[a] differential diagnosis at this time is difficult given the severity of [Claimant's] depression." *Id*.

Patti Lyerly, Lyerly Counseling Services, LLC: The treatments records from Lyerly Counseling Services indicate that Claimant first presented to Lyerly Counseling Services for an Initial Psychosocial Assessment on April 24, 2013. (CX 1 at 7). The records are dated from April 24, 2013 to July 22, 2013 and relate to treatment by Patti Lyerly ["Lyerly"]. (*Id*. at 7-20, 28, 37-40, 43, 46). In the assessment, Lyerly, whose credentials are not of record, recorded that Claimant complained that he "can't sleep" and "don't associate [?] anybody." *Id*. Lyerly also recorded that Claimant stated that he loves working and "didn't want to go home." *Id*. Lyerly recoded that Claimant "kept withdrawing" and "became socially isolated." Claimant stated that "he's only had about three showers since April 24th." Id. Claimant did not report any substance abuse. (*Id*. at 8). Under History, Lyerly, noted "…traumatic events he experienced while being overseas working." (Id. at 8). During this appointment, Lyerly provisionally diagnosed Claimant with PTSD, and recommended that Claimant have psychotherapy one to two times per week. (*Id*. at 9).

[5] Claimant presented to Sandra Rooks on March 25, 26, 27, 28, 30, and 31.

On an undated "Burns Depression Checklist," Lyerly noted that Claimant reported feeling extremely sad, unhappy, hopeless, and guilty, but he denied having any suicidal urges. (*Id*. at 10). On an undated "Burns Anxiety Inventory" checklist, Lyerly noted that Claimant reported feeling extremely stressed, worried, and agitated. (*Id*. at 11).

On a handwritten Progress Note dated April 25, 2013, Lyerly recorded that the two discussed PTSD, specifically addressed the "memory of when [Claimant] slipped in [a] hole while working overseas and injured his ankle/leg." (*Id*. at 14). On a Progress Noted Dated April 30, 2013, Lyerly reported that during their session, Claimant discussed "feel[ing] worthless," "panicky," and "useless," and addressed Claimant's difficulty adjusting to life when he returned from Iraq. *Id*. at 15. A report dated May 2, 2013, Lyerly recorded that Claimant discussed having "difficulty adjusting" during his first trip home from Iraq. (*Id*. at 17). On a report dated May 9, 2013, Claimant reported having trouble sleeping well. (*Id.* at 19). In a report dated May 16, 2013, Claimant reported to Lyerly that he had trouble leaving the house, a place "where he feels safe." Claimant also reported that his wife stated that she is scared of him. (*Id*. at 28). By Claimant's visit on May 28, 2013, he reported that his anxiety was getting "better" and noted improvements in his sleeping. (*Id*. at 39).

Rowan Medical Center, May 9, 2013: Hospital records from Novant Health Rowan Medical Center indicate that Claimant reported to the emergency room on May 9, 2013. (CX 1 at 20-27). Dr. Heather Halton, the attending ER physician, whose credentials are not of record, recorded that Claimant presented to the emergency department with depression and PTSD that he "developed while [working as a] civilian contractor overseas in Afghanistan [over the] past several years." (*Id*. at 20). The report notes that Claimant presented "for a psych [evaluation] for workers comp claim." (*Id*. at 25). Claimant reported having "low self-esteem, low energy level, no appetite, insomnia, etc., since being released from [his] job in April of this year and sent home." *Id*. Claimant denied suicidal thoughts or homicidal ideation. *Id*. Claimant reported positive for "anxiety, depression, insomnia." (*Id*. at 21). Claimant was discharged and instructed to follow up with his physician. *Id*. at 22. Dr. Hamilton made a diagnostic impression of PTSD with depression. (*Id*. at 22, 24).

Dr. Dimkpa, Rowan Psychiatric and Medical Services: The record also includes treatment records from Rowan Psychiatric and Medical Services on May 17, 2013, June 18, 2013, and on July 16, 2013. (CX 1 at 29-36, 41-42, 45). The credentials of the treating physicians are not of record. Claimant first reported to Rowan Psychiatric and Medical Services on May 17, 2013 and was treated by Dr. Dimkpa. (*Id*. at 29). Claimant was evaluated for PTSD. (*Id*. at 31). Claimant reported that he began experiencing insomnia, hypervigilance, anxiety, not getting along with others beginning in February 2013. (*Id*. at 31). Claimant reported that he has dreams of rockets coming in and that he once woke up "chewing on his watch and grinding his teeth." (*Id*. at 33). Claimant reported that he sometimes wakes up with his heart pounding and that he is constantly "thinking of all the things that happened in Iraq and Afghanistan." *Id*. Specifically, Claimant reported "while in Iraq, he and the military were blown up while in Humvee (2 bombs); he has had his windows shot at a few times; he lived in constant fear during those years of dying; many of his coworkers , students, and instructors have died; and he lost 4 co-workers yesterday." *Id*. Claimant reported that he was currently experiencing sleep

disturbances, lack of appetite, and panic attacks. *Id*. Twice in the last two months, Claimant has started experiencing suicidal thoughts. The physician noted in the records that during the examination, Claimant was "rocking back and forth." (*Id*. at 35). Dr. Dimkpa prescribed Ambien, and Prozac, and he advised Claimant to continue counseling with Patti Lyerly. (*Id*. at 36).

Claimant again presented to Rowan Psychiatric and Medical Services on June 18, 2013 for a follow-up appointment with Dr. Dimkpa. (*Id*. at 41-42). Claimant reported that "he is doing somewhat better on medications," but continued to experience "nightmares and flashbacks" and "occasional panic attacks." *Id*. Claimant reported that he "continues to isolate himself and has interactions with other people." (*Id*. at 41). Claimant was diagnosed with PTSD. (*Id*. at 42). In a follow-up visit on July 16, 2013, Claimant reported that "his medications are working well on improving, but he is still extremely anxious, and has issues with sleeping." (*Id*. at 44). Claimant also reported having panic attacks daily. *Id*. Claimant was diagnosed with PTSD. *Id*.

Photograph of Vehicle

Claimant submitted a photograph, showing an explosives-wrecked vehicle. On the photo is written: "My last crime scene 3 wounded TC 1 killed Iraq." (CX 8). At the hearing, Claimant explained that this photograph depicted the last crime scene that he visited, where three were wounded and the truck commander ("TC") was killed. (Tr. 56).

Personnel and Discharge Records:

Claimant submitted records relating to his employment and discharge from Employer dated from 2008 to 2013. (CX 5). Claimant included a performance evaluation signed September 15, 2008. (*Id*. at 13-15). The revaluation notes that Claimant was a "valued member of the PTT and is viewed with high regards by his military counterparts." Claimant was recommended for re-hire and was rated "high-effective" in the categories of jobs knowledge, communication, team work, initiative, dependence, and quality of work. (*Id*. at 14).

