

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 13 November 2013**

CASE NO.: 2013-LHC-00915

OWCP NO.:

In the Matter of:

SAMUEL JACKSON,

Claimant,

v.

CERES TERMINALS,  
(Self Insured),

Employer/Carrier,

And

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS

APPEARANCES: Ira Steingold.  
Attorney for the Claimant

Lawrence Postol  
Attorney for the Employer

BEFORE: KENNETH A. KRANTZ  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding arose upon the filing of a claim for disability benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* ("Act" or "LHWCA"), and is governed by the implementing regulations found at Code of Federal Regulations, Title 29, Part 18, and Title 20, Chapter VI, Subchapter A. A formal hearing was held on June 19, 2013, in Newport News, Virginia. The Director did not have a representative present. Four ALJ Exhibits were admitted into the record without objection. (TR 7). Claimant

submitted Exhibits 1-4. Employer objected to the first 12 pages of Dr. Newfield's report, as Employer believed that the evidence should have been obtained through a deposition subject to cross-examination. (TR 8). I admitted Claimant's evidence with the caveat that the lack of cross-examination would go to the weight of the evidence. (TR 8). Employer's Exhibits 1-25 were submitted into evidence. Claimant objected to Exhibit 13 on the grounds that Dr. Mansheim only examined Claimant for about an hour. I admitted Employer's Exhibit 13 into evidence, explaining that a brief examination nevertheless passes the low threshold for relevance. (TR 9). In addition, I admitted Employer's Exhibit 26 at the end of the hearing for the limited purpose of addressing Claimant's credibility. (TR 72). I also admitted Claimant's Exhibit 5, Dr. Thrasher's October 2, 2011 report, over the objection of Employer's counsel that the offering of the exhibit was untimely. I noted the importance of developing the record as fully as possible. (TR 87).

### **STIPULATIONS**

1. The LHWCA applies to this claim.
2. An incident occurred on March 28, 2011.
3. At the time of the incident, there existed an employer-employee relationship between Claimant and Employer.
4. The claim was timely noticed.
5. The claim was timely filed.
6. The Claimant is not currently working.
7. Claimant has not reached maximum medical improvement.

(ALJ 4).

### **ISSUES**

1. Whether Claimant has suffered an injury or disease.
2. Whether the alleged injury or disease arose out of and in the course of Claimant's employment.
3. Whether Claimant is entitled to compensation.
4. Whether Claimant is entitled to medical benefits.
5. Whether Claimant can engage in his usual employment.
6. Whether Claimant can engage in alternative employment.

7. Claimant's average weekly wage.

(ALJ 3).

### **BACKGROUND**

During his June 19, 2013 hearing, Claimant testified about his accident and his psychological condition. He explained that he was operating a forklift for Ceres Marine terminals on March 28, 2011. (TR 16). Claimant testified that he was retrieving pin buckets at the aft end of the ship. Claimant explained that there were two women acting as spotters for the forklift drivers, one on either side of the crane. Claimant testified that, when a tractor trailer started backing up towards him, Claimant veered to the left and hit one of the women working as a spotter. Claimant explained that he heard someone yelling, and he got off the forklift to help. (TR 17). Claimant testified that he saw the decedent pinned underneath the forklift with a portion of her body poking out from beneath the machine. He testified that he did not know whether she died on impact. (TR 18).

Claimant testified that another forklift driver used his forklift legs to raise the back end of Claimant's forklift. Claimant testified that he tried to remove the decedent from underneath the forklift. Regarding her condition, Claimant testified that her leg was wrapped around the axle of the forklift. In addition, Claimant testified that the decedent's arm was burned and mangled with the bone hanging out, and that she was bleeding from her mouth. (TR 19). He further testified that fire trucks arrived at the scene shortly, perhaps ten minutes, after he attempted to remove the decedent from underneath the forklift. (TR 20). Claimant testified that he was standing between ten and fifteen feet from the decedent as he waited for the emergency team. (TR 21). He testified that the emergency team placed the decedent on a backboard and carried her to the ambulance. Claimant testified that he never saw the decedent again.

Regarding the rest of the workday, Claimant testified that he remained at work participating in the preparation of incident reports. (TR 22). Claimant testified that he provided reports to the Portsmouth Police Department, the Superintendent of Ceres Marine Terminals, Virginia International Terminals Police Department, and OSHA. (TR 23). Claimant testified that, as a result of his conversation with Mr. Concepcion, the Superintendent of Ceres, he decided to seek out medical aid. (TR 23). Claimant testified that he first went to his family physician, Dr. Margaret Stiles. (TR 23). He testified that, after visiting Dr. Stiles, he met Mr. Gregory Griffin, a licensed social worker. (TR 24). Claimant testified that he met with Mr. Griffin, who listened to an explanation of the incident. Regarding his mental state, Claimant testified that things became progressively worse after he met with Mr. Griffin. Claimant testified that Mr. Griffin did not diagnose him with post-traumatic stress disorder. (TR 61). He testified that he sought help from Dr. Newfield. Claimant testified that, as of the hearing, he sees Dr. Newfield twice a week and Dr. Gi-Gi, as Claimant calls Dr. Giorgi-Guarnieri, every fourteen days. (TR 26).

Claimant testified that, before he sought treatment, he did not want to see anyone and he was engaging in self-destructive patterns. (TR 27). Claimant testified that the treatment has helped but that he still struggles. He explained that he generally does not leave the house, unless he is visiting his doctors or his lawyer. Claimant testified that he has not looked for work

because of his outbursts. (TR 63). Claimant testified that he has to travel about 45 minutes to Dr. Gi-Gi's office. (TR 73). Claimant testified that he meets with Dr. Newfield twice per week for a 45 minute session, where they work towards getting Claimant out of the house. (TR 28). He testified that Dr. Gi-Gi's appointments are supposed to last 15 minutes, although he explained that she generally spends 30 to 45 minutes with him. (TR 28). Claimant testified that no one has been paying Dr. Newfield's bills since Employer stopped. (TR 64).

