

**U.S. Department of Labor**

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Issue date: 22Feb2001

**CASE NO.: 2000-LHC-00349**

**OWCP NO.: 2-118766**

**In the Matter of:**

**JAMES T. KEENAN,**  
**Claimant**

**v.**

**GENERAL DYNAMICS CORPORATION,**  
**Employer**  
**and**

**TRAVELERS INSURANCE CO.,**  
**Carrier**

**APPEARANCES:**

Gary B. Pitts, Esq.  
Pitts & Associates  
8866 Gulf Freeway, Suite 117  
Houston, Texas 77017-6528  
For Claimant

Robert E. Thomas  
Cornelius, Sartin, & Murphy  
2850 Poydras Center  
650 Poydras St.  
New Orleans, LA 70130  
For Employer/Carrier

**BEFORE: JAMES W. KERR, JR.**  
**Administrative Law Judge**

**DECISION AND ORDER – AWARDING BENEFITS**

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act"), and as extended by the Defense Base Act, 42 U.S.C. §1651. The claim is brought by James Keenan, Claimant, against his former employer, General Dynamics Land Systems, Respondent. A hearing was held in Houston, Texas on June 26, 2000, at which time the parties were represented by counsel and given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

- 1) Court's Exhibit No. 1;
- 2) Claimant's Exhibits Nos. 1-62, 66-93; and
- 3) Respondent's Exhibits Nos. 1-3, 5-20.<sup>1</sup>

Upon conclusion of the hearing, the record remained open for additional exhibits and the submission of post hearing briefs, which were received by both parties.<sup>2</sup> This decision is being rendered after having given full consideration to the entire record.

**STIPULATIONS**<sup>3</sup>

After an evaluation of the record, this Court finds sufficient evidence to support the following stipulations:

- (1) Claimant was assigned to work in Saudi Arabia, Kuwait, and/or Iraq between August 19, 1990 and November 2, 1991;
- (2) The fact of the injury/accident is disputed;
- (3) Claimant alleges that toxic exposures during the Gulf War and his employment in Saudi Arabia, Kuwait, and/or Iraq from August 19, 1990 to November 2, 1991 caused or contributed to his disability. Respondent disputes this allegation;
- (4) An employer/employee relationship existed from August 19, 1990 through November 2, 1991;

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<sup>1</sup> The following abbreviations will be used in citations to the record: CTX - Court's Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

<sup>2</sup> Claimant submitted additional post hearing exhibits, Nos. 94-95, with no objection from Employer. Employer subsequently submitted its remaining exhibit, No. 4, post hearing with no objection.

<sup>3</sup>CTX-1

- (5) Whether the alleged injury arose in the course and within the scope of employment is disputed;
- (6) The date Respondent was notified of the injury was June 18, 1995;
- (7) The date of notification of the injury/death pursuant to Section 12 of the Act to Respondent was June 18, 1995. Notification to the Secretary of Labor was given on May 2, 1995;
- (8) Notice of Controversion was filed on February 5, 1996;
- (9) An informal conference was held on March 18, 1997;
- (10) Whether disability resulted from the injury is disputed;
- (11) Medical and disability benefits have not been paid;
- (12) Maximum medical improvement is disputed;
- (13) Claimant's average weekly wage is disputed; and
- (14) Both parties agree that Claimant earned \$55,186 in 1992, \$43,360 in 1993, \$44,1995 in 1994, \$41,309 in 1995, \$43,788 in 1996, and \$43,124 in 1997. Claimant has not worked since December 31, 1997.

### ISSUES

The unresolved issues in this proceeding are:

- (1) Timeliness of Notice and Filing;
- (2) Fact of Injury and Causation;
- (3) Nature and Extent of Disability;
- (4) Average Weekly Wage;
- (5) Reasonable and Necessary Medical Benefits.

### SUMMARY OF THE EVIDENCE<sup>4</sup>

#### **I. TESTIMONY**

##### **James T. Keenan**

James Keenan, Claimant, testified that he is forty-five years old and currently resides in White Plains, Kentucky. He stated that he attended college until his sophomore year, at which time he entered the Army. He added that he served as a master gunner on armored tanks. Claimant testified that he was in the Army for fourteen years, until he was given a medical discharge in 1989 for a disability to both ankles. He stated that after his discharge, he worked for Med State Street and went to Respondent for employment in January, 1990. He added that when he was first employed by Respondent, he wrote lesson manuals, developed proposals, and assisted on engineering work for the

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<sup>4</sup>This Court notes that both parties submitted numerous articles, studies, and reports published on the causes and symptoms of Persian Gulf War Syndrome. These articles have been considered by the Court and will be discussed in the body of the opinion.

M1A2, 48H, and FOX vehicles. Claimant explained that the M1A2 is the main battle tank for the U.S. Army, and the FOX vehicle is the nuclear, biological, and chemical detection vehicle. TR. 4-7.

Claimant stated that he arrived in the war area on August 25, 1990, approximately two and a half weeks after the invasion. He testified that his duties included taking care of the MM1s, the mobile mass spectrometers on the FOX vehicle, evaluating tapes sent to CENTCOM, and advising the military staff on employment and use of the FOX vehicle. Claimant added that the MM1 identifies known chemical warfare agents in the air and on the surface. He stated that there were more than thirty of Respondent's employees sent who could work on the FOX vehicles, but only twelve that could work on the MM1. Claimant explained that the FOX vehicle was normally located on the front lines. TR. 7-8.

Claimant testified that he was in Bahrain on January, 1991 when the air strikes began. He stated that he moved into the neutral zone between Kuwait and Iraq on January 22, 1990. Claimant added that, during the entire time he was assigned there, he constantly heard chemical alarms sounding. He stated that it got to the point that he would not put on his MOPP, chemical protection, suit unless the FOX vehicles had gotten an amount versus time reading on the chemical weapons. He explained that an amount versus time reading was an air sample indicating the presence of known chemical warfare agents. Claimant stated that the preference was to use the FOX vehicle for gathering ground samples, but that the vehicle did take air samples during the air strikes. He added that the air samples he received contained the low-level presence of Sarin and mustard gas. Claimant testified that the Army gave him pyridostigmine bromide pills every couple of hours during this period. He also stated that he was given anti-anthrax, tetanus, yellow fever, gamma globulin, and other injections during his employment in the area. He added that he was also exposed to oil fire smoke that was so thick, headlights on the vehicles had to be used in the middle of the day. Claimant stated that even then, visibility was poor. TR. 8-11.

Claimant added that he encountered many dust storms during his experience in the Gulf. He testified that visibility was so poor during these storms that on one occasion, his vehicle almost collided with grounded helicopters. Claimant stated that they were almost beheaded, because the helicopters still had the rotors turning. He added that the storms were very thick, and he was "constantly eating sand." Claimant testified that the weather changes were extreme, ranging from 137 degrees in the day to 65 degrees at night. He stated that he was bitten numerous times by sand flies, and had to constantly spray his hands, arms, and face with insecticide to protect himself. He added that he also ate the local food. Claimant testified that he was exposed to depleted uranium, both during the explosions at Camp Doha and during investigations of abandoned Iraqi vehicles in the desert. He stated that he was issued one MOPP suit, which was only protective for four hours after initial contamination. TR. 11-13.

Claimant recounted many stressful situations that he experienced during the war. He stated that during the air strikes on Iraq, he was close enough to feel the concussion and vibrations from the explosions. He testified that during the ground war, he was in the front lines. He walked through the war areas after the battles were over and saw what he described as "battleground litter," or

corpses and body pieces. Claimant also testified that he saw dogs eating these corpses during this time. He stated that he walked through the “valley of death” with ground guides a couple of hours after the battle was finished. Claimant testified that on two occasions, SCUD missiles struck near his location, once in KKMC and another at Hafar al Batin. He added that there was a constant danger of running into land mines, and that he had to dodge them when working in certain areas. Claimant recounted one instance when his crew drove through what they thought was a “cleared lane,” only to discover that the area still contained land mines. He added that even after the war was over, there was a continuous danger, where he was located, of sniper fire. TR. 13-16.

Claimant recounted one particularly stressful incident at Camp Doha, a twenty-five acre motor pool and artillery facility for the 11<sup>th</sup> Armored Cavalry Regiment in Kuwait. He stated that on July 11, 1991, he was driving out of the compound with some co-workers when an explosion occurred. He believed that a running engine cause the stored diesel fuel to ignite. Claimant added that depleted uranium rounds were stored at this facility. He stated that the explosion caused a chain reaction. Since one of Claimant’s co-workers was still in the motor pool, they had to return to the area. He added that they could hear and see the shrapnel falling around them. After they retrieved the co-worker, they were forced to jump into one of the FOX vehicles, due to the continuing explosions. He stated that if one of the ammunition shells had hit the vehicle, it would have been destroyed. He added that at one time, a white phosphorus shell hit the vehicle. Claimant testified that it was “like a sauna” inside the armored FOX vehicle. He stated that the explosions continued for more than an hour and a half and were getting closer to the vehicle, before they were able to leave. Claimant added that during the entire time, he experienced “tightness of chest and complete fear.” He stated that he was shaking so badly, his co-worker had to press on the accelerator of the FOX vehicle for him so that they could leave the area. TR. 16-25.

Claimant testified that these explosions lasted for a couple of days. He stated that later he saw the EOD personnel, Army soldiers, cleaning up the motor pool. Claimant added that the EOD personnel were disposing of the spent ammunition in a big pit. He testified that a charge went off, and the ammunition exploded, killing several personnel. Claimant stated that he was about 150 meters away, and he could see the soldier’s bodies propelled in the air. He stated that he was approximately 25 kilometers away from the Khamisiyah explosions in March, 1991, and within the nerve gas plume for the entire four days. TR. 25-26.

He testified that, since the war, he has experienced anxiety and stress, manifesting in tightness of his chest and a reduced attention span. Claimant stated that, in the four years after the war, he could hardly sleep, regardless of whether he was tired. He added that he has suffered from night sweats, skin rashes, and lesions on his hands. He stated that he has visible scars resulting from the lesions rupturing. Claimant testified that he has severe joint pain, to the extent that it feels like he cannot move. He stated that he gets severe fevers. Claimant added that he gets extremely depressed and tries to avoid interacting with people. He testified that he suffers from chronic fatigue as well as a concentration problem. Claimant testified that he also experiences gastrointestinal problems, including constant bowel lesions and bleeding. Claimant stated that he has experienced an increased

loss of orientation, especially when driving. He added that this, as well as the seizures that he has, makes him try to avoid driving as much as possible. TR. 26-31.

Claimant was shown a W-2 form reflecting his earnings from Respondent as \$73,000. He stated that the figure was underestimated and did not include his per diem, overtime, and bonuses. Claimant added that he was provided money for a portion of food and lodging, but the rest of the time, he ate and slept in the desert. He stated that Respondent reimbursed him for the periods of time he stayed in a hotel. He added that his food cost him approximately \$35.00 per day, depending on his location. TR. 32-37.