Claimant has also included in the record three memorandums in support of Claimant's contract extensions in Iraq. (CX 9). The first, dated April 11, 2010 and signed by Micah D. Taylor, CPT, MP recommending Claimant for extension as an International Police Advisor, cites Claimant's prior experience and accomplishments working with the Iraq Police as reasons for Claimant's recommendation. (CX 9 at 1). The second, dated September 25, 2010 and signed by Eric von Tersch, COL, SF also reference Claimant's experience and working relationship with Iraqi partners. (*Id*. at 2). The last, dated January 12, 2011 and signed by Kevin T. Henderson, LTC, SF referenced Claimant's expertise and "exceptional performance." (*Id*. at 3).

A letter titled "Position Description" summarizes Claimant's job summary, position responsibilities, skills required, and physical requirements/ working environment. (CX 5 at 2-4). An Employment Verification letter dated January 10, 2013 indicates that Claimant was employed by Employer in Iraq from April 24, 2007 to November 23, 2008 and from June 30, 2009 to September 21, 2011, and in Afghanistan beginning on October 14, 2012. (*Id*. at 12).

Claimant also submitted a Report of Occupational Injury or Disease dated April 23, 2013. (CX 5 at 1). The report notes that Claimant was injured on March 23, 2013 when the following occurred:

> Employee was in his room using social media site Face Book and was reported to have made posting that made others believe that he was an immediate threat to his personal safety. After further investigation supervisors and military staff verified possible [suicidal] tendencies/ threats did exist.

Id. As a result of this episode, the report notes that "employee ended mission/ returned to U.S.A." *Id*. In a form letter signed by Claimant on March 31, 2013 and titled "Exit Interview," Claimant reported that his employment ended due to "stress due to work conditions." (*Id*. at 5). Where the form letter asked Claimant to "Please provide any additional comments or suggestions below that you have for the Company," Claimant wrote, "none." *Id*.

Claimant also submitted a form letter titled "Employee Rehire Status" dated April 3, 2013, wherein Claimant is not recommended for rehire. Human Resources Manager commented "medical issues; did not complete contract." (*Id*. at 7). The record also includes an "AMDP Clearance Form" which indicated that Claimant was terminated without cause. (*Id*. at 8). A Termination Notice also notes that Claimant was terminated without cause effective April 3, 213. (*Id*. at 9).

Also included in Claimant's discharge records are email messages between several of Employer's human resource managers. (*Id*. at 10). In an email dated March 30, 2013, Frankey Pestana-Coetzee wrote of Claimant, "While the employee is fit for duty per out in country Mental health Counselor, it was agreed between the Program and the employee that he would be better off heading home." (*Id*. at 10). A letter dated April 24, 2013 and signed by Kenneth van Osdol, Chief Medical Officer in Afghanistan, stated:

> This individual is found to be medically unfit for duty on the AMDP Program here in Afghanistan.
>
> He has been seen and evaluated by the medical staff at Camp Pinnacle and will be returning home for further treatment.

(*Id*. at 16).

Wage Records

Claimant submitted payment records from Employer's payroll reflecting wages from October 14, 2012 to March 23, 2013, and showing a total of $63,227.28 in wages. (CX 6 at 1). Claimant submitted payroll records from the period of March 8, 2013 to April 4, 2013. (*Id*. at 2).

Claimant also submitted a job offer letter from Employer dated May 10, 2012, with Claimant's signature accepting the offer. (*Id*. at 3). Claimant submitted the Employment Agreement, which noted that Claimant would receive $6,667.20 per 28 day period, for a total of $80,000 per annum that was scheduled commence from October 14, 2012 to October 14, 2013. (*Id*. at 4-11).

Included in the record are Claimant's Income Tax Returns for the years 2011 through 2013. In 2011, Claimant reported income of $139,494. (*Id*. at 12). In 2012, Claimant reported earnings of $36,252. (*Id*. at 14). In 2013, Claimant reported earnings of $51,901. (CX 7 at 1).

Claimant submitted payroll records from Davidson County reflecting gross wages of $24,270.40 from January 1, 2014 to August 1, 2014. (CX 14).

Medical Bills

Claimant submitted various medical bills and receipts, which includes several receipts from Innes St. Drug Co. and CVS Pharmacy; a receipt and carbon copy check from Lyerly Counseling, Client bills from Lyerly Counseling dated December 18, 2013, December 18, 2013, May 9, 2013, and May 16, 2013. (CX 13 at 1-17).[6]

Department of Labor Forms and Filings

As discussed above, Employer filed a First Report of Injury, Form LS-202, on May 2, 2013. (CX 3). Employer filed a Notice of Controversion of Right to Compensation on May 8, 2013. (CX 4). On August 11, 2013, Claimant filed an Employee's Claim for Compensation, Form LS-203. (CX 2). On January 3, 2014, Claimant filed a Pre-Hearing Statement, Form LS-18. (CX 10). The matter was referred for a formal hearing on January 17, 2014. After the referral, on April 9, 2014, Employer filed an LS-18 Pre-Hearing Statement (CX 11).

Discovery Exhibits

Claimant submitted Employer's answers to Claimant's interrogatories, dated March 19, 2014. (CX 12).

[6] Many of Claimant's receipts included in Claimant's Exhibit 13 are duplicates. For instance, page 4 and 7; page 1 and 9; page 2 and 10; and page 3 and 13 are the same. On Claimant's Pre-Trial Statement, Claimant alleges outstanding payments in the amount of $5,846.80 to Novant Health; $248.24 to Lyerly Counseling; and $188.80 to Rowan Emergency Group.

DISCUSSION

Claimant's Credibility

I find Claimant to be a generally credible witness. Although somewhat varied, during the hearing and throughout Claimant's treatment records, Claimant consistently reported feeling depressed and anxious and reported difficulty sleeping. During Claimant's first visit with Sandra Rooks at DynCorp AMPD[7] Mental Health Program on March 25, 2013, Rooks reported (by listing a number indicating degree for listed symptoms) the following signs and symptoms: mild anxiety, mild low energy, mild psychomotor retardation, mild paranoid ideation, moderate depression, moderate appetite disturbance, and moderate sleep disturbance. (CX 1 at 1). It was recommended that weapons be removed from the patient. (*Id.*) During an appointment of April 30, 2013, Patti Lyerly of Lyerly Counseling Services reported that Claimant discussed "feel[ing] worthless," "panicky," and "useless." (CX 1 at 15). At Rowan Psychiatric and Medical Services on May 17, 2013, Claimant reported that he began experiencing insomnia, hypervigilance, anxiety, and not getting along with others beginning in February 2013. (*Id*. at 31). During the hearing, Claimant testified that due to the conflicts at work, he had difficulty sleeping, was paranoid, and "became a hermit." (Tr. 38). As seen through an analysis of Claimant's complaints of depression and anxiety and difficulty sleeping, Claimant's testimony and statements in treatment records are generally consistent, and I find that Claimant's testimony is credible.