Regarding medications, Claimant testified that Dr. Gi-Gi prescribes them to address his "sleep and depression and stuff like that." (TR 30). Claimant testified that he did not have any psychological problems or insomnia issues prior to the accident. Claimant testified that he met with Dr. Thrasher and Dr. Mansheim at Employer's request. (TR 31). Claimant testified that Dr. Thrasher and Dr. Gi-Gi corresponded about Claimant's prescriptions. (TR 36). He testified that he spent 30 to 40 minutes meeting with Dr. Mansheim. Claimant testified that Dr. Mansheim asked about prior family issues, church attendance, history of mental illness, and the accident. (TR 33). Furthermore, Claimant testified that Dr. Mansheim's office called him back to the office to take a test. (TR 34). Claimant testified that he did not meet with Dr. Mansheim on the day he took the test. (TR 34).

Claimant testified about his experience during the state hearing. (TR 74). He stated that he cried and had an occasional outburst. (TR 74). In addition, Claimant testified that the judge broke for the day because of the "nature of what I was going through." (TR 74).

Claimant addressed whether the case was concluded due to scheduling issues or emotional distress:

He said at the end of that day, because of the appointment that he had, he allocated us one hour and the appointment that he had after that was cancelled and so he even ran over the one hour. But, then when it came time for the cross-examination with your question, he made that statement and asked yourself [sic.] and Ira Steingold had your date books so we could schedule it due to the fact of the stress it had on me.

(TR 75).

Claimant's counsel asked Claimant about a safety rule addressed during the July 10, 2012 deposition. (TR 79). Employer's counsel questioned Claimant as to whether he was aware of the safety rule that forklift drivers must drive in reverse if their vision is blocked. (TR 68). Claimant testified that, during his state hearing, he stated that he knew about this safety rule. (TR 69).

Employer's counsel and Claimant discussed the safety rule issue:

Q. So the question is why did you say that in your deposition but at the State hearing you admitted you did know about the rule?

A. I was brought into the industry in 2000. My accident was “2013.” I had not seen that documentation since the year 2000, the best of my recollection of the last time I had ever seen that documentation.

Q. Sir, didn’t you sign for the documentation in 2005?

A. In the State case which we had the documentation because I believe they told us at the State case that we could give these depositions under the whole entire state case, that came up, Mr. Postol-

Q. Sir, it’s a simple question. I’ll show you a document that talks about your State case that shows in 2005 you were actually given a copy of the safety rules.

A. I said I signed this piece of paper.

Q. So it wasn’t 2000, it was 2005. . . My problem is why did you just tell the Court you hadn’t seen that rule since 2000 when it was actually 2005?

(TR 70).

Employer’s counsel noted that Claimant testified that he did not find out about the safety rule through the signed document presented in Employer’s Exhibit 26. (TR 93). Employer’s counsel asked Claimant why he testified at the State hearing that he knew about the rule, if he had not seen the rule when he signed for the safety packet. (TR 93). Claimant testified that he knew about the rule from “this piece of paper that was admitted in the deposition we had over the phone. . .” (TR 94).

Claimant also testified regarding his average weekly wage. (TR 39). Claimant testified that he was out of work from January 5, 2010 until July 6, 2010 due to a straddle carrier accident that injured his back. (TR 41). Claimant testified that he was entitled to vacation, holiday, container royalty, and ILA welfare pay because of the hours he was given as a benefit while out on disability. Claimant explained that “they give you the minimum hours in order to qualify while you’re out of work because you’re not receiving the hours because of an injury.” (TR 42).

During the hearing, Claimant reviewed Exhibit 4. (TR 41). Claimant testified that page ten was the last paycheck he received before his accident. (TR 43). He testified that he received three weeks of paid vacation, container royalties, and paid holidays. (TR 43). Claimant described page 16 as an eligibility certificate from Hampton Roads Shipping. Claimant testified that he qualified prior to the accident. (TR 45).

Opposing counsel asked Claimant if he had earned enough hours to be entitled to the benefits at the time of his accident. Claimant testified that he needed the comp hours from the injury to receive his benefits. (TR 48). He testified that, at the time of the accident, he “was on the path to have more than enough qualified hours.” (TR 48). Claimant agreed that the workers are given a certain amount of credit hours based on each week they are out on disability

compensation. (TR 52). Claimant also agreed that the money received for container royalty, vacation pay, and holiday pay in December of 2010 would have been based on the contract year from October 1, 2009 to September 30, 2010. (TR 55). Claimant's counsel asked Claimant if he knew, as of March 28, 2011, whether he had enough hours to earn his full check. (TR 89). Claimant responded that he did not know. (TR 89). Claimant testified that if he worked less than 1,100 hours in a contract year, he would receive no vacation pay. (TR 91). Claimant agreed with Employer's counsel that, whether he worked 1,100 hours or 3,000 hours, he would have received the same dollar amount. (TR 92).

#### Hearing Testimony of Mr. William Parker

Mr. William Parker, III, Vice President for Ceres Marine Terminals, testified at the hearing. (TR 95). Mr. Parker testified that the contract year for earning vacation, holiday, and container royalties runs from the first of October until the thirtieth of September. (TR 95). Mr. Parker testified that if an employee meets the requisite number of hours by September 30, he will receive a check in December. (TR 95). Mr. Parker testified that the qualifying amounts are; 900 hours for holiday pay, 1,000 hours for container royalty, and 1,100 for vacation. (TR 95). Mr. Parker testified that Claimant did not have sufficient work hours to qualify for any of the benefits, but noted that he did qualify on the basis of his workers' compensation benefit. (TR 95).