Claimant testified that after the war, he worked for Respondent until December 17, 1997. He stated that prior to and during the war, his job ratings were excellent. He added that after the war, his performance evaluations went down. He stated that he missed work because of sickness. He added that while at work, he could not walk for extended periods of time. Claimant stated that he was in good health prior to the war, except for arthritic problems in his ankles. He added that he had been involved in karate, bodybuilding, and running. Claimant testified that prior to the war, he could beat much younger individuals at physical training tests. He stated that since the war, he has not been able to do any of these activities. Claimant testified that he has tried to work doing the type of work that he did for Respondent, but has been unable to do so. He stated that his employment with Respondent ended when they closed the field site at Fort Knox. At that point, Claimant was not offered a subsequent job, even though he stated that he applied for them. Claimant testified that it had been his intention to finish his career with Respondent. TR. 38-41.

On cross examination, Claimant conceded that during both a deposition and a doctor's visit, he had initially been reluctant to speak about the stressful situations he experienced during the Gulf War. He stated that he was able and willing to recount them at the hearing. He testified that after returning from the Persian Gulf, he worked for Respondent for six additional years, until he was laid off in December, 1997. He admitted that he did tell the V.A. counselor in 1998 that he intended to become self-employed and raise horses. He also stated that the arthritic pain he has experienced since the war has not been limited to the areas that were injured previously during his service in the military. TR. 42-46.

## **II. MEDICAL DEPOSITIONS AND RECORDS**

### **1. DEPOSITIONS**

#### **William J. Rea, M. D.**

Dr. William J. Rea, board certified in general surgery, cardiovascular surgery, and environmental medicine, testified by deposition that he is director of the Environmental Health Center in Dallas, Texas. Dr. Rea testified that he has treated veterans of the Gulf War for toxic exposure and has testified before Congress on the issue of Gulf War illness. He stated that he has

seen approximately seventy to seventy-five Gulf War veterans as patients. Dr. Rea stated that he has found some uniformly successful treatments for patients, while others require more individualized programs. Dr. Rea stated that he has been retained as an expert in two other Gulf War Syndrome cases. He added that he examined Claimant for toxic exposure. CX-3, pp. 10-13, 19.

Dr. Rea testified that he first evaluated Claimant on November 15, 1999. He stated that Claimant complained of joint pain, seizures, night sweats, and hand problems. Claimant relayed that he developed symptoms soon after the SCUD missile attacks. Claimant stated that his joints flared up and that he developed nausea. He added that blisters appeared on his foot, which were still present at the time of examination. Claimant complained of seizures, five on the day of the examination, as well as chronic fatigue, headaches, and shaking. Dr. Rea stated that Claimant would stay conscious during seizures, but would not be able to move, talk, or control his bladder. He testified that Claimant relayed his employment history as being a civilian logistics engineer in the Gulf War area. Claimant told Dr. Rea that his main exposures included the oil fires in Kuwait, exhaust fumes in Iraq, nerve gas, and spent uranium. Dr. Rea testified that Claimant's condition was a prime example of the spreading phenomenon seen in Gulf War Syndrome. CX-3, pp. 20-23.

A physical examination of Claimant revealed petechia on his upper chest. Claimant had silver dental fillings in all of his quadrants. He noted petechia and ruptured blood vessels on his abdomen as well as decreased sensation in his feet. Dr. Rea testified that Claimant had positive Rombergs, meaning that he could not stand or walk with his eyes closed. He noted that Claimant was tender over the lumbar spine and had painful areas in his hips. Dr. Rea noted that he had a scar in the medial aspect of his plantar area of the right foot and that his feet were cold and blue. Dr. Rea stated that he first performed a SPECT scan on Claimant. He stated that the scan measures the areas of function in the brain. Dr. Rea added that the results of this test were abnormal in that it indicated increased activity in the left lateral aspect of the right temporal lobe, and the lobes were unequal. Dr. Rea testified that these results were consistent with short term memory loss. Dr. Rea testified that he also performed a thermogram, a test that measures temperature in approximately one hundred different spots, on Claimant. These tests yielded abnormal results in that Claimant had unusual inflammation throughout his body, as well as a dysfunctional thyroid gland. The tests indicated that Claimant had increasing trouble in the head area. Dr. Rea also noted chemical sensitivity to 2-methylpentane, chlorine, formaldehyde, and damage to the autonomic nervous system. He added that Claimant also tested positive to the desert storm vaccine. CX-3, pp. 23-26.

After all of these tests, Dr. Rea opined, to a reasonable medical probability, that Claimant's exposures during the Gulf War and the vaccines administered there were the cause of his problems. He stated that he referred Claimant to Dr. Didriksen, who opined that Claimant had considerable brain damage. Dr. Rea stated that he has seen the symptoms that Claimant suffers from in the Gulf War veterans that he examined. He added that Claimant's condition would restrict the kind of work that he could do and opined that Claimant could not work a full-time job. He also testified that although Claimant's condition is permanent, his symptoms could be alleviated and improved through treatment. CX-3, pp. 26-28.

On cross-examination, Dr. Rea stated that he was aware Claimant had sustained ankle injury during his service in the Army. He added that Claimant's joint complaints were not limited to the ankle area, however, the joint complaints in the ankle area were of concern to Claimant. He stated that he was aware Claimant was currently a student. He opined that Claimant's propensity for seizures, potential exposure to pesticides, and emotional problems could restrict his ability to be a student. CX-3, pp. 28-29.

Dr. Rea testified that he could tell that Claimant's condition was caused by the Gulf War exposures because Claimant had a high level of performance pre-war with no problems. He stated that Claimant did not have any pre-existing seizure condition or short-term memory loss. He added that there was no way Claimant could teach tank school with short term memory loss. Dr. Rea explained that individuals can have different manifestations of symptoms from exposure to toxic substances. He testified that this is due to biochemical individuality, the amount of toxic load present in each case, and the geographical area of the exposure. Dr. Rea diagnosed Claimant as suffering from toxin encephalopathy and vasculitis. He reiterated that Claimant reported that he was exposed to mustard gas and Sarin, among various other toxins, near the front lines. Dr. Rea opined that the route of entry was mainly from the lungs and definitely from the GI tract, skin, and through the nose. He added that he did not treat Claimant, other than administering the Desert Storm vaccine, because Claimant had no funds to stay close to the clinic for on-going treatment. CX-3, pp. 29-32.

Dr. Rea testified that he would recommend a comprehensive treatment program for Claimant. First, he would teach Claimant to avoid common pollutants in his home, including a bedroom devoid of formaldehyde, foam rubber, or carpet. He would further prescribe an organic diet and have Claimant drink spring water in glass bottles. He stated that this would decrease his average pollutant load and relieve his immune and detoxification systems. Second, he would perform detailed tests and give Claimant injections for secondary sensitivity. He stated that when individuals in Claimant's situation go for a long time without treatment, approximately eighty percent of them get secondarily sensitive to foods and molds. Dr. Rea's third part of treatment would be to give him nutrition treatments. He would administer intravenous nutrients to restore Claimant's deficiencies in his detoxification system. Fourth, he would put Claimant in heat therapy to sweat out the toxins stored in his system in conjunction with physical therapy. His fifth part of treatment would be to administer an immune booster made out of Claimant's own blood. Dr. Rea also recommended oxygen therapy. CX-3, p. 32.

Dr. Rea testified that his extensive research and testing on Gulf War Syndrome shows a latency period anywhere from two to four years. In particular, he noted two groups of patients. In one group, the syndrome occurs either immediately during the exposure or within the first six months after returning home. In the second group, symptoms manifest from two to three years after the exposure. He stated that due to the recency of the Gulf War, a fifteen or twenty year latency period had not been discovered. Dr. Rea stated that he did know Claimant was a smoker, and stated that the effect of tobacco on the syndrome would further aggravate his condition. CX-3, pp. 33-34.

Dr. Rea stated that Claimant exhibited the spreading phenomenon for Gulf War Syndrome.

He added that Claimant first got arthritis, followed by weakness and seizures. Dr. Rea stated that at some point other chemicals began triggering the condition, a prime example of the spreading phenomenon. He gave a guarded prognosis of Claimant's condition and added that Claimant's condition would certainly deteriorate without further medical treatment. Dr. Rea predicted, to a reasonable degree of medical certainty, that Claimant's next symptom manifestation would take the form of irreversible brain damage, which would come from the seizures. He stated that he found no genetic susceptibility other than the one paraoxonase that Dr. Furlong discovered. CX-3, pp. 34-35.

Dr. Rea testified that he did not perform scratch, patch, RAST, or Booth tests on Claimant. He explained that the scratch and patch tests are inaccurate and have no value in a Desert Storm patient. The RAST test, a test for antibodies, was not done for the same reason. Dr. Rea stated that he would have liked to do a Booth test on Claimant. He was able to do a post-urography test, which indicated normal motor and sensory tests, but abnormal amplitude strengths. He also gave Claimant the Desert Storm vaccine, consisting of a mixture of Claimant's blood and white blood cells. He added that he did not give Claimant an atropine sulfate injection, an antidote for nerve gas. Dr. Rea stated that he was familiar with the work being done on a new antibiotic treatment. He stated that it could be a treatment option for Claimant. Dr. Rea opined that he could have helped Claimant more if he had seen Claimant sooner. CX-3, pp. 35-38.

## **2. REPORTS & RECORDS**

### **Robert A. Diasio, M.D., Veterans' Administration Environmental Physician**

Dr. Robert Diasio issued a letter to Claimant on January 26, 1994. In this letter, he acknowledges that Claimant participated in the VA Persian Gulf Registry. He goes on to state that the results of Claimant's examination and laboratory tests indicate that he has no reason to be concerned about any adverse health effects stemming from his service during the Gulf War. Dr. Diasio also notes that Claimant's lab tests were normal. RX-13, p. 4.

### **Veterans' Administration Facilities**

Claimant was seen several times at V.A. facilities. The first medical records indicate that he was seen on June 14, 1994 in Louisville, Kentucky for a Persian Gulf War Protocol Examination. He complained of skin rashes, edginess, joint aches, emotional instability, sleeping problems, upset stomach, and a decreased libido. The physician noted dyshidrotic lesions to the hands and feet. CX-5, pp. 87-88.

On August 30, 1994 progress notes indicate that Claimant reported experiencing extreme combat stress and significant exposure to death and atrocities. At that time, Claimant appeared to have symptoms of PTSD with nightmares, insomnia, avoidance phenomena, emotional numbing, irritability, explosive anger, and increased somatic complaints. Claimant's main complaint was "anxiety attacks," which were triggered by sounds that reminded him of battle. He reported that this

occurred with greater frequency, accompanied by increasing insomnia. The progress notes indicate that Claimant reported being repeatedly exposed to sound triggers while at work. CX-5, pp. 67-69.

A letter from the Veterans' Administration Medical Center, dated August 17, 1994, notes that Claimant received outpatient mental health therapy for Post Traumatic Stress Disorder and resulting marital conflict. It notes that Claimant was seen on a weekly basis for a three month period. CX-5, p. 53.