Establishment of a Compensable Injury

Prima Facie Case and Section 20(a) Presumption

The Longshore Act, as extended by the Defense Base Act, defines an injury as an "accidental injury or death arising out of and in the course of such employment, and such occupational disease or infection as arises naturally out of such employment or as naturally and unavoidably results from such accidental injury…." 33 U.S.C. §902(2). To establish a *prima facie* claim of entitlement to compensation, a claimant must establish that: (1) he/she sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *See Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984); *Bartelle v. McLean Trucking Co*., 14 BRBS 166, 167 (1981), *aff'd*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982).

It is well-settled that a psychological impairment can be an injury under the Act if it is work-related. *Lazarus v. Chevron, USA*, 958 F.2d 1297, 1299 (5th Cir. 1992); *Director, OWCP v. Potomac Electric Power Co.*, 607 F.2d 1378, 1385 (D.C. Cir. 1979); *Sewell v. Noncommissioned Officers Open Mess, McChord Air Force Base*, 32 BRBS 127, 129 (1997) ; *Konno v. Young Brothers, Ltd.*, 28 BRBS 57, 61 (1994). Psychological impairments have included depression due to a work-related disability, *Hargrove v. Strachan Shipping Co*., 32 BRBS 11, 15 (1998) , anxiety conditions, *Moss v. Norfolk Shipbuilding & Dry Dock Corp.*,

[7] Claimant testified that the AMPD program is a program that trains the Afghani police. (Tr. 46).

10 BRBS 428 (1979), headaches, *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340, 341-42 (1989); and stress. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112, 117 (2000), *aff'd* 248 F.3d 54 (2nd Cir. 2001). Where a work-related accident has psychological repercussions, it is also compensable. *Tampa Ship Repair & Dry Dock v. Director, OWCP*, 535 F.2d 936, 938 (5th Cir. 1976); *Tezeno v. Consolidated Aluminum Corp.*, 13 BRBS 778, 782 (1981). However, a psychological injury stemming from a legitimate personnel action is not compensable. *Army & Air Force Exchange Service v. Drake*, 172 F.3d 47 (6th Cir. 1998) (unpub.) (stating that justified discriminatory acts cannot form the basis for a claim under the Act); *Marino v. Navy Exchange*, 20 BRBS 166 (1988) (finding that a reduction in force is not a working condition that can form the basis of a compensable injury).

Once this *prima facie* case is established, a presumption is created under Section 20(a) of the Act that the employee's injury or death arose out of his employment. 33 U.S.C. §920(a). Under Section 20, it is presumed—in the absence of substantial evidence to the contrary—that (a) the claim comes within the provisions of the Act; (b) sufficient notice of the claim has been given; (c) the injury was not occasioned solely by the intoxication of the injured employee; and (d) the injury was not occasioned by the willful intention of the employee to injure or kill himself. *Id.* To rebut this presumption, an employer must present substantial countervailing evidence that the employee's death was not caused by, contributed to, or aggravated by his employment. *See Everson v. Stevedoring Servs. of Am.*, 33 BRBS 149 (1999). If the employer presents substantial rebuttal evidence, sufficient to sever the connection between the employee's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the complete record, without the benefit of the presumption. *See Holmes v. Universal Mar. Servs. Corp.*, 29 BRBS 18 (1995). An employee's intoxication is insufficient to sever the causal connection unless intoxication was the sole cause of the employee's injury or death. *See* 33 U.S.C. § 903(c) ("No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee…."); *Birdwell v. W. Tug & Barge*, 16 BRBS 321 (1984).

I find that Claimant has established a *prima facie* case and is therefore entitled to the benefit of the Section 20(a) presumption for compensation due to psychological impairments as a result of his employment in Afghanistan. Claimant's credible testimony, treatment records, and other evidence indicate that Claimant became isolated from his coworkers after a series of disputes over work duties while employed by Employer in Afghanistan, a hostile environment encased in war. These events were the genesis of Claimant's psychological symptoms, including depression and possible symptoms of PTSD. Additionally, the record also indicates that Claimant's psychological problems were also aggravated by his two earlier tours in Iraq.

Physical/Psychological Harm

First, the credible evidence shows that Claimant suffered psychological harm during his third tour in Afghanistan. Claimant testified that his relationship with his coworkers and roommates, Michael Freeman and Gregory Hudson, was constantly combative, and the two eventually ceased communication with Claimant. (Tr. 35-37). Due to this hostile environment, Claimant testified that he suffered from insomnia and paranoia and was withdrawn. (Tr. 38). Eventually, Claimant contemplated suicide. (Tr. 40). Claimant's discharge records reflect that

his employment was terminated due to his psychological symptoms. Claimant also submitted a form letter titled "Employee Rehire Status," wherein Claimant is not recommended for rehire. Human Resources Manager commented "medical issues; did not complete contract." (CX 5 at 7). Human Resources employee Frankey Pestana-Coetzee wrote that while Claimant was fit for duty, it was agreed between the Program and Claimant that he should return home. (*Id*. at 10). An employee of the Chief Medical Office in Afghanistan, Kenneth van Osdol, concluded in that letter that Claimant was "medically unfit for duty" and that Claimant was sent home for further treatment. (*Id*. at 16).

Although it is not clear whether Claimant has a treating physician, Claimant has received consistent out-patient counseling and treatment for his psychological symptoms. While in Afghanistan, Employer referred Claimant to Sandra Rooks, MA, LPC in March 2013. At the end of his counseling, Rooks recorded that "the presence of PTSD is a strong possibility and it complicating the depressive episode." (CX 1 at 6). Once Claimant returned to the United States he was treated at Lyerly Counseling Services from April 24, 2013 to July 22, 2013, and counseled for PTSD. (*Id*. at 7-19, 28, 37-40, 43, 46). The record also includes treatment records from Rowan Psychiatric and Medical Services on May 17, 2013, June 18, 2013, and on July 16, 2013, where Claimant was evaluated for PTSD. (*Id*. at 29-36, 41-42, 44-45). The records show that Claimant reported that he began experiencing insomnia, hypervigilance, anxiety, and not getting along with others beginning in February 2013. (*Id*. at 31). Claimant presented to Dr. Dimkpa at Rowan Psychiatric and Medical Services on June 18, 2013 for a follow-up appointment, where he was diagnosed with PTSD. (*Id*. at 29-36). In a follow-up visit on July 16, 2013 at Rowan, Claimant was again diagnosed with PTSD. (*Id*. at 42). Dr. Dimkpa prescribed Ambien and Prozac. (*Id*. at 36).