#### October 21, 2011 Deposition of Claimant

During the October 2011 deposition, Claimant discussed his initial quest for treatment. (EX 19 at 14). He explained that he met with Mr. Griffin three times after being referred to him by the union representative. (EX 19 at 14). Claimant stated that the meetings with Mr. Griffin were not helpful. (EX 19 at 15).

Claimant testified that someone approached him about an available job at the paper mill. (EX 19 at 48). Claimant stated that he did not pursue the position because he "was in no frame to pursue something of that nature." (EX 19 at 48). In addition, Claimant indicated that he was approached about taking a position with HRCP II. Claimant testified that he was not interested in the position because he fears being near the terminals. Claimant explained that he even takes detours to avoid driving near them. (EX 19 at 50).

Claimant testified:

I have a problem with going out in public. I mean, unless somebody is going to come to work- it's like I said, Stephanie is my crutch, and right now, it's something that I – me [sic.] and Mr. Newfield explained- talked about yesterday a lot. You know, I just- public- everything. I have problems with everything. I seen [sic.] a container the other day and went into a frenzy. I mean, I don't know how to explain this.

(EX 19 at 51).

### July 10, 2012 Deposition of the Claimant

During the deposition, Employer's counsel asked Claimant if he had ever seen the Specific Rules for Forklift Trucks in the Port of Hampton Roads. (EX 14 at 12). Claimant testified that he had never seen the document.

Claimant testified that he was meeting with Dr. Newfield once a week for about 45 minutes. (EX 14 at 18). Claimant testified that he was leaving the house more at the time of the deposition than he had been in October of 2011. (EX 14 at 21). Claimant testified that he has not traveled at all, other than to see his doctors and lawyer. (EX 14 at 23). When asked whether any of his medication was helping, Claimant responded that his medication had significantly reduced his nightmares. (EX 14 at 27).

### February 20, 2013 Deposition of Claimant

Claimant's deposition was taken on February 20, 2013. (EX 15 at 9). When asked about his emotional state compared to the last deposition, Claimant responded that he was facing new obstacles and battles in his PTSD and noted that he was thankful to still be here. (EX 15 at 9). Furthermore, Claimant testified that his girlfriend struggles to deal with his PTSD. (EX 15 at 10). Claimant testified that he remains at his house ninety percent of the time and does not go out on vacations or to see movies. (EX 15 at 13). When asked what he had done in the past month, Claimant responded that he had gone shooting and taken his girlfriend out to a restaurant. (EX 15 at 18). Claimant explained that talking to certain people causes anxiety. He testified that he is sometimes afraid to call his mom because he worries that calling her will remind him of the accident. (EX 15 at 22).

Claimant testified regarding his meeting with Dr. Mansheim. (EX 15 at 35). He testified that Dr. Mansheim asked him questions for about thirty minutes. (EX 15 at 35). Claimant testified that his office called five or six days later to request that Claimant return for a test. (EX 15 at 35).

Claimant addressed his meeting with Dr. Mansheim:

Dr. Mansheim did not go into depth with me. And of course, as we were talking, I got quite upset, emotionally upset, at Dr. Mansheim. And I think actually he ended the therapy- or the questions after this occurred. I don't know if Mr. Mansheim knows that once somebody told me that I had struck and ran over somebody, that I then got off the forklift to find the person trapped under there. I had to witness them picking the forklift up and dragging her body out and the ambulance and the fire trucks . . . So I don't understand how Mr. Mansheim can say that you cannot have post-traumatic stress disorder without understanding what actually took place.

(EX 15 at 53).

When asked how his medications are working, Claimant testified:

So right now Dr. Gigi has semi, I would say, dialed in with all my different medications, that they're working better than, you know, things have been working for me. However, like Dr. Newfield explained, it's like having a cold. You can take cold medications, but the symptom's still there. So it helps with- you know, before I was under medication, it was extremely bad to the point to where if anybody had intervened, I was willing to do whatever harm to them to stop them from entering my house.

(EX 15 at 46).

Claimant explained that Employer's allegation that the accident occurred due to the violation of a safety rule has emotionally bothered him. (EX 15 at 49). Claimant also testified that he was upset about the allegation that he may have a problem with drug and alcohol abuse. Claimant testified that he had not recently done drugs, and also testified that he has not used alcohol since his mid-thirties. (EX 15 at 53).

## **DISCUSSION OF RELEVANT EVIDENCE**

### Virginia Workers' Compensation Commission Hearing

Claimant testified that he was involved in an accident on March 28, 2011. (EX 25 at 21). Claimant testified that he realized that his forklift struck a person when a co-worker flagged him down. (EX 25 at 21). He testified that when he got off the forklift, he immediately realized that a woman was pinned underneath. (EX 25 at 22).

Claimant testified:

Her legs were wrapped around the rear axle, they, a couple of people were untangling her legs so that we could drag her body out from underneath and then obviously once we got the body out from underneath, she was pretty mangled, bleeding from the mouth, her arm was mangled. . . It just basically just flesh, burn marks, I mean, you could pretty much see the bone in her arm, her wrist and hand were twisted around backwards.

(EX 25 at 23).

### Dr. Stiles' Medical Records

Claimant presented at Dr. Stiles' office after suffering a work-related accident. (CX 1 at 14). Dr. Stiles noted that Claimant struck and killed a woman while driving his forklift. (CX 1 at 15). She noted that Claimant was "acutely extremely upset, stressed, calmer now." (CX 1 at 15).

During a June 2011 appointment, Dr. Stiles stated:

Patient was seen here a month ago, at that time was saying he was doing well and felt ready to go back to work. Apparently he was not being entirely honest, was still having significant issues, but was hoping that if he pushed himself to go back to work he would be able to adjust. However in the last few weeks he has become significantly worse. He is here today with girlfriend and mother who are concerned about him. They state that he is withdrawn, becomes agitated and upset easily, does not want to do anything or go anywhere.