A Mental Health Intake record, dated October 6, 1994, notes that Claimant reported having increased disassociation, usually while driving. He reported increased nervousness, increased anger and irritation, decreased sleep, and night sweats. Claimant relayed that his nightmares and inability to sleep stemmed from the Gulf War. He reported that he had seen corpses and body parts in the valley of death, as well as witnessed the deaths of soldiers during the Camp Doha incident. The report notes classic Post Traumatic Stress Disorder symptoms from his Persian Gulf experiences. CX-5, pp. 43-45.

Progress notes, dated November 14, 1994, state that Claimant reported increased fatigue and an inability to sleep due to military nightmares. CX-5, p. 22.

A physical examination on November 28, 1994, noted that Claimant had rashes on his hands for two years, and scales on his lower lip for two to three years. The report notes a recurring blistering on Claimant's right foot. CX-5, pp. 19.

Claimant was seen by a family therapist at the V.A. Mental Health Clinic on December 8, 1994. The therapist noted several consistent stressors on Claimant during the Gulf War. The first was the increased amount of work Claimant had to do because of an incompetent support staff. Claimant also reported that SCUD missiles exploded very close to Claimant's compound on two occasions. Claimant stated that everyone would sit in protective gear for extended periods of time during the explosions without knowing what was going on. He noted that the rehearsals for the chemical warfare combat was stressful. Claimant reported that during the air war, he was close enough to see the Iraqi positions, and he saw the aftermath of the battles during the ground war. He noted that in February and March 1991, he was under tremendous stress driving the FOX vehicles because of the constant danger of sniper fire, traps, and land mines. He reported seeing the effects of mustard gas on exposed soldiers. The report concluded by noting that Claimant returned to the United States on November 2, 1991. CX-5, pp. 14-17.

On February 22, 1995, Paul J. Wehner, therapist, noted that Claimant was seen because he reported symptoms of Post Traumatic Stress Disorder. He emphasized Claimant's short-tempered behavior (verbal), loss of orientation as to place (while driving), parent-child conflict, and marital stress. A provisional diagnosis was given as generalized anxiety disorder and Post Traumatic Stress Disorder. CX-5, p. 4.

The Department of Veterans' Affairs issued a letter dated November 22, 1996 regarding Claimant's condition. The letter states that upon his return to the United States after the Gulf War, his family reported noticeable changes in temperament. Claimant self-reported long periods of isolation and a short temper. Claimant's psychiatrist, Dr. Pary, as well as his social worker noted that Claimant had been an active participant in the mental health clinic and received psychiatric supervision, individual, marital, and family therapy. Dr. Pary opined, based on a reasonable medical probability, that Claimant's physical and emotional problems were the results of the Persian Gulf War. CX-84.

### **Hardin Memorial Hospital**

Emergency Room records from Hardin Memorial Hospital reflect that Claimant was admitted on July 25, 1994 and seen by Dr. Moore. Claimant complained of lower abdominal pain. He added that he had occasional abdominal pain and difficulty with pain prior to urination since the Gulf War. Claimant was diagnosed with abdominal pain and leukocytosis. The report noted that Claimant had been previously treated at the V.A. Medical Center and at Carefirst. CX-5, p. 55.

On August 30, 1994, Claimant was seen at the Hardin Memorial Hospital Emergency Room for anxiety, depression, and marital problems. The report notes that Claimant reported that these symptoms manifested after his return from the Persian Gulf. He reported decreased sleep, increased irritability, depression, aggression, and racing thoughts. Claimant stated that he had no previous psychological problems. The report noted an impression of general anxiety disorder and Post Traumatic Stress Disorder. CX-5, pp. 51-52.

On January 11, 1995, Claimant was seen at Hardin Memorial Hospital for gastrointestinal problems, including diarrhea, constipation, and rectal bleeding. CX-5, p. 9.

Claimant was admitted to the Hardin Memorial Hospital on March 17, 1997 for burning and intermittent abdominal pain, fever, and diarrhea. Claimant disclosed a history of diverticulitis or possibly colitis, which was treated by the Veterans' Administration facilities. In the review of systems, the report lists Gulf War Syndrome, negative immune deficiency, and negative seizures. Dr. Edward Wilson gave a provisional diagnosis of abdominal pain with an indeterminate etiology. He also noted that the differential diagnoses included diverticulitis, irritable bowel syndrome, Crohn disease, and ulcerative colitis. RX-20, p. 1.

### **Lee R. Chutkow, M.D.**

Claimant was examined by Dr. Lee Chutkow on May 29, 1997. Claimant reported that he stopped taking the medication prescribed for him by the Veterans' Administration. He stated that after he stopped taking the medication, he had a very bad outburst of anger that resulted in over night hospitalization. Dr. Chutkow gave Claimant's Axis I diagnosis as chronic Post Traumatic Stress

Syndrome, and dysthymia. He deferred on Axis II and III. Dr. Chutkow recommended that Claimant continue with the Nefazadone medication and prescribed Depakote for Claimant's seizures. RX-16, p. 1.

Dr. Chutkow also interviewed Claimant's second wife during this visit. He noted that she was very angry about Claimant's outbursts. She stated that Claimant had difficulty remembering things, especially while driving. She added that Claimant was subject to seizures. His wife complained that Claimant has lied to her about his life prior to their marriage. Dr. Chutkow noted that Mrs. Keenan was skeptical that his behaviors towards their family were related to his experiences during the Gulf War. RX-16, p. 2.

Dr. Chutkow's impression was that Claimant's scores on the Hamilton Depression Inventory were in the 97<sup>th</sup> percentile, below the score for major depression. He added, however, that Claimant's T score of 72 indicated moderately severe depression. Dr. Chutkow noted that Claimant did not know the source or purpose of his anger. He also indicated that he intended to keep Claimant on Serzone. RX-16, p. 2.

Claimant was examined again by Dr. Chutkow on October 20, 1997. Dr. Chutkow noted that Claimant expressed concerns regarding his second wife and their impending divorce. Claimant kept his important data, events, and appointments in a notebook, which Dr. Chutkow stated improved his memory for such events. Claimant also expressed concerns that he would lose his job with Respondent when the soldiers were reassigned out of Fort Knox. Dr. Chutkow noted that Claimant reported no symptoms with respect to episodes of anger, anxiety, or frequent nightmares. RX-15.

Dr. Chutkow reported that Claimant's mental status exam showed that he was alert, responsive, coherent, and in good spirits. His Axis I diagnosis was Post Traumatic Stress Disorder. Dr. Chutkow recommended continued use of Serzone and Depakote. RX-15.

### **Nancy Didriksen, Ph.D., Health Psychologist**

Dr. Didriksen's report notes that she examined Claimant on November 16, 1999 and completed a neuropsychological consultation based on her findings. The description and behavioral observations in this consultation describe Claimant as having normal speech quality and good posture while sitting. Dr. Didriksen noted that Claimant's motor activity was slowed with poor balance during walking. She added that he was unable to stand on either foot with his eyes closed or walk a straight line. She attributed this condition to his inability to move his legs in close proximity to one another. She observed tremors in his upper extremities. Her report describes Claimant as oriented for place, and person, but not well-oriented as to time. He was alert and cooperative, if somewhat anxious. CX-4, pp. 2-3.

Dr. Didriksen noted that no fluctuations were observed in the affective sphere. She reported that the affect appeared restricted but was generally appropriate to stimuli at all times. She stated that Claimant reported a dysphoric and depressed mood, with depression ranging from three to four on a zero to ten scale. She noted that no disorders of thought were immediately apparent, with the

exception of short term memory deficits. Claimant reported deficits in attention, concentrating, logical thinking, organizational skills, and obsessive thinking. He reported primary stressors, in addition to physical dysfunction, to be disorganization and exaggerated startle response. Claimant reported joint pain and anxiety during the evaluation. She noted pain behaviors during movement and frequent standing. Dr. Didriksen concluded that despite this, Claimant put forth his best effort with no evidence of malingering. CX-4, p. 3.

Claimant reported his primary complaints to be seizures, joint pain, blisters on his foot, numbness in hands and feet, Post Traumatic Stress Disorder, insomnia, and chemical sensitivity. He related that he had a severe reaction to the cleaning agent, 409, where his arms became red and swollen. He reported numerous other symptoms on the Physical Symptom Checklist. CX-4, p. 4.

On the Psychological Symptom Checklist, Claimant noted negation of joy, inability to cope with daily stressors, unexplained anger, free-floating anxiety, loss of control, general stressed feelings (eight on a zero to ten scale). Claimant reported that his balance and coordination problems included unexpectedly dropping items as well as reaching for objects and missing them. He noted frequent disorientation and reported that his sense of direction prior to the Gulf War was "superior." Claimant also reported hypersensitivity to odors. He gave his current medications as Depakote (for seizures), Vioxx (for arthritis), Tylenol or Percocet (for pain), and Trazodone (for sleep). CX-4, pp. 4-6.

Dr. Didriksen also reviewed Claimant's medical records. These records included reports from the Environmental Health Center, Veterans' Administration Mental Health records from 1994 and 1995, Hardin Memorial Hospital records, and Sharon Brown Lane's Vocational Rehabilitation Report. She also administered a battery of tests. She concluded that Claimant's age-corrected subtest scores on the Wechsler Adult Intelligence Scale-Revised ranged from low-average to high-average. Claimant scored at the lowest limit of the abstract reasoning and the ability to differentiate essential from non-essential details. He scored in the high-average range in long term memory and general retention of information. She noted that his remaining verbal subtest scores fell in that average range. He scored at the population mean in numerical reasoning and at the average range in short-term and immediate auditory memory, attention, and concentration. His verbal IQ fell in the average range and exceeded forty-five percent of his peers. His performance IQ score of 97 exceeded forty-two percent of his age peers, and his full-scale IQ was labeled as "average." CX-4, pp. 6-7.

After comparing these scores to Claimant's age, sex, and educational peer group, Dr. Didriksen concluded that his IQ scores and the majority of his subtest scores fell into the below average, or twenty-second percentile, range. She noted that he was most impaired in speed of mental operation, psychomotor speed, and perceptual-motor learning. She noted that this measure is the most sensitive indicator of brain dysfunction on the WAIS-R. CX-4, pp. 7-8.

Claimant's scores on the Wechsler Memory Scale III strongly indicated an acquired impairment of cognitive functioning. She added that this test is used in a core group of tests to detect sensitivity from neurotoxic effects. Dr. Didriksen concluded that Claimant's score on the

General Neuropsychological Deficit Scale during the Halstead-Reitan Neuropsychological Test Battery indicated moderate impairment of brain-related abilities. She noted that two of the five most sensitive indicators of impairment fell into the severely impaired range, and the remaining three fell into the mild to moderately impaired ranges. She added that Claimant did not appear to be as impaired on general function tests, which are not as demanding of high-order functions. CX-4, pp. 8-9.

She noted deficits in motor functioning that concentrated in his dominant left hand. Dr. Didriksen also noted impairment in the right hand during the Tactual Performance Test, indicating difficulty with tactile perception and discrimination. In testing Claimant's academic abilities, Dr. Didriksen reported that Claimant appeared the least impaired in reading. His spelling scores were equivalent to a high school grade, and arithmetic scores were equivalent to a seventh grade level. CX-4, p. 9.