Evidence of a Causal Relationship

Second, the evidence shows conditions that could have given rise to psychological injuries. Claimant presented credible evidence regarding the etiology of his psychological injuries through his testimony. Claimant testified that he worked for Employer on three tours as an international police liaison officer and a trainer for local police forces in Iraq and Afghanistan between 2007 and 2013. During his first tour in Iraq, Claimant was exposed to "a few" mortar attacks on base, and during Claimant's second tour, his convoy was nearly hit by a grenade. (Tr. 20, 26-28). Over the course of this third tour in Afghanistan, Claimant had disputes with his coworkers, who were also his roommates, and became frustrated with his work. (Tr. 35). Claimant testified that he and his coworkers "did not see eye to eye on how to do the jobs." (Tr. 36). As a result, Claimant and his coworkers were constantly arguing and eventually, the co-workers stopped communicating with Claimant. (Tr. 37). Because of this discord within his working and living environment, Claimant testified that he had difficulty sleeping, was paranoid, and "became a hermit." (Tr. 38). Eventually, Claimant contemplated suicide. (Tr. 40). After Claimant revealed his suicidal ideation to a former co-worker, the co-worker reported Claimant to HR. (Tr. 41, 69-70). On March 23, 2013, Claimant was removed of his weapons, and over the next few days, Claimant was under suicide watch by his co-workers, Hudson and Freeman, with whom he did not get along. (Tr. 42-44). On April 1, 2013, Claimant was sent home for "stress due to work conditions." (Tr. 45).

Claimant's testimony of the events during his third tour in Afghanistan was corroborated by Michael Freeman and Greg Hudson, Claimant's co-workers and housemates. The coworkers testified that the conflict between them and Claimant arose from disagreements on how to carry out their work orders. (EX 3 at 13-15). Hudson alleged that as a result of the conflicts, Claimant "separated himself" from him and Freeman. (CX 3 at 21). Freeman testified that although he saw Claimant daily, he and Claimant were not close, and that he did not know Claimant well. (*CX 2* at 22). He admitted, "… [Claimant] and I never were what you would call friends." (*Id*. at 28). Hudson testified that while working with Claimant, the two had very limited interactions despite sharing a house. (CX 3 at 13).

Accordingly, Claimant has established a *prima facie* case and is entitled to the presumption under Section 20(a) that his psychological impairments, including but not limited to depression and PTSD, were causally related to his employment.

Zone of Special Danger

Under the DBA, moreover, the "condition or course of employment standard" has been expanded by the "zone of special danger" doctrine. As such, in cases arising under the Defense Base Act, an employee's injury or death need not occur within the space and time boundaries of his work to occur in the course of his employment; "[a]ll that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose." *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). In *O'Leary*, a government contractor drowned in a channel located next to a recreation center his employer maintained in an attempt to rescue two men. *Id.* at 505. The Court found that the evidence supported the Deputy Commissioner [District Director]'s award of benefits, for the decedent's rescue attempt was reasonable and his death could be seen as fairly attributable to the risks of his employment. *Id.* at 508. The Court made clear that there need not be a causal relationship between the nature of the decedent's employment and the accident nor must the employee be engaged in an activity that benefits his employer at the time of his injury or death. *Id.* at 506-07. Further, an employer can be said to create a zone of special danger simply by employing an employee in a foreign country, as long as the employment is related to a federal contractual obligation. *Harris v. England Air Force Base*, 23 BRBS 175, 179 (1990).

In considering the aforementioned cases, I find that the instant case is covered by the "zone of special danger" doctrine. Here, there is no dispute that Claimant was employed by Employer in Afghanistan as a police advisor in a war zone. Therefore, Claimant has produced sufficient evidence to show that working for Employer in Afghanistan created a "special zone of danger" out of which Claimant's psychological impairments arose.

Rebuttal of Section 20(a) Presumption

Having found evidence of a causal relationship, the burden shifts to Employer to offer substantial evidence to rebut the presumption. Employer seeks to rebut this presumption by arguing that Claimant's conditions were not sufficient to cause Claimant's psychological condition, by suggesting that Claimant lacked documented stressors sufficient to meet the diagnostic criteria for PTSD.

Employer introduced testimony of Michael Freeman and Greg Hudson, Claimant's coworkers and housemates during the time of Claimant's injury. (EX 2, EX 3). Freeman and Hudson testified that the base where they lived with Claimant was secure, and that they enjoyed the living conditions. (EX 2 at 15-16; EX 3 at 9, 10, 17-18). Hudson testified that during his time at Orgun, he experienced indirect fire very infrequently; and surprisingly infrequent compared to other overseas locations where he lived. (*Id*. at 17). He did not find the work to be stressful and stated, "I wish I would have learned about it earlier. I would have moved there much earlier—or requested to live there." (*Id*. at 18). Freeman testified that the mentors had few work-related responsibilities during their time in Afghanistan. Twice a day, every day, for two weeks, the police mentors met with their students, who were Afghan policemen, until the program "fizzled out." (*Id*. at 19-20). The co-workers testified that the conflict between them and Claimant arose from disagreements on how to carry out their work orders. (EX 3 at 13-15). Hudson alleged that as a result of the conflicts, Claimant "separated himself" from him and Freeman. (CX 3 at 21). Freeman and Hudson also testified that they did not believe Claimant was suicidal. Freeman also observed Claimant during Claimant's suicide watch. (*Id*. at 26). Freeman stated that "it was like it was a joke to him." (*Id*. at 26). Like Freeman, Hudson testified that the news that Claimant was suicidal and that his weapons needed to be secured came "out of nowhere." (*Id*. at 29). When Claimant's weapons were taken away, Hudson testified that "[i]t appeared that he was making light of it; that it was not genuine." (CX 3 at 29). Finally, Freeman and Hudson described their relationship with Claimant. Freeman testified that although he saw Claimant daily, he and Claimant were not close, and that he did not know Claimant well. (*CX 2* at 22). He admitted, "… [Claimant] and I never were what you would call friends." (*Id*. at 28). Hudson testified that while working with Claimant, the two had very limited interactions despite sharing a house. (CX 3 at 13).

Employer also introduced the medical opinion of Dr. Jack Spector, who performed a psychological evaluation on Claimant. (EX 1). He maintained that Claimant does not have a triggering event of sufficient severity to meet the criteria of PTSD. Dr. Spector recorded that he did not observe that Claimant experienced deficiencies in activities of daily living or in instrumental activities, such as driving, preparing meals, taking medication, and managing money. (*Id.* at 4). Dr. Spector further noted, that Claimant reported that he experienced flashbacks and nightmares but was unable to detail the actual content of these experienced. (*Id*. at 6). Dr. Spector recorded that the psychological and personality testing conducted during the examination reflected exaggerated complaints of emotional impairment. *Id*. While Dr. Spector noted that Claimant endorsed nearly every relevant symptom of post-traumatic stress, he opined that there was an absence of documented stressors sufficient to meet the diagnostic criteria for this condition. *Id*. Instead, Dr. Spector diagnosed Claimant with adjustive disorder with mixed disturbance of emotions and conduct.[8] *Id*. He opined that Claimant's "alleged emotional collapse" was related to Claimant's adverse supervisory environment during his third contract tour in Afghanistan, instead of the near-miss explosion he experienced during his first two tours in Iraq. *Id*. Dr. Spector noted that Claimant did not have a history of a pre-existing emotional condition. (*Id*. at 7). Dr. Spector opined that there were no restrictions on Claimant's ability to work in his prior capacity as a sheriff, but that he would not be suited to return to Afghanistan

[8] In assessing Dr. Spector's opinion, I note that regardless of the diagnosis, Dr. Spector found the impairment to be related to Claimant's employment and to prevent him from returning to his prior employment.

due Claimant's prior inability to tolerate the "stresses inherent to serving in a war zone" as well as the "level of supervision and scrutiny." (*Id*. at 8).