(CX 1 at 9).

Claimant met with Dr. Stiles on July 26, 2011. (EX 1 at 5). During this appointment, Dr. Stiles noted that Claimant started taking Lexapro to address his PTSD. (CX 1 at 6). Although Dr. Stiles noted that this medication was helping, she stated that Claimant was still having significant trouble “interacting with people or even going out in public,” as well as problems with insomnia, to the point that Claimant was not falling asleep until 4:00 or 5:00 in the morning. (CX 1 at 6). Dr. Stiles met with Claimant on November 14, 2011. (CX 1 at 1). Dr. Stiles noted that Claimant was receiving treatment for his PTSD. (CX 1 at 2). In addition, she noted that Claimant was a pack per day smoker who did not use alcohol. (CX 1 at 2). She noted that Claimant has “periods where he does not want to go out or do anything.” (CX 1 at 2). She also noted that Claimant was sleeping poorly.

#### Dr. Newfield’s Medical Records

Dr. Newfield saw Claimant on July 11, 2011. (CX 2 at 147). Dr. Newfield listed PTSD with anxiety and depression as Claimant’s Axis I. (CX 2 at 147). He noted that Claimant felt very guilty about the accident. (CX 2 at 145). During a July 25, 2011 appointment, Dr. Newfield noted that images of the person, body, and the event occurred over and over in Claimant’s mind. (CX 2 at 143). On August 2, 2011, Claimant informed Dr. Newfield that he was doing a lot better and that the increased medications seemed to help. (CX 2 at 142). On August 17, 2011, Claimant noted that the last week had been bad, as he had met with his attorney and talked to OSHA, which left him feeling upset and agitated. (CX 2 at 141). Dr. Newfield mentioned that the company informed Claimant that he could return to work, but Claimant worried that returning to work would bring back the flashbacks and nightmares. (CX 2 at 141). At an August 31, 2011 appointment, Claimant informed Dr. Newfield that the prospect of seeing a psychiatrist for an independent medical examination was increasing his anxiety. (CX 2 at 139). On September 21, 2011, Claimant noted that good things were occurring and he was helping his family more. (CX 2 at 137).

During an October 13, 2011 appointment, Dr. Newfield noted that Claimant had an anxiety attack after a car reminded him of a vehicle at work. (CX 2 at 135).

On February 20, 2012, Dr. Newfield explained:

We are working to desensitize this, to help him face his fears, and to push against the envelope of PTSD that squeezes his life down into areas of dysfunction. He is working hard in this regard. [Claimant], with the help of Stephanie, is trying to get out of the house more to challenge himself to face his fears. He is still experiencing extremely bad nightmares and is continuing to be very preoccupied with the events that have occurred. The combination of his internal preoccupation and the levels of guilt, shame, and grief that he is experiencing make him unable to work at this point. I am also monitoring suicidality with [Claimant] as well.

(CX 2 at 121).

Claimant acknowledged that the house is his safe place but stated that he has to push against that and try to leave the house more often. (CX 2 at 118). Claimant complained of very vivid dreams. (CX 2 at 113).

On June 11, 2012, Dr. Newfield drafted a report to respond to Dr. Thrasher's report and to explain his treatment of Claimant.

Dr. Newfield stated:

By the end of the initial meeting, it was very clear to me that [Claimant] suffers from very severe Post-Traumatic Stress Disorder (PTSD) with significant levels of anxiety and depression. His avoidance behaviors, intense preoccupation with the events, and disruption of daily functioning, including isolation, sleep disturbance, and flashback experiences make for that diagnostic impression.

(CX 2 at 99).

Dr. Newfield opined that "any job at the waterfront would be extremely difficult and probably unlikely for [Claimant], although return to some form of meaningful employment continues to be a direction of therapy." (CX 2 at 104). Furthermore Dr. Newfield explained that Claimant was at risk for "episodic periods of deterioration." (CX 2 at 105).

On October 1, 2012, Dr. Newfield noted that Claimant's isolation had worsened, and Claimant described the situation as "a war inside my head." (CX 2 at 82). On October 8, 2012, Claimant informed Dr. Newfield that the Friday before he had broken down and cried for most of the day. (CX 2 at 80). Claimant experienced chest pain and felt like he was having a panic attack. (CX 2 at 80). On October 15, 2012, Claimant informed Dr. Newfield that he was experiencing visual images of the woman killed in the accident out of the corner of his eye. (CX 2 at 78). Claimant further explained that he felt like the woman was walking around with him all of the time. During another appointment, Claimant commented on his lack of desire to experience positive things. (CX 2 at 76).

On December 3, 2012, Dr. Newfield noted Claimant's increasing anger and belligerence. (CX 2 at 66). He stated that Claimant confronted people in a belligerent manner and suffered from increased paranoia. (CX 2 at 66). On January 28, 2013, Dr. Newfield noted that Claimant experienced a rage episode where he followed a car in the neighborhood and felt intense hatred towards the person in the car. (CX 2 at 50). During the next appointment, Dr. Newfield opined that, had Claimant not been in therapy, he likely would have committed suicide. (CX 2 at 52). On February 11, 2013, Claimant informed Dr. Newfield that he had to reschedule his hearing because he could not handle the emotional strain. (CX 2 at 49). During another appointment that month, Claimant informed Dr. Newfield that his girlfriend had moved out, which exacerbated his symptoms. (CX 2 at 47). During a March 4, 2013 appointment, Claimant cried as he described his experiences with powerful and disturbing dreams. (CX 2 at 45). Claimant also suffered a crying episode during a March 21, 2013 appointment. (CX 2 at 38).