In evaluating Claimant's personality profile, Dr. Didriksen noted that Claimant appeared to suffer from a strong degree of depression and anxiety associated with physical malfunctioning. She also noted that the social isolation reported was evident. His self-confidence, self-esteem, and coping ability appeared severely compromised with little stress tolerance or resources to meet challenges. She noted that he was likely to be easily frustrated by unsatisfactory conditions and changeable demands. She noted that Claimant appeared able to conform to group standards and had emotional discipline. CX-4, p. 10.

Dr. Didriksen ultimately concluded that Claimant's neurocognitive tests indicated functioning in the below average range as compared with others in his same peer group. She also noted that his neuropsychological deficit score indicated moderate impairment. Claimant was significantly impaired on those functions most necessary for effective and efficient workplace functioning, as well as effective and efficient everyday functioning. His motor functions were particularly impaired in the non-dominant right hand. She noted very significant impairment in sensory-tactile perception bilaterally, and added that Claimant was impaired in his short term memory. Claimant's personality and behavioral tests indicated a severe negative impact of toxic exposure and resultant illness on emotional functioning. She added that Claimant was evaluated in an environment relatively free of toxins and under conditions of reduced stress. Dr. Didriksen reported that Claimant's test results were consistent with others evaluated by her office after serving in the Persian Gulf, and that he meets the diagnostic criteria for Post Traumatic Stress Disorder. She considered him totally disabled from any occupation due to his injuries associated with his experiences in the Persian Gulf. CX-4, pp. 11-12.

**Clement Furlong, Ph.D., University of Washington, Dept. of Medicine and Genetics**

Clement Furlong submitted a report, dated April 18, 2000, on the genetic susceptibility of Claimant to toxin exposure. In his report, he opined that Claimant is more genetically susceptible to Sarin nerve gas and other organophosphate exposures than the average person. The average person has 630 units/liter of paraoxonase activity, and testing revealed that Claimant has 1,203 units/liter. Dr. Furlong opined that Claimant was in the ninety-first percentile of the population with

respect to paraoxonase activity. Dr. Furlong noted that Claimant was above average with respect to resistance to an exposure to chlorpyrifos oxon, but below average with respect to resistance to diazoxon. CX-62, p. 5.

**Manuel Lopez, M.D.**

Claimant was referred to Dr. Manuel Lopez, an immunologist, allergist, and rheumatologist, on April 28, 2000 for evaluation. Dr. Lopez reviewed Claimant's past medical records, noting that Claimant had been treated for mental problems as well as fever, joint pains, and seizures. These physical symptoms were diagnosed as the flu. Dr. Lopez administered laboratory testing and a physical examination. He opined that Claimant suffered from Post Traumatic Stress Disorder, degenerative joint disease of the hips, ankles, and knees, bullous tinea of the feet, dyshidrosis of the hands, external hemorrhoids, and gastroesophageal reflux. Dr. Lopez further opined that Claimant's degenerative joint disease was aggravated by trauma. He stated that there was no evidence of significant impairment of the immune system. Dr. Lopez added that Claimant's skin condition was consistent with dyshidrosis and tinea infections rather than vasculitis. He ultimately concluded that there was no clinical or laboratory evidence that Claimant suffered any significant impairment of the immune function as a result of exposure in the Persian Gulf. RX-2, pp. 2-4.

He noted there were no indications that Claimant had developed an increased intolerance to environmental chemicals. Dr. Lopez noted that Claimant was constantly exposed to a large number of chemicals with cigarette smoke actively as well as in his home environment. Therefore, Dr. Lopez ultimately concluded that there was no clinical or laboratory evidence to indicate that Claimant's current medical condition was the result of exposure in his work environment during the Gulf War. RX-2, p. 5.

**Rennie Culver, M.D., Ph.D.**

Claimant was referred to Dr. Rennie Culver, a psychiatrist, on June 15, 2000 for psychiatric evaluation. Dr. Culver stated that Respondent provided all of the medical records that were reviewed. Claimant appeared to be walking stiffly, but not in apparent distress. Claimant reported that he last worked in December, 1997. He attributed his unemployment to the Persian Gulf and stated that he had chronic PTSD. Claimant stated that he would rather not talk about the specific experiences he had in the war. He added that he was angry at not being able to explain it in a comprehensive way. Dr. Culver reported that Claimant described his attitude as "angry and mistrustful," but would not elaborate on why he was angry. Claimant denied any physical injury except for blistering on his hands and treatment for warts, which he attributed to his anxiety. He stated that it took him four years to become aware of these symptoms. RX-3, pp. 2-4.

Dr. Culver reported that Claimant's first apparent symptom was insomnia, which manifested after the ground war in Kuwait. He stated that his nightmares occur only occasionally and have not manifested in the year prior to the examination. Claimant added that his seizures have almost

stopped, because he is taking Depakote. Claimant relayed various symptoms including joint pain,

intermittent rashes, abdominal pain, shakes, and numbness in the hands and feet. RX-3, pp. 6-8.

Dr. Culver noted that Claimant was currently taking classes totaling twelve semester hours. Claimant stated that his income was \$659.00 per month in V.A. Vocational Rehabilitation Benefits and \$322.00 per month for disabilities received while on active duty. He added that his plans for the future were to care for horses. Claimant denied having any psychiatric or other mental health treatment prior to 1995 and knew of no family history of mental illness. As far as past physical illnesses, Claimant stated that his only major injury was when he injured his back, hips, and ankles during an accident while he was in the Army. RX-3, p. 9.

Dr. Culver noted that Claimant was mentally oriented in all spheres. Affect was appropriate and associations tight. Dr. Culver reported that his thought processes were intact. Claimant's fund of general information was appropriate to his education, and his intelligence was given to be in the average range with a normal ability to concentrate. Dr. Culver gave Claimant's diagnosis on Axis I as malingering, Axis II as personality disorder (unspecified), and Axis III as traumatic arthritis. Dr. Culver admitted that Claimant had uniformly been diagnosed with Post Traumatic Stress Disorder, but noted that the diagnosis is always primarily based on a patient's subjectively reported symptoms and is easy to imitate. Additionally, Dr. Culver reported that Claimant had been "educated" on symptoms of PTSD from the beginning. She noted that Claimant's malingering should have been clear on March, 1995, during the examination with Drs. Morris and Braunstein, where they indicated that he was lying about his symptomology and faking certain movements. Dr. Culver reported that Claimant had a history of lying, as reported by his second wife. Claimant also was quick to blame his behavior on his Gulf War experiences, a typical sign of malingering. RX-3, pp. 10-15.

Dr. Culver further noted that even if Claimant suffered from Post Traumatic Stress Disorder in the past, he did not have it at the time of the evaluation. She supported this by reporting that Claimant did not fulfill several essential criterion for PTSD, such as a markedly diminished interest or participation in significant activities and a sense of a foreshortened future. Claimant remarried after his Gulf War experiences and currently was in training to raise horses, which belies a sense of a foreshortened future. He also stated that he was not afraid of anything, which is inconsistent with PTSD, an anxiety disorder. RX-3, pp. 17-18.

Dr. Culver stated that it is now customary to administer a forced-choice answer test and a dot counting test in order to rule out malingering. She added that it is customary to analyze the Halstead-Reitan Battery for internal consistency. Dr. Culver criticized Dr. Didriksen's neurological testing, because she did not include any objective test results to rule out malingering. Dr. Culver concluded that Claimant did not have a symptom complex consistent with a diagnosis of PTSD, nor any impairment in mental functioning. She stated that Claimant's behavior towards his family members could easily be explained by a personality disorder as by PTSD. Dr. Culver noted that from a psychiatric viewpoint, Claimant is capable of employment in any job for which he is qualified. RX-2, pp. 19-21.

### **III. OTHER EVIDENCE**

## **1. VOCATIONAL REHABILITATION REPORTS**

### **Sharon Brown Lane, Lane and Associates**

Sharon Brown Lane, vocational rehabilitation counselor submitted her report dated August 31, 1998. She interviewed Claimant on January 29, 1998 in Louisville, Kentucky. Mrs. Lane reviewed several medical records dated through October 20, 1997. In evaluating Claimant's job eligibility, she took into consideration his age, education level, and work experience. She defined Claimant's past job history as containing mostly skilled to semi-skilled employment. She noted that his transferable skills included knowledge of tools, materials, and equipment used in the maintenance and repair of tanks, using shop math, keeping records and inventory, understanding and following scale drawings or other written specifications, using technical knowledge and visual abilities to test and inspect repairs, using communication skills to relay information, and using supervisory skills to plan and direct the work of others. She reported these skills to be transferable to an Assistant Instructor position, Teacher's Assistant, Endless Track Vehicle Mechanic, Endless Track Vehicle Supervisor, Construction Equipment Mechanic Helper, and Maintenance Mechanic Helper. CX-5, pp. 1-5.

Mrs. Lane evaluated Claimant's functional capacity by using his self-reported symptoms and medical records. She noted that Claimant had been treated for multiple physical and emotional conditions diagnosed as Gulf War Syndrome and Post Traumatic Stress Disorder. She noted that Claimant has continuing treatment for those conditions and that, from a vocational standpoint, the medical treatment records are consistent with Claimant's self-report of his symptoms. She ultimately concluded that his condition resulted in him having difficulty maintaining regular attendance at work and an inability to function in a family setting. She noted that his physical limitations seem to be fatigue, joint and muscle pain, and gastrointestinal problems. Mrs. Lane concluded that the combination of physical and emotional problems renders Claimant unable to return to his past relevant work. She added that his condition also results in a 100% loss of access to the competitive labor market. CX-6, pp. 5-8.

### **Veterans' Administration Vocational Reports**

Claimant submitted various reports generated by the Department of Veterans' Affairs. The first, dated January 26, 1990, was compiled by Lucile C. Barnett, Ph.D. It notes that Claimant becomes "stiff" if he does not move around. It also notes that the work available for him could not be heavy or involve lifting, carrying, etc. CX-93, pp. 2-3.

The second report was generated around November 15, 1994. It notes that Claimant reported a service connection for a condition causing night sweats, dizziness, and headaches. The report also notes an increased evaluation for lumbar arthritis currently at ten percent. The medical records used in this evaluation were listed as his service records from 1975 to January, 1989, an exam dated July 13, 1989, and AMC Louisville Treatment records dated through August, 1994. It notes that since

Claimant was not active military during the Persian Gulf War, he is not eligible for any benefits stemming from conditions contracted during that time. CX-93, pp. 5-10.

Claimant underwent another evaluation by Michelle Gidley, rehabilitation counselor, dated January 15, 1999. This report listed his program goal as Equine Manager. It noted a 30% left/right ankle sprain with arthritic changes. It listed his Academic Training Objective towards this goal as a two year degree in Equine Management with an anticipated graduation date of August, 2000. Progress notes following this report indicate that Claimant reported a visit to Hardin Memorial Hospital on February 3, 1999 for "unbearable pain" all over his body. CX-93, pp. 11-12.