I find that the medical opinion of Dr. Spencer and the testimony of Freeman and Hudson are not sufficient to rebut Claimant's evidence. Although Dr. Spector opined that Claimant's emotional complaints were exaggerated, Dr. Spector did not dispute that Claimant's condition is related his employment nor did he identify non-work-related stressors that could have caused Claimant to leave his employment. In fact, Dr. Spector opined that Claimant's "alleged" psychological impairment was related to Claimant's adverse supervisory environment during his third contract tour in Afghanistan. (*Id*. at 6). Furthermore, Dr. Spector opined that Claimant would not be suited to return to Afghanistan due Claimant's prior inability to tolerate the stresses inherent in serving in a war zone as well as the level of supervision and scrutiny. (*Id*. at 8). As to the testimony of Freeman and Hudson regarding Claimant's psychological impairment, neither are physicians, and both admitted to not particularly caring for Claimant, and as such, while I have taken into consideration their objective observations, I give their opinions minimal weight. (*Id*. at 37). Accordingly, I find that Employer has failed to produce substantial countervailing evidence indicating that Claimant's psychological impairments, including but not limited to depression and PTSD, were not caused by his employment in Afghanistan. Therefore, Claimant is entitled to compensability under section 20(a) presumption.

In light of the medical opinion and Claimant's credible testimony, Employer has failed to produce sufficient evidence to rebut the presumption under Section 20(a). Based on the foregoing discussion, I find that Employer has failed to produce substantial countervailing evidence indicating that Claimant's PTSD was not caused by his employment. Therefore, Claimant is entitled to compensability under section 20(a) presumption.

Nature and Extent of Disability

Disability under the Act is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10). To establish a *prima facie* case of total disability, Claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Blake v. Bethlehem Steel Corp.,* 21 BRBS 49 (1988). "Usual" employment is defined as the claimant's regular duties at the time that he was injured. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). At the initial stage, a claimant need not establish he cannot return to any employment, only that he cannot return to his former employment. *Elloit v. C. & P Tel. Co.*, 16 BRBS 89 (1984) (finding employee required lighter duty, which did not require the use of his right hand for heavy grip, and thus could not resume his former employment of holdman); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988) (finding due to permanent restrictions against heavy lifting and excessive bending, employee could not resume usual job as sandblaster). See also 33 U.S.C. § 902(10).

As factfinder, an administrative law judge must compare the claimant's medical restrictions with specific requirements of his usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). In doing so, "an administrative law judge is not bound to accept the opinion of any particular witnesses, including doctors, and draw his own inferences from the

evidence." *Lombardi v. Universal Maritime Serv. Corp*. 32 BRBS 83 (1998). The Board held in *Lombardi*, that the credited medical opinion of claimant's treating orthopedic surgeon, in combination with the claimant's testimony regarding his job requirements, constituted substantial evidence in support of a determination that the claimant's impairment prevented him from performing his usual employment duties. *Id*.

It is well settled that a claimant can be totally disabled despite continuing to work if he only does so with extraordinary effort and in spite of excruciating pain. *See Louisiana Ins. Guar. Assoc. v. Bunol*, 211 F.3d 294 (5th Cir. 2000) (finding claimant established extraordinary effort when he testified that he worked in constant pain and his doctors placed restrictions on his physical activities at work); *Reposky v. Int'l Transp. Servs.*, BRB. Nos. 06-0148 and 06-0148A (Oct. 20, 2006) (finding extraordinary effort when claimant underwent numerous surgeries, took strong pain killers, and pushed her doctors to release her to work); *G.F. v. CSX Lines, Inc.*, BRB No. 08-0837 (June 24, 2009) (unpub.) (finding claimant was totally disabled when he testified that his pain level ranged from 7 to 10 but he continued working because he thought he "had to try to get through" and he missed some work because of his pain).

Once a claimant demonstrates that he is unable to perform his previous job due to a work-related injury, he has established a prima facie case of total disability and the burden shifts to his employer to prove the availability of suitable alternative employment. *See, e.g., Lentz v. Cottman Co.*, 852 F.2d 129 (4th Cir 1988). To do so, an employer must show that there is a range of jobs available in the claimant's geographic area which he is reasonably capable of performing and which he could realistically and likely secure given his age, education, and vocational background if he diligently pursued the opportunity. *Id*. at 131. If the employer establishes the existence of such employment, the employee's disability is treated as partial, not total, unless the claimant can rebut by showing that he diligently tried yet was unable to secure employment. *See, e.g. Newport News Shipbuilding & Dry Dock Co. v. Tabb*, 841 F.2d 540, 542 (4th Cir. 1988).

Total Disability

It is clear from the facts presented that Claimant cannot return to his regular employment as a police advisor in Afghanistan. Employer does not offer any evidence to dispute this issue. Claimant has not presented any evidence that indicates that he can return to his former job or that he has the psychological ability to perform it. At the hearing, Claimant testified that he has continued seeking treatment regularly at Lyerly Counseling. (Tr. 49). Claimant also testified that he has continued to take the Trazadone, Klonopin, and Prozac prescribed by Dr. Dimkpa. (Tr. 49). Claimant began working a civil position with the Davidson County Sheriff's Department in August 2013, which he stated was "less stressful than doing full-blown patrol work…." (Tr. 50, 51). To accommodate his impairment, Davidson County has allowed Claimant the flexibility to "pick and choose" which assignments he wanted. (Tr. 52).

The medical evidence establishes that Claimant cannot return to his former employment. Dr. Dimpka did not opine specifically as to whether Claimant could return to his usual employment, but during Claimant's last recorded visit to Rowan Psychiatric & Medical Services, P.A. on July 16, 2013 he was advised to continue his current medications, and Claimant's Prozac prescription was increased. (CX 1 at 45). Dr. Spector opined that there are no restrictions on

Claimant's ability to work in his prior capacity as a sheriff, but that he would not be suited to return to Afghanistan due Claimant's prior inability to tolerate the "stresses inherent to serving in a war zone" as well as the "level of supervision and scrutiny." (EX 1 at 8).

Based on my review of the evidence of record, I conclude that Claimant is unable to return to his usual employment and is totally disabled. Temporary total disability benefits should begin on March 24, 2013 (inasmuch as Claimant was paid by Employer through March 23, 2013, CX 6) and extend until the date suitable alternative employment has been established.