During an appointment in April of 2013, Dr. Newfield advised Claimant to stay connected with others and reduce his isolation levels. (CX 2 at 34). During this month, Dr. Newfield also expressed concerns about Claimant's increasing depression. (CX 2 at 25). During a May 2013 appointment, Dr. Newfield noted that Claimant had texted his mother and girlfriend that he loved them and was considering committing suicide with a gun. (CX 2 at 21). On May 20, 2013, Dr. Newfield noted that Claimant seemed intense, which caused Dr. Newfield to note that Claimant's family knew to contact him if they felt a heightened sense of concern. (CX 2 at 18).

#### Dr. Thrasher's October 2, 2011 Report

Dr. Thrasher performed an independent medical examination on September 14, 2011. (CX 5 at 1). Prior to drafting the report, Dr. Thrasher reviewed two letters from Claimant's attorney, Dr. Stiles' records, and an accident report. (CX 5 at 1). Dr. Thrasher spent one and a half hours interviewing Claimant.

Dr. Thrasher began his interview with Claimant by discussing Claimant's depression and reluctance to leave the house. (CX 5 at 3). In addition, Claimant explained the work-place accident to Dr. Thrasher. (CX 5 at 3). Claimant stated that his forklift crushed the decedent, and although he did not remember much of what occurred, he complained of "a few short vivid images," such as "seeing the [victim] trapped under the forklift." (CX 5 at 3).

Regarding initial treatment, Claimant informed Dr. Thrasher that Mr. Griffin did not seem particularly concerned by Claimant's experience. (CX 5 at 3). Claimant explained that Mr. Griffin did not suggest a follow-up appointment after their initial meeting. Claimant suspected that Mr. Griffin "seemed to specialize in working with children and did not seem to have a plan of treatment for him." (CX 5 at 3).

Dr. Thrasher evaluated Claimant's symptoms. He noted that Claimant suffered from depressed mood, insomnia, poor concentration, forgetfulness, and fatigue. (CX 5 at 4). Dr. Thrasher noted that Claimant suffered from "nightmares and flashbacks of the incident with intrusive recollections." (CX 5 at 4).

Dr. Thrasher stated:

He is suffering from intense feelings of shame and guilt over the accident. His judgment is generally intact though the intensity of his shame and guilt affect his thinking and behavior regarding being out of the house or returning to the waterfront. He does show some ideas of reference, but not in a delusional intensity.

(CX 5 at 5).

Dr. Thrasher listed Posttraumatic stress disorder, chronic, and Major depression, single episode, severe, as Claimant's Axis I. (CX 5 at 5). Dr. Thrasher characterized both of these diagnoses as related to the March 28, 2011 accident. In addition, Dr. Thrasher noted that Claimant's difficulty leaving the house prevented him from working. Dr. Thrasher suggested that Claimant might return to the waterfront if he could engage in systematic desensitization with possible accommodations. (CX 5 at 5). Dr. Thrasher stated that "with aggressive psychiatric treatment and psychotherapy, [Claimant] may be able to return to work on the waterfront within six to twelve months." (CX 5 at 6).

#### Dr. Thrasher's February 12, 2012 Report

Dr. Thrasher indicated that he had reviewed the updated medical records. (EX 16 at 1). Dr. Thrasher noted that Dr. Newfield's report indicated the goal of returning Claimant to the waterfront but did not explain the therapy process necessary to return Claimant to work. (EX 16 at 2). Dr. Thrasher recommended increasing the Doxepin dosage to establish a good night's sleep and adding Prazocin to eliminate the nightmares. (EX 16 at 4). In addition, Dr. Thrasher suggested a more broad-spectrum SNRI such as Effexor or Cymbalta. (EX 16 at 4).

#### Dr. Giorgi-Guarnieri's Records

On April 12, 2012, Dr. Giorgi-Guarnieri met with Claimant. She noted that Claimant was taking Lexapro, Saphris, Minipress, and Vyase. (EX 18 at 3). In addition, she noted that Claimant was still waking up three to four times per night and was also struggling with some anger issues. (EX 18 at 3). She also noted that Claimant was suffering from panic attacks. Dr. Giorgi-Guarnieri suggested continued therapy with Dr. Newfield and a trial of propranolol. In an April 24, 2012 office note, Dr. Giorgi-Guarnieri noted that Claimant did not like to leave the house and also felt agitated around others. (EX 18 at 3).

During a May 2012 appointment, Dr. Giorgi-Guarnieri noted that increased stressors were wearing at his mood and his relationship. (CX 3 at 19). During a June 2012 appointment, Dr. Giorgi-Guarnieri noted that Claimant was still having trouble being around other people or leaving the house. (CX 3 at 17). On a July 31, 2012 appointment, Dr. Giorgi-Guarnieri noted that Claimant was doing much worse and was not getting out of bed until the afternoon. (CX 3 at 15). On August 21, 2012, Dr. Giorgi-Guarnieri noted that Claimant had a bad outburst with an intrusive neighbor, and also noted that Claimant was starting to fear driving. (CX 3 at 12). Dr.

Giorgi-Guarnieri noted that Claimant struggled with the two year anniversary of the accident. (CX 3 at 8). Claimant informed Dr. Giorgi-Guarnieri that he “feels better during therapy but 15 mins later the anger bubbles up and he feels like hurting someone.” (CX 3 at 7). Claimant explained that he wanted to vote but could not because he could not handle the crowds. (CX 3 at 6). During an appointment in February of 2013, Claimant explained that there was an episode where he thought someone was following him so he chased that person. (CX 3 at 3).

#### Dr. Mansheim’s December 8, 2012 Report

Dr. Mansheim conducted an independent medical examination of Claimant. (EX 11 at 1). Dr. Mansheim noted that he relied on a one hour interview, a personality assessment inventory, and various medical records. (EX 11 at 1). Dr. Mansheim reviewed records from; Maryview Medical Center, Churchland Family Medicine, Hampton Roads Psychological Associates, Dr. Giorgi-Guarnieri, Dr. Newfield, and Dr. Thrasher. (EX 1 at 11).