Michelle Gidley conducted another evaluation of Claimant on June 25, 1999. She notes that Claimant is continuing in his school curriculum. His disability rating was increased to 40%. CX-93, p. 14.

Claimant was seen on June 26, 1999 by Robert G. Piper for vocational evaluation. Claimant maintained his desire to manage horses. He reported pain in his ankle and increased swelling. He also complained of pain in his knees and lower back. Claimant reported GI tract lesions which occasionally swell. Claimant reported that he attends a bi-weekly post traumatic stress disorder group and has severe but infrequent headaches. He reported that he has occasional seizures and difficulty sleeping. He noted that he tries to structure his activities so that he can better cope with situations. He stated that he does not like crowds. He reported poor balance and difficulty gripping objects, as his hands are sometimes numb. He added that he is unable to crouch or crawl and can only sit for 15-20 minutes before his back gets stiff. The report indicates that the Myers-Briggs Type Indicator labeled Claimant as an extraverted thinking individual with introverted sensing. CX-93, pp. 16-18.

Mr. Piper reported that Claimant had been working as a farm manager, medium work, since 1994. He added that Claimant reported being able to accommodate his physical restrictions by using other employees. Therefore, Mr. Piper concluded that farm management was a suitable occupation for Claimant. CX-93, p. 19.

#### **Nancy T. Favaloro, Seyler - Favaloro, Ltd.**

Nancy Favaloro, licensed rehabilitation counselor, submitted a vocational rehabilitation report regarding Claimant on July 19, 2000. Ms. Favaloro interviewed Claimant and reviewed his medical and vocation records taken up until the date of the interview. She noted that Claimant is participating in vocational rehabilitation services provided by the Veterans' Administration and is doing well academically. Physically, he still reported joint pain, rashes, and shaking. He also reported that his last seizure was in the fall of 1999. Ms. Favaloro noted that Claimant reported an inconsistent work history to her office, as opposed to the one given to the Veterans' Administration counselor. RX-4, pp. 1-6.

She determined that Claimant had acquired skills transferrable into many work settings. Ms.

Favaloro reported that Claimant demonstrated average intelligence and could probably enter the market at least at a semi-skilled level. She stated that Claimant could work in farm management after he receives his degree, earning approximately \$447 per week full-time. RX-4, p. 6.

Ms. Favaloro gave several alternate positions in the Louisville, Kentucky area. The first available position is a property manager. This would entail handling the general problems of tenants, collecting rent, performing minor inspections, and changing air conditioner filters. This position would require alternately sitting, standing, walking, and occasional bending. There would be no heavy lifting, because maintenance people are on call. Median wages in 1998 for this position are \$11.90 per hour. The second position is a service writer in an automobile dealership. This would involve writing repair orders after discussing any mechanical problems with the customers and inputting information into the computer. It would require Claimant to do paperwork and occasionally drive an automobile within the facility. The position would require alternately sitting, standing, and walking. It pays \$1,200 per month for a beginner, with a potential increase of up to \$3,000.00 per month. RX-4, p. 6.

The third position is an assistant manager of a local finance company. This company is willing to provide on the job training to someone who makes phone calls to collect loan payments. This training would include education on how to complete loan contracts and use of a computer for data entry. This position requires alternately sitting, standing, and walking. Wages would be \$8.00 per hour. The fourth available position is a production worker. This would require standing on an assembly line and moving material for steering columns. This position requires standing with two breaks, one in the morning and afternoon. The lifting is frequently ten pounds and occasionally up to twenty pounds. Wages average \$6.00 to \$7.00 per hour. The final position is a Guest Service Representative. This position requires answering phones, routing calls, taking reservations, and working on a computer. The primary duties are checking guests in and out of the hotel and accepting payments. Lifting requirements would be occasionally lifting boxes of paper weighing twenty to twenty-five pounds. The company pays approximately \$6.00 per hour. RX-4, pp. 6-7.

Ms. Favaloro noted that generally there were several other minimum wage positions available, such as in retail sales and in unarmed security. She added that some of the unarmed security posts pay \$7.00 per hour. Ms. Favaloro classified both the farm manager and alternate positions as light-level employment. She opined, after examining the reports of Dr. Lopez and Dr. Culver, that Claimant is capable of engaging in this type of employment. RX-4, pp. 7-8.

## **2. VIDEOTAPE AND PHOTOGRAPHS**

Claimant submitted several photographs and a video tape depicting Claimant engaged in various activities during the Gulf War. In the first photo, Claimant is near Safwan, Iraq and standing next to a T55 in order to check out the effects of a bombing. CX-80, p. 1. Claimant was also photographed in that same location examining weapons captured by the military and checking damage to the T72. CX-80, p. 2, 4. He was photographed south of Nasiriya, Iraq at a bombing site. CX-80, p. 3. Claimant also submitted photographs showing the damage and destruction after the explosions

at Camp Doha. CX-82, pp. 1-3. The videotape was taken to show the various war locations where Claimant claims toxic exposure and shows the FOX vehicle. CX-76. These photographs and videotape have been examined by the Court and will be considered as persuasive evidence of the stressful events that Claimant experienced and as corroboration of his testimony that he was present in combat areas.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses who testified at the hearing and upon an analysis of the entire record, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). In evaluating the evidence and reaching a decision, this Court applied the principle, enunciated in Director, OWCP v. Maher Terminals, Inc., 115 S. Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates section 556(d) of the Administrative Procedures Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 221 (1994).

### **I. TIMELINESS OF NOTICE AND FILING**

#### **1. CLASSIFICATION OF INJURY**

The classification of the claimed disability as an occupational disease or traumatic injury may or may not ultimately determine whether proper notice was given, as well as whether a timely claim was filed. See Gencarelle v. General Dynamics Corp., 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989), aff'd, 22 BRBS 170. Section 12(a), governing notice deadlines, treats both disabilities in the same manner. The primary difference between the two types of disabilities is in section 13 of the LHWCA. In that section, Claimants suffering from occupational diseases are given a longer limitations period in which to file their claims.

There has been no explicit ruling on whether or not Gulf War Syndrome is traumatic or occupational in nature. Prior Board case law, however, has applied the occupational disease provisions of the LHWCA to work-related injuries that are potential hazards to an entire class of employees in employment similar to that of the claimant. See Gencarelle, 892 F.2d 173, 23 BRBS 13 (CRT).

This Court finds that Persian Gulf War Syndrome is more similar to an occupational disease than a traumatic injury. As such, the occupation disease provisions of the LHWCA should apply in evaluating this claim. First, the risk of toxic exposure in the Persian Gulf was a potential hazard to Claimant's fellow employees, who worked in the same area. Claimant was employed as an instructor, trainer, and mechanic for the FOX vehicles and MM1s during the Persian Gulf War. This Court finds

that Claimant's testimony establishes that due to the nature of his work, he and his co-workers were consistently located in combat areas and on the front lines, where toxins were present. Claimant even reported that he personally saw soldiers affected by chemical warfare agents, such as mustard gas. *See CX-5*, p. 14-17. He testified that he consistently heard chemical alarms sounding in his immediate area. Both he and his co-workers were given chemical suits and gas masks in the period leading up to the air strikes and the ground war. However, due to the frequency of the alarms, he and his co-workers would sometimes not wear the chemical suits unless they got a certain reading on the MM1s regarding the presence of chemical agents in the air.

The memo written by Respondent further supports the proposition that an entire class of employees in the Persian Gulf area, where Claimant worked, were at risk of being exposed to toxins. This memo states, in relevant part, that:

During Operation Desert Shield, General Dynamics personnel were given various prophylactic treatments for chemical and biological threats, i.e., nerve agents, Anthrax, etc. *The exposure to the burning oil fields in Kuwait affected the majority of Desert FOX and Desert Shield personnel. See CX-2*, p. 1 (emphasis added).

Therefore, this Court concludes, from the evidence, that the employees performing the same duties as Claimant in the war area were at risk for toxin exposure.

Second, Dr. William Rea, Director of the Environment Health Center, gave credible, expert testimony opining that the Gulf War Syndrome can have a latency period from two to four years after the initial exposure. *See CX-3*, pp. 33-34. Therefore, the syndrome is similar to the occupational diseases such as asbestosis, bronchial asthma, and hearing loss, all of which result from work exposure to environmental hazards in a similar environment. Dr. Rea's opinion regarding a latency period for Persian Gulf War Syndrome makes it even more analogous to these occupational diseases. In light of this evidence, this Court finds that Gulf War Syndrome is more similar in nature to an occupational disease rather than a traumatic injury. Therefore, the Court will apply the occupational disease provisions in this case where relevant.

## **2. TIMELY NOTICE OF INJURY**

### **A. Section 12(a) Thirty Day Notice Period**

Section 12(a) of the LHWCA provides that an employee must give notice of a work-related injury for which compensation is payable within thirty days after such injury, or within thirty days after the employee or beneficiary is aware of, or in the exercise of reasonable diligence, or by reason of medical advice should have been aware of a relationship between the injury and the employment. *See Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990); *Sheek v. General Dynamics Corp.*, 18 BRBS 1 (1985), *on recon.*, 18 BRBS 151 (1986). The judge must determine the date on which the claimant became aware of, or should have become aware of, the relationship between the disease, the employment, and the disability. *See Martin v. Kaiser Co.*, 24 BRBS 112

(1990). It is the claimant's burden to establish timely notice.

In this case, medical reports indicate that Claimant stated that he developed nausea and blisters on his feet soon after the SCUD missile attacks occurred. *See* CX-3, pp. 20-23. There is no evidence, however, that he received any medical confirmation that these symptoms might be an immediate manifestation of toxic exposure during his employment in the war areas. Therefore, this Court finds that Claimant was not made sufficiently aware of the work-related nature of his injury during the period of his employment in the Persian Gulf.

Claimant sought additional treatment for his deteriorating health after he returned from the Persian Gulf. Self-reported histories in his medical records show that Claimant suspected that he could have been exposed to chemicals during the Gulf War. He even registered in the Persian Gulf War Registry at the V.A. prior to 1994, but received no medical confirmation that his symptoms were related to the Gulf War. His medical history indicates that approximately one month after returning from the Persian Gulf, he complained of fever, joint pains, and recurring seizures, which were diagnosed as symptoms of the flu. *See* RX-2, p. 1. Additionally, a letter from Dr. Robert Diasio, dated January 26, 1994, specifically stated that Claimant had no reason to be concerned about any adverse health effects stemming from his service during the war. *See* RX-13, p. 4. Claimant was similarly unable to effectively corroborate his suspicions through independent research, because the government did not publish any declassified reports concerning chemical warfare and toxic exposure in the Persian Gulf until 1997. *See* CX-26, p. 17. Therefore, prior to 1994, Claimant was not made sufficiently aware of a possible work-related injury.