Suitable Alternative Employment

Once a claimant demonstrates that he is unable to perform his previous job due to a work-related injury, he has established a prima facie case of total disability and the burden shifts to his employer to prove the availability of suitable alternative employment. *See, e.g., Lentz v. Cottman Co.*, 852 F.2d 129 (4th Cir 1988). To do so, an employer must show that there is a range of jobs available in the claimant's geographic area which he is reasonably capable of performing and which he could realistically and likely secure given his age, education, and vocational background if he diligently pursued the opportunity. *Id*. at 131. If the employer establishes the existence of such employment, the employee's disability is treated as partial, not total, unless the claimant can rebut by showing that he diligently tried yet was unable to secure employment. See, e.g. *Newport News Shipbuilding & Dry Dock Co. v. Tabb*, 841 F.2d 540, 542 (4th Cir. 1988).

Employer has presented no evidence of suitable alternative employment apart from evidence of Claimant's current employment. In that regard, Claimant has been employed as a deputy sheriff at the Davidson County Sheriff's Office since August 2013. (Tr. 51). Since Claimant's employment is consistent with Dr. Spector's opinion that there are no restrictions on Claimant's ability to work as a sheriff, but that he would not be suited to return to Afghanistan, I find that Claimant's current employment with the Sheriff's Office qualifies as suitable alternative employment and his earnings there represent his post-injury wage-earning capacity. *Id*. at 8.

In determining Claimant's wage earning capacity based upon his actual earnings, I note that Claimant's wages at the Sheriff's Office were not fixed. Claimant testified at the hearing that he earned $14.25 an hour until July 2014, when his pay increased to $14.49 an hour. (Tr. 52-53). That hourly wage does not include all earnings, such as overtime, however, so I must instead rely upon tax records to determine wage earning capacity. Tax records show that Claimant earned $13,703.50 from the Davidson County Sheriff's Office in 2013 [from August to December], which represents weekly earnings of $626.96, based upon Claimant's calculations.[9] (CX 6). Claimant has earned $24,270.40 from January 1, 2014 to August 1, 2014, which amounts to $797.62 per week, based upon Claimant's calculations (*Claimant's Brief* at 34; CX 14). I find that those amounts constitute a fair and reasonable estimate of Claimant's wage earning capacity during the pertinent periods.

[9] Claimant's calculations (*Claimant's Brief* at 34) were as follows: His tax records show earnings of $51,901 in 2013, of which $38,197.50 was paid by Employer, leaving $13,703.40 paid by the Davidson County Sheriff's Office for the period from August 1, 2013 to December 31, 2013, a period of 21.8571 weeks, translating to a weekly pay of $626.96. Claimant testified that he earned $24,270.40 from January 1, 2014 to August 1, 2014 (30.4286 weeks), which amounts to $797.62 weekly.

In view of the above, I find that Employer has established Claimant's wage earning capacity as $626.97 from August 1, 2013 to January 1, 2014 and $797.62 from January 1, 2014 to the present based upon Claimant's actual wages. Claimant's partial disability is therefore calculated based upon the difference between his average weekly wage and his wage earning capacity. See 33 U.S. C. §908(c) [permanent partial disability], (e) [temporary partial disability].

Permanency of Disability/Maximum Medical Improvement

Having established that Claimant is disabled, I must determine whether his disability is temporary or permanent in nature. A permanent disability is one which "has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *see Gen. Dynamics Corp. v. BRB*, 565 F.2d 208 (2d Cir. 1977); *Seidel v. Gen. Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984). Whereas the extent of a disability—total versus partial—involves both a medical and an economic analysis, the determination of whether a disability is permanent is based on medical evidence alone. *Id.* Where a claimant's condition is still improving, maximum medical improvement (MMI) has not been reached and the disability is not yet permanent. *Dixon v. John J. McMullen & Assoc.*, 19 BRBS 243, 1986 WL 66395 (1986).

Claimant contends that he established a prima facie case of entitlement to temporary total disability beginning March 23, 2013, the day that he was removed of his weapons and placed on suicide watch. (Post-Hearing Brief at 37). Claimant contends that he has not yet reached MMI. (Brief at 38). Employer asserts that the disability was temporary from March 23, 2013 through the date Dr. Spector found Claimant capable of working on June 7, 2013, should I find that Claimant suffered a compensable injury. (Post-Hearing Brief 16). Based on his June 7, 2013 examination of the Claimant, Dr. Spector recorded that there was "…no significant improvement with [Claimant's] current treatment." (EX 1 at 7). He recommended that Claimant would "…benefit from cognitive behavior therapy and/or desensitization therapy, and would benefit from psychiatric intervention for better medication management that appears to be the case." *Id*. Dr. Spector also opined that there are no restrictions on Claimant's ability to work in his prior capacity as a sheriff. (*Id*. at 8).

The record also shows that Claimant continued to seek medical treatment after Dr. Spector's assessment. Claimant again presented to Rowan Psychiatric and Medical Services on June 18, 2013 for a follow-up appointment with Dr. Dimkpa. (*Id*. at 41). Claimant reported that "he is doing somewhat better on medications," but continued to experience "nightmares and flashbacks" and "occasional panic attacks." Claimant reported that he "continues to isolate himself and has interactions with other people." (*Id*. at 41). Dr. Dimkpa diagnosed Claimant with PTSD. (*Id*. at 42). In a follow-up visit on July 16, 2013, Claimant reported that "his medications are working well on improving, but he is still extremely anxious, and has issues with sleeping." (*Id*. at 44). Claimant also reported having panic attacks daily. *Id*. Claimant was

again diagnosed with PTSD. *Id*. At the hearing, Claimant testified that he continues to seek treatment.

Therefore, having reviewed the records and particularly the medical opinion of Dr. Spector based upon the June 7, 2013 examination of the Claimant; I find that Claimant has not yet reached maximum medical improvement. Dr. Spector's opinion that Claimant would benefit from further treatment is supported by the weight of the evidence. Accordingly, I find that Claimant's disability is temporary as he has not yet reached MMI.

Average Weekly Wage/Maximum Compensation Rate

Under the Longshore Act, as incorporated into the Defense Base Act, temporary total disability payments are calculated at two-thirds of the injured employee's average weekly wage for his employer, up to the maximum rate of compensation for his date of injury determined by the U.S. Department of Labor every year. [10] 33 U.S.C. § 908(b). Under section 6(b)(1) of the Act (Maximum rate of compensation), "[c]ompensation for disability . . . shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary." 33 U.S.C. § 906(b). The Supreme Court has ruled that the applicable maximum rate of compensation a claimant can receive is the one in effect when his injury occurs. *Roberts v. Sea-Land Services, Inc.*, 2012 WL 912953 (Mar. 20, 2012). The maximum compensation rate is therefore $1,325.18.[11]

There are three alternative methods for computation of a claimant's average weekly wage ("AWW"), as delineated in Section 10 of the Act at 33 U.S.C. §910.[12] The first of these methods, contained in Section 10(a), provides a means of computing average annual earnings when an injured employee's work was similar and continuous for substantially the entire year preceding the injury. 33 U.S.C. §910(a). Second, pursuant to Section 10(b), "[w]here claimant's employment is regular and continuous, but he has not been employed in that employment for substantially the whole of the year, the wages of similarly situated employees who have worked substantially the whole of the year may be used to calculate average weekly wage . . ." *Maldano*

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[10] Annual Maximum rates change every October 1st of each year and can be found at: http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm

[11] See footnote 10. The maximum compensation rate for October 1, 2012 to September 30, 2013 is $1,325.18; for October 1, 2013 to September 30, 2014 is $1,346.68; for October 1, 2014 to September 30, 2015 is $1,377.02; and for October 1, 2015 to September 30, 2016 is $1,406.00.