Dr. Mansheim noted that Claimant was involved in an accident on March 28, 2011, in which a woman died. (EX 11 at 1). Dr. Mansheim further noted that Claimant presented at Dr. Stiles’s office the next day, where he appeared “acutely extremely upset and stressed.” (EX 11 at 1). Dr. Mansheim stated that Claimant next saw Mr. Griffin, who described Claimant “as most cooperative and engaging,” as well as “genuine and forthcoming in his presentation of the events which prompted the referral.” (EX 11 at 1). Dr. Mansheim stated that, during a June 29, 2011 visit, Claimant reported to Dr. Stiles that he was doing worse and Dr. Stiles opined that Claimant could not go back to work. (EX 11 at 2). Dr. Mansheim also noted that Dr. Newfield diagnosed Claimant with “PTSD with anxiety and depression.” (EX 11 at 2). In addition, Dr. Mansheim noted that Dr. Thrasher diagnosed Claimant with “posttraumatic stress disorder, chronic.” (EX 11 at 3).

Claimant informed Dr. Mansheim that he did not have a history of mental health or addiction issues. (EX 11 at 5). Claimant explained that he struggles to drive a vehicle and generally does not go out in public. In addition, Claimant complained of work-related nightmares three or four times per week. (EX 11 at 5). Claimant stated that “if things go on as they have been” it would “be unreasonable to anticipate” his return to work. (EX 11 at 6). Claimant confessed to thoughts of “hurting others when people come over unexpectedly” and “thoughts of wanting to hurt or kill someone, but not someone in particular.” (EX 11 at 6). When asked whether he heard voices or thought someone was out to get him, Claimant denied such feelings. (EX 11 at 6). However, Claimant stated that he sees a specific individual often when he is out in public, and feels that this cannot be a coincidence. (EX 11 at 6).

Dr. Mansheim had Claimant complete a Personality Assessment Inventory on November 21, 2012. (EX 11 at 7). Dr. Mansheim noted a “tendency to endorse items that presented an unfavorable impression or which represented extremely bizarre and unlikely symptoms.” (EX 11 at 7).

Dr. Mansheim noted that a diagnosis of Post-Traumatic Stress Disorder (PTSD) is predicated on an event where:

The person experienced, witnessed, or was confronted with an even [sic.] or events that involved actual or threatened death or serious injury, or threat to the physical integrity of self or others.

(EX 11 at 7).

Dr. Mansheim opined that the incident experienced by Claimant did not qualify. He explained that Claimant “did not experience a threat to himself, he was never in danger, and if someone had not told him stop his vehicle, he would not have known that something happened.” (EX 11 at 7). Dr. Mansheim noted that a diagnosis of PTSD is also contingent on resultant symptoms. Dr. Mansheim stated that Mr. Griffin noted some symptoms, but explained that these symptoms “were not severe and the prognosis appeared favorable.” (EX 11 at 7). Dr. Mansheim stated that Claimant’s symptoms became progressively more serious and included suicide concerns and nightmares. (EX 11 at 7). Dr. Mansheim noted that, despite the fact that nightmares usually taper off after six to twelve months, Claimant continued to have nightmares three or four times per week. (EX 11 at 7). Furthermore, Dr. Mansheim stated that any attempt to gain more objective data about Claimant’s condition has led to “significant evidence of malingering, attempting to appear more ill than is actually the case. . .” (EX 11 at 8). Dr. Mansheim ultimately concluded that “there is no psychiatric contraindication to vocational training and to employment in any field for which [Claimant] is qualified by virtue of education, training, or experience.” (EX 11 at 8).

#### Dr. Newfield’s Response to Dr. Mansheim’s Report

On January 7, 2013, Dr. Newfield responded to the independent medical examination conducted by Dr. Mansheim. (CX 2 at 59).

Dr. Newfield opined:

The Diagnostic and Statistical Manual clearly states that if a person experiences, witnesses, or is confronted with an event, that they have the potential risk for experiencing this trauma, and this is whether or not the actual or threatened death or serious injury to one’s self or to the physical integrity of others. If the person’s response involves fear, helplessness, and horror, there is the potential for trauma, and this is clearly the circumstance, not just for [Claimant], but for anybody who discovers that they have inadvertently killed somebody due to their actions. Secondly, he is suggesting in his report that [Claimant] might be malingering, and this is quite shocking. He states in Axis I that “Malingering is more likely than not.” There is absolutely no evidence for malingering, and all of the other clinicians who have seen him, including another IME doctor (Dr. Thrasher) have never even hinted at the possibility of malingering. Why is Dr. Mansheim bringing this up? He points out that [Claimant’s] symptoms are “subjective”, and the clinician must rely on the patient in order to make an assessment. Well, that is just the nature of this job.

(CX 2 at 60).

Dr. Newfield also emphasized that it was not unusual for a patient to not fully experience their traumatic symptoms until a while after the accident. (CX 2 at 60).

Dr. Newfield also discussed the Personality Assessment Inventory ordered by Dr. Mansheim. He noted that the Inventory suggested possible PTSD, Major Depressive Disorder, and Schizophrenia. (CX 2 at 61). Dr. Newfield stated that the Inventory likely suggested schizophrenia because the intense flashbacks and unusual visual experiences associated with PTSD have some overlap with schizophrenia. (CX 2 at 61). Dr. Newfield emphasized that standardized tests cannot differentiate symptoms like a clinician. In addition, Dr. Newfield pointed out that, despite Dr. Mansheim's oblique references, there is no evidence that Claimant uses alcohol or drugs. (CX 2 at 61). Regarding the connection between disability payments and malingering, Dr. Newfield noted that merely because a patient's income is compensated does not mean that the patient is malingering. (CX 2 at 62).