The first medical indication that Claimant's deteriorating health could be linked to his employment during the war was in June, 1994. At that time, Claimant was evaluated at the V.A. Clinic in Louisville, Kentucky. *See* CX-5, pp. 87-88. In August, 1994, medical reports note that Claimant's mental condition appeared to be due to Post Traumatic Stress Disorder stemming from stressors during the Persian Gulf War. *See* CX-5, pp. 67-69. Dr. Robert Diasio, despite initially ruling out Gulf War Syndrome, was the first physician to diagnose Claimant with an adjustment disorder and possible Post Traumatic Stress Disorder. *See* CX-5, pp. 49-50; RX-3, p. 11. On October 6, 1994, Dr. Daniel Moore definitively diagnosed Claimant with Post Traumatic Stress Disorder and linked it to his Persian Gulf experiences. *See* CX-5, p. 43. Therefore, on this date, Claimant should have been sufficiently aware that he might at least have a possible psychological injury stemming from his employment.

This Court finds that Claimant was made sufficiently aware of a possible work-related injury on October 6, 1994. Pursuant to section 12 of the LHWCA, Claimant had thirty days from this date in which to give Respondent notice of his claim. In this case, both parties stipulated that notice was given to Respondent on June 18, 1995. *See* CTX-1. This is clearly outside the thirty-day notice provision of section 12(a). Therefore, this Court finds that Claimant failed to give Respondent timely notice of his injury.

**B. Section 12(d)(2) Excused Delay - Employer Not Prejudiced by Delay**

Failure to provide timely notice is excused under section 12(d)(2) if the employer was not prejudiced by the failure to give timely notice. See Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32, 34 (1989); Sheek v. General Dynamics Corp., 18 BRBS 151 (1986). Prejudice is established when the employer demonstrates that, due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. Strachan Shipping Co. v. Davis, 571 F.2d 968, 972, 8 BRBS 161 (5<sup>th</sup> Cir. 1978), rev'g 2 BRBS 272 (1975); White v. Sealand Terminal Corp., 13 BRBS 1021 (1981). In the absence of evidence to the contrary, it is presumed, pursuant to section 20(b) of the LHWCA, that an employer has been given sufficient notice under section 12. See Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989). Accordingly, an employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant's failure to provide adequate notice. See Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990). A generalized claim of not being able to investigate while the claim is fresh is insufficient to prove prejudice. See Ito Corporation v. Director, OWCP, 883 F.2d 422, 22 BRBS 126 (CRT) (5<sup>th</sup> Cir. 1989).

In this case, Respondent has not presented any evidence indicating that it was prejudiced by Claimant's failure to give timely notice. In absence of evidence to the contrary, this Court will presume, consistent with section 20(b) of the LHWCA, that Respondent was given sufficient notice of the present claim. As a result, this Court finds that Claimant's failure to give notice within the thirty-day limit, established by section 12(a), is excused under section 12(d)(2).

### **3. TIMELY FILING OF CLAIMS**

Section 13 provides a one-year period for filing a claim under the Act. In cases involving occupational diseases, the filing period is extended for two years from notice of injury. The limitations period in occupational disease claims begins to run when the claimant becomes aware of the relationship between the injury, employment, and disability. See Lindsay v. Bethlehem Steel Corp., 18 BRBS 20 (1986). The criteria for determining the date of awareness in this section is virtually identical to the criteria used in section 12.

This Court previously determined that the Persian Gulf War Syndrome was more similar in nature to an occupational disease as opposed to a traumatic injury. Therefore, this Court will use the two year limitations period provided under section 13(b)(2). This Court also previously determined the date of awareness in this case to be October 6, 1994. That is the date the Claimant became aware, or should have become aware, he had a condition which could be related to his employment in the Persian Gulf. Prior to that date, Claimant knew that his health, both mental and physical, was deteriorating but only had suspicions as to the cause. Although he sought treatment from V.A. facilities, he received no medical confirmation that either his mental or physical conditions were related to his employment in the Persian Gulf. Additionally, the United States government did not officially admit to certain chemical warfare exposure in the Persian Gulf until 1997. See CX-26, p. 17. Based on these factors, Claimant could not confirm that he was exposed to chemicals during his

employment with Respondent. On October 6, 1994, however, he was made sufficiently aware that his condition could be related to his employment by Dr. Moore's medical report. Therefore, this Court will use October 6, 1994 to determine the timeliness of filing under section 13.

Claimant had two years from October 6, 1994 in which to file his claim under the LHWCA. Both parties presented evidence showing inconsistent filing dates. Claimant's LS-203 form indicates a filing date of May 2, 1995, while Respondent's LS-203 shows a filing date of May 6, 1996. *See* CX-66; RX-7. Both dates clearly fall within the two year limit established by section 13(b). However, this Court notes that Claimant also presented a letter sent to Respondent, dated November 20, 1995, indicating that Claimant had filed his LS-203 prior to that date, i.e. on May 2, 1995. *See* CX-77. Therefore, this Court finds that Claimant timely filed his claim pursuant to section 13(b)(2) on May 2, 1995.

## **II. FACT OF INJURY AND CAUSATION**

To establish a prima facie claim for compensation, a claimant does not need to affirmatively establish a connection between the work and the harm. Section 20(a) of the Act, 33 U.S.C. §920(a), provides the claimant with a presumption that his injury was causally related to his employment if he establishes two things. First, the claimant must prove that he suffered a physical injury or harm. Second, he must show that working conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the injury. *See Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989).

### **1. CLAIMANT'S SHOWING OF A HARM**

The first prong of a claimant's prima facie case requires him to establish the existence of a physical harm or injury. The Act defines an injury as the following:

accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.  
33 U.S.C. § 902 (2).

An accidental injury occurs when something unexpectedly goes wrong within the human frame. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). Additionally, an injury need not involve an unusual strain or stress, and it makes no difference that the injury might have occurred wherever the employee might have been. *See Wheatley*; *Glens Falls Indemnity Co. v. Henderson*, 212 F.2d 617 (5th Cir. 1954). The claimant's uncontradicted credible testimony may alone constitute sufficient proof of physical injury. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Golden v.*

Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980).

In this case, Claimant alleges that he sustained exposure to toxic substances while employed by Respondent during the Gulf War in Saudi Arabia and Kuwait from August 19, 1990 through November 2, 1991. He testified that he suffers from rashes, chronic fatigue, chronic headaches, joint pain in multiple joints, muscle pain, chest pain, night sweats, numbness in hands and toes, seizures, stomach pain, occasional inability to control bowels or urinary function, chronic constipation or diarrhea, dizziness, disorientation, extreme depression, difficulty concentrating, short-term memory loss, chronic moodiness and irritability, problems handling stress, sleep disorders, sexual dysfunction, sensitivity to chemicals, and Post Traumatic Stress Disorder. *See* TR. 9-21. He claims that these symptoms are evidence of Gulf War Syndrome, a chronic, multi-symptom condition.

The Center for Disease Control's 1998 case definition of "Gulf War Illness" is, "a chronic multi-symptom illness." To have Gulf War Illness, one or more of the listed chronic symptoms must manifest for six months or more. These list categories are fatigue, mood/cognition (including feelings of depression, difficulty remembering or concentrating, feeling moody, anxious, trouble finding words, or difficulty sleeping), and musculoskeletal (symptoms of joint pain, stiffness, or muscle pain). *See* CX-7, p. 4. Claimant alleges that he suffers from symptoms in all three of the CDC's categories. He maintains that his these symptoms have manifested since his return from the Persian Gulf in November, 1991, well over the case definition's minimum six-month period.

This Court finds Claimant's testimony regarding his physical and mental health generally straight-forward, unequivocal, and credible throughout the hearing. Claimant relayed consistent mental and physical symptoms to all of his physicians and throughout the hearing. He also testified that he was in excellent physical and mental health prior to his employment with Respondent. The only physical problems prior to his employment appear to be ankle arthritis and some back pain, stemming from a prior accident while on active duty in the Army. *See* CX-78; RX-18, pp. 1-2. His claim of mental and physical injury is bolstered by his excellent occupational performance both before and while in the Persian Gulf.<sup>5</sup> This is even more significant when contrasted with his diminished occupational performance after returning from the Persian Gulf area. *See* CX-85, p. 2; CX-86; CX-90. Thus, this Court finds Claimant's testimony credible regarding his past and present health condition.

The medical evidence presented also supports Claimant's allegation of an injury. Examinations of Claimant subsequent to his employment in the Gulf reveal deteriorating mental and physical health. The V.A. clinics where Claimant went for treatment in 1994 noted that he appeared to have symptoms of Post Traumatic Stress Disorder. *See* CX-5, pp. 87-88, 67-69. Claimant's chief complaints regarding his mental condition was that he was unable to sleep without having nightmares of battle and increased edginess. Records indicate that Claimant also consistently reported that he

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<sup>5</sup> Claimant submitted certificates and awards of appreciation for outstanding job performance during the Persian Gulf War. These certificates and awards are reproduced as CX-69-73, 75, 83, 91.

was experiencing increased disorientation while driving. *See* CX-5, pp. 43-45. His chief physical complaints were that he had skin rashes, seizures, and joint aches. *See* CX-5, pp. 87-88, 67-69.

The testimony of Dr. William J. Rea, a specialist in environmental medicine, establishes that Claimant's symptoms are compatible with those of combat veterans diagnosed with Gulf War illness. Dr. Rea first noted that Claimant had petechia on his upper chest. He noted that Claimant's SPECT scan established increased activity in the left lateral aspect of the right temporal lobe. He also noted that the lobes were unequal, consistent with short term memory loss and toxic exposure. *See* CX-3, pp. 23-26. Additionally, Claimant's other tests, including a thermogram, chemical sensitivity, and Desert Storm vaccine, yielded results consistent with toxic exposure. Dr. Rea opined to a reasonable degree of medical certainty that Claimant's increased joint arthritis, seizure episodes, and neurological dysfunction were due to toxic exposure. Therefore, Claimant's own testimony is supported by Dr. Rea's medical conclusions and is sufficient to constitute evidence of physical injury.

This Court also finds that Dr. Nancy Didriksen's report is credible evidence of neuropsychological injury stemming from exposure in the Persian Gulf. Dr. Didriksen's report supports Dr. Rea's diagnosis that Claimant suffered mental and physical injury due to toxic exposure. After evaluating Claimant's performance on the Halstead-Reitan Battery, a comprehensive neuropsychological battery that yields a general neuropsychological deficit scale score indicating one's overall level of functioning, Dr. Didriksen opined that Claimant exhibited moderate impairment of brain-related activities. *See* CX-4, pp. 8-9. She reported that his scores on memory indicated an acquired impairment of cognitive functioning, consistent with toxic exposure. *See* CX-4, pp. 8-9. She also noted that on two of the most sensitive subsets, Claimant's abilities were in the severely impaired range. *See* CX-4, pp. 8-9. She concluded that this finding was evidence of neuropsychological damage, given Claimant's educational and occupation achievements both prior to and during the Gulf War. *See* CX-4, p. 8-9. Therefore, this Court finds credible medical evidence to establish that Claimant sustained neuropsychological as well as physical impairment as a result of toxic exposure in the Persian Gulf.