[12] The three methods of computation are:

33 U.S.C. §910(a): If a claimant worked in his line of employment for substantially the entire year preceding the injury, "his average annual earnings shall consist of three hundred times the average daily wage for salary for a six-day worker and two hundred and sixty times the average daily wage for a five-day worker," earned during the days in which he was employed.

33 U.S.C. §910(b): If a claimant did not work in his line of employment for substantially the entire year preceding the injury, "his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary" that an employee in a similar position would have earned in the previous year.

33 U.S.C. §910(c): If either of the prior methods cannot reasonably and fairly be applied, the average earnings shall be a sum that reasonably represents his earning capacity, based on "the previous earnings of the injured employee in the employment in which he was working at the time of his injury," and of similar employees working in similar jobs in the locality, or other employment of the claimant if representative.

v. Transcon. Terminals, Inc., BRB No. 98-512 (Dec. 22, 1998) (unpub.) Finally, Section 10(c), the third method, is "a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b) . . . can be reasonably and fairly applied." *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999). As the Board observed in *Story*:

> The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. . . . All sources of income are to be included in determining claimant's average weekly wage. . . . The Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. . . .

Story, slip op. at 14 [citations omitted].

Here, Employer's Pay Statement to Claimant and Claimant's Foreign Service Contract confirmed that Claimant's biweekly base wage was $3,333.60 or $1,666.80 per week. (CX 6 at 1, 4-11). The service employment agreement indicates that if he worked 2,880 hours per annum in the theater per his assigned schedule, Claimant would expect to earn an annual base salary of $80,000 if all scheduled work days are worked. (CX 6 at 4). Claimant's Offer Letter outlines that Claimant was also entitled to additional compensation, including 10% Completion Bonus, 35% Hazardous Pay, and 35% Post Differential Pay, provided that Claimant meet certain conditions. (CX 6 at 3). Payment records indicate that Claimant earned $63,227.28 from October 14, 2012 through March 23, 2013, which amounts to $2,749.01 per week over 23 weeks. (CX 6 at 1). In reviewing Claimant's W-2 statements, he earned $139,494.00 during 2011; $36,252.00 during 2012; and $51,901.00 during 2013. (CX 6 at 13-16, CX 7). Employer controverted the claim on the basis that Claimant lacked medical records to determine the extent of Claimant's injury and the cause of injury. (CX 4). At the hearing, Claimant testified that Employer had not paid any benefits to Claimant. (Tr. 13).

Based on Claimant's past earnings, Claimant has requested an Annual Weekly Wage (AWW) of $2,749.01 at the time of injury. (Post-Hearing Brief at 40). Employer counters that Claimant's biweekly wage was $3,333.60.00 or $1,666.80 per week. (Post-Hearing Brief at 16). Employer contends that Claimant only worked for the Employer for approximately a period of approximately six months in the year before the accident, and as such, this is insufficient to rely on Section 10(a).

I find that section 10(c) is the correct method for calculating Decedent's pre-injury average weekly wage (AWW). Section 10(c) may be applied when it would be unreasonable or unfair to calculate the claimant's AWW under sections 10(a) or 10(b). 33 U.S.C. 910(c); *Matulic v. Director, Office of Workers Compensation Programs*, 154 F.3d 1052, 1057 (9th Cir. 1998). Here, section 10(a) cannot be applied because the evidence indicates that Claimant worked much less than a substantial part, or 75%, of the working days in the year preceding his injury. *See Matulic*, 154 F.3d at 1057-58. Section 10(b) also cannot be applied because there is no evidence regarding the wages of other employees. Thus, section 10(c) must be applied. 33 USC 910(c). Section 10(c) requires the ALJ to determine a sum that shall reasonably represent the annual earning capacity of the claimant at the time of injury. 33 U.S.C. 910(c). That figure is

then divided by 52, as required by section 10(d), to arrive at the average weekly wage. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

In determining the claimant's annual earning capacity, the express language of section 10(c) provides that the factfinder may consider (1) the previous earnings of the injured employee in the employment in which he was working at the time of the injury, (2) the previous earnings of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or (3) other employment of such employee, including the reasonable value of the services, if engaged in self-employment. 33 U.S.C. 910(c); *Palacios v. Campbell Industries*, 633 F.2d 840, 842 (9th Cir. 1980); *National Steel Shipbuilding v. Bonner*, 600 F.2d 1288, 1291 (9th Cir. 1979). Since annual earning capacity represents "the amount of earnings the claimant would have the potential and opportunity to earn absent injury," *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980), it is also necessary to consider the claimant's ability, willingness and opportunity to work. *Tri-State Terminals. Inc. v. Jesse*, 596 F.2d 752, 757 (7th Cir. 1979). Thus, while the actual wages earned by the claimant at the time of injury should not be disregarded, they are not controlling. *Hall v. Consolidated Equipment Services*, 139 F.3d 1025 (5th Cir. 1998); *Palacios*, 633 F.2d at 843 (citing *Bonner*, 600 F.2d at 1292).

Here, Claimant earned $139,494.00 during 2011; $36,252.00 during 2012; and $51,901.00 during 2013. (CX 6 at 13-16, CX 7). Claimant argues that his AWW should be calculated by dividing by 23 weeks the $63,227.28 that Decedent earned between October 14, 2012 and March 23, 2013. That calculation would yield an AWW of $2,749.01, with a corresponding compensation rate of $1,832.67. Employer counters that Claimant's weekly wage was $1,666.80 (based upon his base biweekly wage). (Brief at 16). However, Employer's proposal does not reflect the additional compensation that Claimant received, including the 10% Completion Bonus, 35% Hazardous Pay, and 35% Post Differential Pay. (CX 6 at 1, 3). In contrast, Claimant's proposed AWW reflects Claimant's actual earnings during his employment with Employer. Therefore, I find that Claimant's proposed AWW of $2,749.01, with a corresponding compensation rate of $1,832.67, is fair and reasonable in accordance with section 10(c) of the Act, subject to the statutory cap.

Entitlement to Temporary Total Disability and Temporary Partial Disability Benefits

Under 33 U.S.C. 908(a) [permanent total disability or PTD] and (b) [temporary total disability or TTD], a totally disabled employee is entitled to receive 66 and 2/3 centum of his average weekly wage, subject to the statutory cap. 33 U.S.C. 908(a), (b); 906(b). I have determined that the average weekly wage (AWW) is $2,749.01 with a corresponding compensation rate of $1,832.67. As noted above, the maximum compensation rate is $1,325.18 and Claimant's benefits are limited to that rate at the time of the injury. Compensation benefits are therefore payable at the statutory cap of $1,325.18.