Dr. Newfield also addressed Claimant's tardiness to his appointments. Unlike Dr. Mansheim, Dr. Newfield did not attribute Claimant's tardiness to a lack of interest in his treatment. (CX 2 at 62). Instead, Dr. Newfield attributed it to Claimant's issues with isolation, withdrawal, and difficulty breaking away from intrusive thoughts. He noted that "it is very difficult for him to get out of the house and come to meetings." (CX 2 at 62).

Dr. Newfield concluded his report by noting:

This is a massively depressed man who is struggling hard to maintain a foothold in life, who is working diligently in therapy and who is under intensive medication management. To suggest that such a man is malingering appears to be unconscionable and beyond the bounds of what is reasonable from any competent clinical perspective. I hope this injustice to [Claimant] can be resolved quickly.

(CX 2 at 63).

#### May 13, 2013 Deposition of Dr. Mansheim

Dr. Mansheim testified that he received a referral from the U.S. Department of Labor to evaluate [Claimant]. (EX 13 at 11). He explained that the Department of Labor sent him a set of records and an assignment to do a psychiatric evaluation. (EX 13 at 11). Dr. Mansheim noted that Claimant initially met with Mr. Griffin, a licensed clinical social worker. (EX 13 at 12). Dr. Mansheim noted that he worked with Mr. Griffin at the Norfolk Psychiatric Center and has a high opinion of him. (EX 13 at 13). Regarding Mr. Griffin's report, Dr. Mansheim confirmed that Mr. Griffin described Claimant as having "adjustment reaction with depressed mood," which Dr. Mansheim explained to mean that Mr. Griffin believed that Claimant had some symptoms of depression that were not necessarily longstanding, but likely related to a specific event. (EX 13 at 13).

Employer's attorney asked Dr. Mansheim a series of questions regarding whether Claimant's initial limited symptomatology was consistent with PTSD.

Dr. Mansheim explained:

Well, there's more than one course. It is true that there is such a thing as a post-traumatic stress disorder situation that develops over time, but in my experience that's only when people don't realize how serious the situation was in which they found themselves.

(EX 13 at 19).

Dr. Mansheim explained that this was not the case with Claimant, as Claimant immediately understood the severity of the situation. (EX 13 at 19).

Employer's counsel also questioned Dr. Mansheim about the general presentation of individuals with PTSD. (EX 13 at 22). Dr. Mansheim explained that people with PTSD generally do not like to talk about the incident and become tearful and embarrassed. (EX 13 at 22).

When asked about the Personality Assessment Inventory, Dr. Mansheim explained that Claimant endorsed items which suggested "having extremely bizarre and unlikely symptoms." (EX 13 at 24). Dr. Mansheim indicated that it was very odd that the test came back positive for both PTSD or schizophrenia, as a person with undifferentiated schizophrenia should not be similar to a person with PTSD. (EX 13 at 24). Dr. Mansheim opined that, due to Claimant's strange responses, "any one diagnosis maybe wouldn't be any more likely than any other diagnosis based on this report." (EX 13 at 25).

In response to Employer's questions about the incident, Dr. Mansheim opined:

First of all, the event itself in my opinion did not meet criteria for a diagnosis of post-traumatic stress disorder. And the reason was, first of all, that the most common kind of event for post-traumatic stress disorder is one in which the individual himself experiences the possibility of death or serious injury. In this case that didn't occur. Secondly, in a situation in which an individual learns of the death or serious injury of somebody else, it's supposed to be somebody as close as a family member. That wasn't the case either. Thirdly, [Claimant] didn't even find out about this until after it had happened, which I think calls it in to play.

(EX 13 at 26).

Dr. Mansheim also noted that Claimant's personality assessment inventory showed malingering in the clinical range. (EX 13 at 26). When asked which factors pointed towards malingering, Dr. Mansheim mentioned; the results of the psychological test, the worsening of his condition, the number of prescription medications that did not help with Claimant's symptoms,

the inability of Claimant to remember his medications, and Claimant's tardiness to his sessions with Dr. Newfield. (EX 13 at 31). Dr. Mansheim testified that a worsening of symptoms does not necessarily mean that a patient is malingering. (EX 13 at 62). Dr. Mansheim also discussed how Claimant's nightmares were not characteristic of PTSD, as nightmares associated with PTSD are generally peripheral and not focused on the incident itself. (EX 13 at 30). Dr. Mansheim stated that he believed Claimant could return to his Longshore job. (EX 13 at 32). Dr. Mansheim testified that it may be difficult to suggest to one's patient that he is malingering, and noted that one benefit of the independent medical exam is that the examiner is not embarrassed to suggest malingering. (EX 13 at 64).

#### Dr. Newfield's Response to Dr. Mansheim's Deposition

Dr. Newfield wrote another report to address the opinions Dr. Mansheim expressed in his deposition. First, Dr. Newfield addressed Dr. Mansheim's emphasis on Claimant's lack of intense symptoms immediately following the incident. (CX 2 at 2). Dr. Newfield noted that "[o]ften, patients who are seen very early on appear to have acute anxiety or adjustment problems, as they begin to deal with the full psychological impact of the events . . ." (CX 2 at 2). Dr. Newfield acknowledged that long term delayed onset is rare, but opined that a short-term evolution of symptomatology is normal. (CX 2 at 3).

In addition, Dr. Newfield confronted Dr. Mansheim's assertion that Claimant did not meet the diagnostic criteria for PTSD. (CX 2 at 6).

Dr. Newfield stated that the following must be present:

'That a person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others,' and that 'the person's experience involve fear, helplessness, or horror.'

(CX 2 at 6).