It is evident to this Court that Claimant has proven a harm, as Claimant's testimony, the medical evidence, and comprehensive diagnostic studies reveal that Claimant sustained both physical and mental injury. This, in and of itself, is sufficient to meet the first prong of Claimant's prima facie case.

## 2. CLAIMANT'S SHOWING OF A WORK ACCIDENT

In order to invoke the §20(a) presumption, Claimant must also show the occurrence of an accident or the existence of working conditions which could have caused the harm. The Section 20(a) presumption does not assist the Claimant in establishing the existence of a work-related accident. *See* Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 275 (1981). Therefore, Claimant has the burden of establishing the existence of such an accident by a preponderance of the evidence.

The Court must weigh all of the record evidence, including that supporting Claimant's testimony and that contradicting it, in order to determine whether Claimant has met his burden in establishing a work accident. In order to establish his prima facie case under the Defense Base Act, Claimant must show that he was in the "zone of special danger," or area of exposure, and that his condition was caused by, or likely to be caused by his employment. Furthermore, this Court finds that although Title XVI, of Division C, of Public Law 105-277, "Service Connection for Persian Gulf War Illnesses" does not directly relate to civilian defense workers, it should be considered persuasive in establishing Claimant's prima facie case. *See* CX-8. This law provides a legal presumption for U.S. Military Veterans that they were exposed to a list of toxic substances during the Gulf War. This Court notes that Claimant alleges exposure to several of the substances on the list, including pyridostigmine bromide, pesticides, Sarin, depleted uranium, and sandfly fever. *See* CX-8. Claimant has also sufficiently proven that he was in close proximity to areas containing toxic chemicals, such as the nerve gas plume and the oil fires in Kuwait. *See* CX-12; TR. 8-11, 16-26.

In the instant case it is uncontested that Claimant was employed by Respondent in Saudi Arabia and Kuwait during the Persian Gulf War. *See* CTX-1. The working conditions which Claimant argues caused his health condition included use of the anti-nerve gas pill, pyridostigmine bromide, exposure to low-level Sarin within the nerve gas plume, exposure to oil well smoke caused by burning oil wells in Kuwait, and depleted uranium. Additionally, Claimant relies on congressional findings and numerous medical articles to support his contention that his symptoms were caused by exposure to toxic substances.

As stated previously, Claimant has established that he was in areas at risk for chemical exposure. Due to the very nature of his employment, as a technician on the chemical warfare detection vehicles, he was consistently on the front lines and in areas prone to chemical warfare. His own testimony, plus the internal memorandum issued by Respondent, is sufficient to establish that Claimant was issued and took pyridostigmine bromide, anti-nerve gas pills, on several occasions to counteract possible chemical agents. *See* CX-2. Claimant presented an article showing that the effect of these tablets under stress may cause an increased susceptibility to certain types of toxic exposure. *See* CX-56. Claimant also presented medical evidence indicating that he has high levels of paraoxonase activity but is below average with respect to resistance to diazoxon. The results showed a genetic susceptibility to certain other toxins the would be heightened when the pyridostigmine pills were taken. *See* CX-62. This Court notes that he also presented evidence in a medical article specifically addressing the hazards that these anti-nerve gas pills pose to genetically susceptible individuals located within the nerve gas plume. *See* CX-26, pp. 20-22; CX-35, pp. 19-20.

Claimant submitted photographs and videotape showing his presence in, or close proximity to, areas which had been bombed. *See* CX-76, CX-80-82. The Gulf War Research Foundation issued a report dated September, 1996, confirming that the destruction of the Iraqi storage facilities resulted in exposure for United States troops and civilian support staff in these nearby locations. *See* CX- 15. He was also photographed investigating abandoned Iraqi vehicles, which put him in danger of uranium exposure. *See* CX-80 -82. Claimant testified that he was in Camp Doha during the explosions, a well-documented event that would have placed him at risk for exposure from depleted

uranium rounds. *See* TR. 16-26. He also presented uncontested evidence showing he was located within the area covered by the nerve plume from Khamisiyah on March 11, 1991. *See* CX-12. As stated previously, Claimant was assigned to these areas with the troops due to the nature of his employment.

Additionally, this Court finds credible evidence in Claimant's testimony that he was also exposed to pesticides, depleted uranium, and oil fire smoke during the war. He presented substantial evidence in medical articles and congressional reports outlining what the effects and symptoms of exposure in these situations would be. *See* CX-28, 29. This Court notes that Claimant reported symptoms consistent with Gulf War Illness before the majority of these articles were published, lending more support for his position. Respondent also submitted several articles indicating that individuals stationed in Saudi Arabia and Kuwait during the Persian Gulf War had no reason to be concerned about adverse health affects stemming from that service. *See* RX-11, 12, 14. However, this Court notes that these articles were published in 1996, prior to the release of the majority of declassified government reports on the use of chemical agents during the Gulf War. The Court further finds that the articles, reports, and testimony submitted by Claimant as to causation are highly persuasive and indicative of a work condition causing his current mental and physical condition. However, this Court places determinative weight as to causation on the medical evidence given by the physicians who actually examined the Claimant.

Although Claimant does not have a "treating physician" *per se*, this Court notes that he received consistent out-patient counseling and treatment for his mental problems through the V.A. clinic. His therapist was listed as Paul J. Wehner and psychiatrist as Dr. Pary. Therefore, since they had an opportunity to examine Claimant's mental condition over an extended period of time, this Court will give determinative weight to their opinions regarding Claimant's mental condition. The V.A. clinic was the first institution to affirmatively diagnose Claimant's deteriorating mental condition as Post Traumatic Stress Syndrome from his employment in the Gulf War. Claimant relayed consistent stressors regarding his employment in the Gulf War to both his psychiatrist and therapist. *See* CX-5, pp. 67-69, 43-45, 14-17. After extended therapy, beginning in 1994, Dr. Pary diagnosed Claimant with generalized anxiety disorder and Post Traumatic Stress Disorder. He opined, to a reasonable medical probability, that Claimant's emotional problems were the result of his Persian Gulf War experiences. *See* CX-84. Claimant was also consistently diagnosed with Post Traumatic Stress Syndrome in 1995, when he was examined by Dr. Chutkow. *See* RX-16, p.1. As a side note, Dr. Chutkow also noted that Claimant reported physical seizures, with no family history of seizures. Claimant's seizure episodes, at that time, were corroborated by his second wife. *See* RX-16, p. 2.

Claimant presented affirmative evidence regarding the etiology of his physical and mental condition through Dr. Rea's testimony. Dr. Rea, the director of the Environmental Health Center, testified that Claimant's symptoms were compatible with those of other Gulf War veterans, particularly the sixty to seventy veterans he examined. *See* CX-3, pp. 10-13. After administering a battery of tests, Dr. Rea concluded that Claimant's symptoms were consistent with toxin encephalopathy, toxic exposure, and vasculitis. *See* CX-3, p. 29-32. Dr. Rea also testified that Claimant's condition, toxin encephalopathy, was separate from multiple chemical sensitivity. After

examining Dr. Rea's credentials and expertise in evaluating Gulf War Syndrome, this Court finds that Dr. Rea's medical opinions regarding Claimant's condition and its etiology are credible.

Additionally, Dr. Didriksen submitted a report regarding Claimant's neurocognitive impairment. Her detailed report summarized Claimant's level of impairment as a marked decrease in neurocognition from someone having his educational and occupational achievements. She opined that there is a reasonable medical probability that these deficits were caused by toxic exposure, and that Claimant meets the criteria for a diagnosis of Post Traumatic Stress Disorder. *See* CX-4. Although Dr. Didriksen does not have the medical expertise of Dr. Rea in evaluating toxic exposure, this Court does note that she has practical experience, as she has evaluated several individuals at her clinic for conditions stemming from Gulf War Syndrome. *See* CX-4, p. 11-12.

After an examination of the entire record, including the articles and medical reports, this Court finds that Claimant has clearly met his initial burden of proving that working conditions existed which could have caused his deteriorating physical and mental symptoms. With respect to Claimant's joint pains, this Court notes that he does admit to having a prior injury in his hip and ankle areas that could have caused a pre-existing arthritic condition. However, the physicians examining Claimant were aware of this pre-existing condition. This did not affect the diagnosis that this condition could have been aggravated by the toxic exposure. Claimant's own testimony, which this Court finds credible indicates that this joint pain worsened and spread to other locations in his body after his return from the Gulf War. Therefore, this Court finds that Claimant has provided sufficient evidence to invoke the Section 20(a) presumption.

### **3. REBUTTAL EVIDENCE**

Once Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). The employer must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and the employment or working conditions. *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the presumption is rebutted, it no longer controls, and the record as a whole must be evaluated to determine the issue of causation. *See Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1982); *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

Respondent, Claimant's employer, submitted several reports as rebuttal evidence. The first was a letter from Dr. Robert Diasio, a V.A. Environmental Physician, dated January 26, 1994. *See* RX-13, p. 4. This letter stated that Claimant had no reason to be concerned about any adverse health effects stemming from the Gulf War and noted that Claimant's examination and laboratory tests were normal. At the outset, this Court finds that the letter will be accorded little weight in that it is not clear which on which tests Dr. Diasio based his opinion. Additionally, it is not evident whether Dr. Diasio is ruling out physical, neurocognitive, or general mental adverse mental health effects. Therefore, it is not effective rebuttal evidence.

The second report that Respondent submitted was from the Emergency Room at Hardin Memorial Hospital dated March 17, 1997. Respondent emphasized the fact that a review of Claimant's systems at that time was negative for "psyche, immune deficiency, and seizures." *See* CX-20, p. 1. However, this report is insufficient, by itself, to outweigh the medical evidence indicating that Claimant does have neurological and immunity problems, as well as seizures. Nor is this report sufficient to sever any causal connection between Claimant's injury and his exposure in the Gulf War. The emergency room report notes that Claimant was admitted to the emergency room for abdominal pain, and that the physician was unable to determine the etiology for his condition. *See* CX-20, p. 1. The physician was not able to rule out toxic exposure as a cause for the Gulf pain, the records merely indicate that the etiology of the pain was indeterminate. Therefore, these records are not sufficient evidence to sever a causal connection between Claimant's condition and his service in the Persian Gulf.

Respondent also submitted a report from Dr. Manuel Lopez. Dr. Lopez, an immunologist, allergist, and rheumatologist, examined Claimant on April 28, 2000, at the request of Respondent, and submitted a report. *See* RX-2. He determined that Claimant had normal test results and did not suffer from vasculitis. Ultimately he concluded that there was no clinical or laboratory evidence to indicate that Claimant suffered from an impaired immune function as a result of toxic exposure in the Persian Gulf. *See* RX-2, pp. 2-4. Dr. Lopez opined that Claimant's skin condition was consistent with dyshidrosis and tinea infections, rather than vasculitis. *See* RX-2, pp. 2-4. Although this Court recognizes Dr. Lopez's qualifications as an allergist and immunologist, he does not allege any particular experience with evaluating Gulf War Veterans or any particular knowledge of the chemical exposure associated with employment in combat zones. Therefore, his opinion as to Claimant's immunity and skin problems is not sufficient to sever the connection between Claimant's numerous symptoms and his exposure to toxic chemicals in the Persian Gulf.