Temporary partial disability (TPD) benefits are paid under section 8(e) of the Act, which provides:

> (e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

33 U.S.C. 908(e).

Based on the above, I find that Claimant is entitled to Temporary Total Disability (TTD) from March 24, 2013 to July 31, 2013; Temporary Partial Disability (TPD) from August 1, 2013 [when Claimant began his current employment] to December 31, 2013 based on the difference between his average weekly wage of $2,749.01 and his earnings of $626.96 ($2,122.05 with a corresponding compensation rate of $1,414.70); and Temporary Partial Disability from January 1, 2014 to the present based on the difference between his average weekly wage of $2,749.01 and his earnings of $797.62 ($1,951.39 with a corresponding compensation rate of $1,300.92) during the period of disability. As noted above, the maximum compensation rate is $1,325.18 so compensation during the earlier periods (from March 24, 2013 to August 1, 2013 for TTD and from August 1, 2013 to December 31, 2013 for TPD) is limited to that amount. However, the amount payable for TPD of $1,300.92 beginning on January 1, 2014 falls within the cap. Payments of TPD are limited to a period of five years and may not therefore extend beyond August 1, 2018. 33 U.S.C. 908(e).

Medical Benefits

Pursuant to Section 7(a) of the Act, an 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). The Board has interpreted this provision to require an employer to reimburse a claimant for all reasonable and necessary medical treatment related to his work injury. *See Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988). Furthermore, a claimant is entitled to these medical benefits regardless of whether his injury is economically disabling as long as treatment is necessary. *See Ingalls Shipbuilding, Inc. v. Dir., OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993).

Section 7(b) of the Act vests the authority to supervise medical care with the Secretary of Labor. 33 U.S.C. §907(a), (b). Under the regulations, "[t]he Director, OWCP, through the district directors and their designees shall actively supervise the medical care of an injured employee covered by the Act." 20 C.F.R. § 702.407. The District Directors' supervisory functions include requiring periodic medical reporting; determining the necessity, sufficiency, and character of medical care furnished; determining whether change in service providers is necessary; and evaluating medical questions regarding the nature and extent of the covered injury and medical care required. 20 C.F.R. § 702.407; *see also* §702.401-702.422.

Claimant has raised the issue of Section 7 medical benefits in his Form LS-18 (CX 10), and he has offered evidence of medical payments he has made out of pocket (CX 13). Therefore,

as I have determined that Claimant's psychological injuries are work-related, he is entitled to reimbursement for all related past and future medical treatment that is reasonable and necessary. 33 U.S.C. § 907(a). In the future, these matters will be addressed by the District Director, who is responsible for overseeing medical care.

Interest

Although the Act does not provide for interest to be paid on past due disability benefits, courts have upheld interest awards as consistent with the Congressional purpose of making claimants whole for their injuries. *See, e.g.*, *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), *cert. denied*, 406 U.S. 958 (1972); *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). In *Santos v. General Dynamics Corporation*, 22 BRBS 226 (1989), the Board dictated that interest, when allowable, should be calculated on a simple rather than a compound basis. *Id.* at 228 (citing *Stovall v. Ill. Cent. Gulf. R.R. Co.*, 722 F.2d 190 (5th Cir. 1984)). The appropriate interest rate is that employed by the United States District Courts under 28 U.S.C. § 1961, which is periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). This Order incorporates that statute by reference and provides for its specific administration by the District Director.

Attorney's Fee and Costs

As Claimant has prevailed on the disputed issues, reasonable and necessary attorney's fees are awarded. 33 U.S.C. § 928; 20 C.F.R. §§ 702.131—702.135. Costs may also be awarded, including witness fees and expenses for transcripts. 33 U.S.C. § 928(d). Claimant's attorney shall have 30 days to submit a fee petition and bill of costs, after which the Employer's attorney shall have 30 days to file any objections. The issue of attorneys' fees and costs will be addressed in a supplemental order.

CONCLUSION

Based on the foregoing findings of fact, conclusions of law, and all evidence of record, I find that Claimant has not yet reached maximum medical improvement and he was temporarily totally disabled beginning March 24, 2013 to July 31, 2013 and he was temporarily partially disabled from August 1, 2013 to the present. In accordance with 33 U.S.C. 908(b), TTD compensation is payable at 66 and 2/3 per centum of his average weekly wage of $ 2,749.01; however, compensation is limited to the maximum compensation rate under the statutory cap, 33 U.S.C. 906(b). The TPD benefits during the time of Claimant's employment will be based upon two thirds of the difference between the average weekly wage of $2,749.01 and his actual wages of $626.97 from August 1, 2013 to December 31, 2013, and his actual wages of $797.62 from January 1, 2014 to the present, during the period of disability, for a period of up to five years, subject to the statutory cap. Additionally, Claimant is entitled to interest calculated in accordance with 28 U.S.C. § 1961 on the unpaid deficit compensation. Furthermore, Claimant is entitled to reimbursement for all past and future medical treatment costs, including out-of-pocket medical payments and Claimant is further entitled to medical treatment for his psychological impairment under section 7 of the Act, as administered by the District Director. Accordingly,

COMPENSATION ORDER

IT IS HEREBY ORDERED that Claimant's claim against Employer/Carrier, for compensation benefits is **GRANTED** to the extent set forth above;

IT IS FURTHER ORDERED that Employer/Carrier shall pay Temporary Total Disability from March 24, 2013 to July 31, 2013 based upon the maximum compensation rate; Temporary Partial Disability from August 1, 2013 to January 1, 2014 (based upon a difference between the Average Weekly Wage of $2,749.01 and Claimant's actual wages of $626.97, limited to the maximum compensation rate); Temporary Total Disability from January 1, 2014 to the present (based upon a difference between the Average Weekly Wage of $2,749.01 and Claimant's actual wages of $797.62); during the period of disability, subject to the five-year cap, with interest on accrued benefits, to the extent not already paid, as set forth above;

IT IS FURTHER ORDERED that the Employer/Carrier shall pay for reasonable and appropriate medical, surgical, and related expenses, including transportation and prescription costs, for Claimant's psychological condition, and shall reimburse Claimant for reasonable and appropriate medical, surgical, and related expenses paid, as overseen by the District Director;

IT IS FURTHER ORDERED that the District Director is authorized to make and adjust any calculations necessary to implement this Order; and

IT IS FURTHER ORDERED that Claimant's attorney shall file a fully supported and itemized petition for attorney's fees and costs within thirty (30) days of the service of this Decision and Order, and that Employer/Carrier shall file any objections within thirty (30) days of service of Claimant's petition.

Digitally signed by Pamela Lakes
DN: CN=Pamela Lakes,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Washington, S=DC, C=US
Location: Washington DC

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.