Respondent also offered a psychiatric evaluation of Claimant given by Rennie Culver as rebuttal evidence. Dr. Culver diagnosed Claimant's mental condition as an unspecified personality disorder. *See* RX-3, pp. 19-21. She opined that Claimant was basically malingering and trying to imitate symptoms of Post Traumatic Stress Disorder. *See* RX-3, pp. 10-15. Although this Court recognizes Dr. Culver's qualifications, it notes that from as early as 1994, Claimant was uniformly diagnosed with Post Traumatic Stress Disorder by the V.A. clinic, an institution that frequently encounters this disorder. Respondent even submitted a report by Dr. Chutkow, who similarly diagnosed Claimant with Post Traumatic Stress Disorder. *See* RX-16, p. 1. Dr. Culver's basis for malingering was that by the time she examined Claimant, Claimant was "well-educated" in the symptoms that he was supposed to have. *See* RX-3, pp. 10-15. This Court notes, however, that Claimant complained of consistent symptoms throughout his initial examinations at the V.A., even before he was admitted into therapy. Additionally, Claimant had been in therapy for years before he saw Dr. Culver, so it is not unusual that Claimant would be aware of his symptoms and the relationship between his symptoms and the Gulf War. This is not sufficient evidence, in itself, of malingering. Plus, even Dr. Culver admitted that Claimant was generally cooperative throughout the evaluation. Therefore, his opinion as to Claimant's mental condition is not sufficient rebuttal evidence

to sever the connection between Claimant's stressors in the Gulf War and his deteriorating mental condition.

This Court finds that these medical opinions are not sufficient to rebut the V.A. clinic's and Dr. Rea's medical conclusions. After 1994, the V.A. clinic uniformly diagnosed Claimant with Post Traumatic Stress Disorder linked to his experiences during the Gulf War. *See* CX-5, p. 87. The clinic reports also noted physical manifestations in the form of rashes and blisters. *See* CX-5, pp. 87-88. This Court gives determinative weight to the V.A. clinic's diagnosis. Additionally, although Dr. Rea is not specifically qualified as an immunologist, like Dr. Lopez, he is an expert in environmental medicine and has extensive experience in evaluating Gulf War Veterans as to chemical exposure. Therefore, this Court also assigns determinative weight to Dr. Rea's conclusions regarding Claimant's physical and neurological impairment and its etiology. Claimant has reported both physical and mental symptoms which have been confirmed by this highly persuasive medical evidence.

After an examination of the evidence, this Court finds that Respondent has not presented substantial countervailing evidence to rebut Claimant's section 20(a) presumption. Additionally, this Court finds that Claimant's exposures to toxic substances during his employment with Respondent in the Gulf War could, in fact have caused, contributed to, or accelerated Claimant's multi-system chronic illness, and is compensable under the LHWCA.

### **III. NATURE/EXTENT OF DISABILITY AND MAXIMUM MEDICAL IMPROVEMENT**

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. *See Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5<sup>th</sup> Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask*, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services v. Director, OWCP*, *supra*, at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, fn. 5, (1985); Trask v. Lockheed Shipbuilding Construction Co., *supra.*; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. See Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); See Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

A judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quinton Eng'rs, 14 BRBS 395, 401(1981). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15 (1988). The date of permanency may not be based on the mere speculation of a physician. Steig v. Lockheed Shipbuilding & Constr. Co., 3 BRBS 439, 441 (1976). In the absence of any other relevant evidence, the judge may use the date the claim was filed. Whyte v. General Dynamics Corp., 8 BRBS 706, 708 (1978).

If the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that maximum medical improvement has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245 (1986); See Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1980).

In the present case, Dr. Rea opined that Claimant's physical and neurological condition was permanent and rendered him totally disabled. However, Dr. Rea also opined that there was certainly a chance for significant improvement if the proper treatments were administered. Dr. Rea outlined a comprehensive treatment program that would improve Claimant's ability to function. See CX-3, pp. 32. As to Claimant's psychological condition, the records from the Veterans' Administration indicate that Claimant is currently receiving outpatient therapy, and has not been declared permanently disabled by the condition. See CX-84. Therefore, this Court finds that Claimant has not reached maximum medical improvement. Thus, Claimant's disability is temporary in nature.

The extent of disability can be either partial or total. Total disability is a complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co.,

22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

In the present case, Claimant worked for Respondent for six years after returning from the Gulf War. Claimant testified that it was increasingly more difficult to perform his normal duties with Respondent, and he missed work days due to his deteriorating health. *See* TR. 38-41. His employment records and testimony indicate that he was laid off in December, 1997, when Respondent closed the field office where he was working. *See* CTX-1; RX-1. He also stated that he was not able to perform the same type of job duties as he had with Respondent. *See* TR. 38-41. Additionally, an examination of Claimant's earnings do reflect a steady decrease in wages while he worked for Respondent. *See* CTX-1. In light of this evidence, this Court finds that Claimant was only partially disabled from the time he returned from the Persian Gulf, November 2, 1991 to December 31, 1997. Therefore, he is entitled to compensation reduced by the wages that he earned during this period.

However, from the period of January 1, 1998 to the present, Claimant presented evidence that he was no longer able to continue to perform the same type of work that he did for Respondent. The vocational report of Sharon Brown Lane, dated August 31, 1998 indicates that she examined Claimant in January, 1998. *See* CX-6, pp. 1-5. She determined, from an examination of medical records dated through October 20, 1997 that not only was he unable to perform a job similar to his previous position, but that his mental and physical conditions resulted in a total loss of access to the competitive job market. *See* CX-6, pp. 5-8. Therefore, this Court finds after an examination of the record, including Claimant's own testimony regarding his deteriorating health, that Claimant has presented sufficient evidence to establish total disability and loss of wage earning capacity beginning on January 1, 1998 to the present.

Total disability, and loss of wage earning capacity, becomes partial on the earliest date that the employer establishes suitable alternative employment. *See* Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, physical restrictions, and an opportunity that he could secure if he diligently tried. *See* New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); *See* McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

In this case, Claimant reported to Mr. Robert Piper, the V.A. vocational rehabilitation counselor, that after he left Respondent's employment, he was a farm manager at his residence. Mr. Robert Piper, V.A. vocational rehabilitation counselor, evaluated Claimant on June 26, 1999 and found him to be capable of medium-type work, the category for a farm manager. *See* CX-93, pp. 16-

18. Mr. Piper reached this result by evaluating Claimant's V.A. medical records and progress notes. Therefore, this Court finds that there is sufficient evidence to conclude that Claimant was capable of engaging in suitable alternative employment as a farm manager from January, 1998 and continuing. Ms. Favaloro, vocational rehabilitation counselor, gave the figure for a full-time salaried farm manager as approximately \$447.00 per week based on 1998 statistics. *See* RX-4, p. 6. Therefore, this Court finds that his disability became partial on January 1, 1998, the month after he left Respondent's employment and became a farm manager. This finding is supported by Mr. Piper's opinion that Claimant was capable of medium work. His compensation will therefore be diminished accordingly based on a weekly wage for a salaried farm manager of \$447.00 per week from that date.

Since Respondent has provided sufficient evidence of a realistically available job opportunity that Claimant is currently engaged in and capable of doing, Respondent has established suitable alternative employment in the amount of \$447.00 per week beginning on January 1, 1998 and continuing subject to the limitations of section 8(e). Claimant has sustained only a partial loss of wage earning capacity for that period of time. Thus, Claimant's compensation will be diminished accordingly.

#### **IV. AVERAGE WEEKLY WAGE**

Section 10 of the LHWCA sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to section 10(d), to arrive at an average weekly wage. *See Johnson v. Newport News Shipbuilding and Dry Dock Co.*, 25 BRBS 340 (1992). The determination of an employee's annual earnings must be based on substantial evidence. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

The calculation of average weekly wage is dependent on the time of injury, which is determined by the nature of the injury. Since this Court has determined that the occupational disease standards apply to Persian Gulf War Syndrome, the provisions of section 10(i) apply. Under this section, the "time of injury" is defined as the date on which the claimant or employee becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of the relationship between the employment, disease, and the disability. *See Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1988). However, where the work-related wage loss pre-dates the "time of injury," the average weekly wage should reflect earnings prior to the onset of disability, rather than the subsequent earnings at the later time of awareness. *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

In the present case, this Court has already determined that the "time of injury," or date of awareness, is October 6, 1994. This Court previously found that date of total disability, and total loss of wage earning capacity, is January 1, 1998. Under this calculation, the year 1993, one year prior to his awareness, should be used for determining average weekly wage. Claimant worked substantially for the whole of the year 1993. Additionally, this Court finds that only Claimant's base salary should be used in the average weekly wage calculation, due to the fact that claimant was no longer working overseas with Respondent and had no future expectation of obtaining these additives.

The parties stipulated that Claimant earned \$43,360.00 in base salary in 1993 from his position with Respondent. *See* CTX-1; CX-74; RX-8. This amount composes his entire earnings in salary for the year. Since Claimant worked substantially for the entire year, this figure should be divided by 52 weeks. Thus, this Court arrives at the figure of \$833.85 as an average weekly wage based on Claimant's earnings in 1993.

## V. REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

(a) The 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 or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'd 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; See also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'd 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); See McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); See Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary only where the claimant is seeking reimbursement for medical expenses already paid. The court held that the prior request requirement applies at all times. See Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'd, 6 BRBS 550 (1977).

Section 7(d)(2) of the Act provides in pertinent part that:

(2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may

excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so. 33 U.S.C. § 97(d)(2).

The Court has found that Claimant established causation with respect to his chronic, multi-system illness. Claimant has sufficiently established that his exposure to chemicals and traumatic situations while employed in the Persian Gulf is causally connected to his current physical and mental condition. Thus, Claimant is entitled to reasonable and necessary past and future compensable medical treatment associated with this work-related injury. This includes, but is not limited to the treatment program recommended by Dr. Rea and treatment, suggested by Dr. Didriksen, for Claimant's neurocognitive impairment and Post Traumatic Stress Disorder relating to the toxic exposure.

Accordingly,

### **ORDER**

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from November 2, 1991 until December 31, 1997, based on an average weekly wage of \$833.85, reduced by Claimant's actual wages earned during this period;

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from January 1, 1998 and continuing subject to the limitations of section 8(e), based on an average weekly wage of \$833.85, minus the suitable, alternative employment wages of \$447.00 per week;

(3) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

(4) Employer/Carrier shall pay or reimburse Claimant for reasonable medical expenses, with interest in accordance with Section 1961, which resulted from toxic exposure during Claimant's employment with Respondent. See 33 U.S.C. §907.

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

Entered this 22<sup>nd</sup> day of February, 2001, at Metairie, Louisiana.

**A**

**JAMES W. KERR, JR.**

**Administrative Law Judge**

JWK/sls