Dr. Newfield explained that Dr. Mansheim believed that Claimant could not have PTSD because Claimant did not find out about the decedent's death until after it happened. He noted that there "was a small delay between the time [Claimant] ran somebody over, and because of the size of the truck and the configuration of the load, that he did not know. . ." (CX 2 at 7). Dr. Newfield emphasized that Claimant's car was stopped and Claimant witnessed the decedent's mangled body underneath the forklift. (CX 2 at 7). Dr. Newfield explained that he failed to comprehend why Dr. Mansheim would make such a distinction between a situation where a person actively saw that they hit the decedent and a situation where, immediately after impact, the person viewed the mangled body. (CX 2 at 7).

Dr. Newfield addressed Dr. Mansheim's belief that seeing a mangled body could not meet the criteria for PTSD. Dr. Newfield explained that Dr. Mansheim was of the opinion that such an experience could not satisfy the requirements, because then more than half of the population would meet the criteria for the diagnosis. (CX 2 at 9). First, Dr. Newfield noted that

Dr. Mansheim vastly overestimated the number of people who view mangled bodies in real life and not on television. (CX 2 at 9). Second, Dr. Newfield noted that those who are exposed to traumatic and horrific events often do not develop PTSD. (CX 2 at 9).

In addressing Dr. Mansheim's report, Dr. Newfield also confronted the issue of malingering. (CX 2 at 7). Dr. Newfield noted that Dr. Mansheim interpreted the Personality Assessment Inventory to show evidence of malingering. (CX 2 at 7).

Dr. Newfield explained:

It [Personality Assessment Inventory] merely pointed out three questions that [Claimant] answered that were in the malingering category, but that this did not rise to the level of there being a possible diagnosis. I might add, at this point, that there is one substance abuse answer under the critical term endorsement of denying that 'my drinking has never gotten me into trouble.' This does not rise to the level of this person having a substance abuse problem either, and indeed, is not a differential diagnosis. Indeed, the critical items merely are there to alert the clinician working with a patient to review those items with the patient, as the answers may be important to understand. They are 'orange warning lights' to alert the clinician, rather than to make a diagnosis. For Dr. Mansheim to ignore all of the major clinical suggestions of this report and move to some minor considerations of critical items and say that this somehow alerted him to a diagnosis of malingering, is either a deliberate distortion, or a misreading of, or a misunderstanding of the nature of these psychological tests.

(CX 2 at 8).

Dr. Newfield strongly disagreed with Dr. Mansheim's assertion that Claimant's inability to recall all of his prescriptions suggested malingering. (CX 2 at 12). First, Dr. Newfield noted that Claimant's medications are often modified or changed. (CX 2 at 12). Second, Dr. Newfield stated, "I cannot tell you how many patients I have asked to give me the names of their medications and they could not accurately reproduce all of their medications or remember their names. . ." (CX 2 at 12). He explained that this common problem in any clinical practice should not be interpreted as a sign of malingering. (CX 2 at 12).

Dr. Newfield concluded his report by opining:

Overall then, it is my clinical opinion, and the clinical opinion of other clinicians, that [Claimant] is suffering from Severe Post-Traumatic Stress Disorder. This is consistent with the clinical data, and he is appropriately being treated for his condition. I believe that Dr. Mansheim's interpretations are incorrect, in that there is no consistent evidence for malingering, and that many of his interpretations are based either on a misreading of a psychological report, a misrepresentation of the clinical criteria as reported in the Diagnostic and Statistical Manual, and, unfortunately, based on a very brief, one-hour

interaction with [Claimant], which I believe does not qualify as being enough time to make an appropriate clinical conclusion and diagnosis.

(CX 2 at 13).

#### Personality Assessment Inventory Clinical Interpretive Report

Dr. Mansheim ordered a Personality Assessment Inventory of Claimant on November 21, 2012. (EX 12 at 1). The report stated that certain indicators fell outside the normal range “suggesting that the respondent may not have answered in a completely forthright manner.” (EX 12 at 6). The report also noted that Claimant’s response patterns indicated “a defensiveness about particular shortcomings as well as an exaggeration of certain problems.” (EX 12 at 6). In addition, the findings suggested a tendency to endorse “items that present an unfavorable impression or represent extremely bizarre and unlikely symptoms.” (EX 12 at 6).

The report suggested that the Claimant is:

[A] person with significant thinking and concentration problems, accompanied by prominent distress and ruminative worry. The respondent is likely to be withdrawn and isolated, feeling estranged from the people around him. As a result, he probably has few if any close interpersonal relationships and tends to become quite anxious and threatened by such relationships.

(EX 12 at 7).

The report further noted that Claimant is most likely severely constricted by his psychological problems. (EX 12 at 7). Importantly, Claimant’s test results suggested that he “likely experienced a disturbing traumatic event in the past- an event that continues to distress him and produce recurrent episodes of anxiety.” (EX 12 at 7). The report listed PTSD, schizophrenia, and major depressive disorder as possible Axis I Diagnostic Considerations. (EX 12 at 10).

#### Employment and Earnings Documentation

Employer filled out a Notice of Final Payment and Suspension of Compensation Payments on July 12, 2010. (CX 4 at 2). The Notice indicated that Employer paid Claimant temporary total disability payments at a compensation rate of \$752.98 per week from January 6, 2010 to July 6, 2010. (CX 4 at 2). Employer paid Claimant a total of \$19,577.74.

Claimant submitted his 2010 W-2 and earnings summary. (CX 4 at 4). The W-2 stated that Claimant earned \$25,381.00 in gross pay with Ceres Marine Terminals in 2010. In addition, Claimant earned \$1,079.00 in wages with CP&O. (CX 4 at 5). Claimant earned \$2,986.80 with the HRSA-ILA Vacation and Holiday Fund and \$12,157.11 with the HRSA-ILA Container Royalty Fund No. 1, and \$24.00 with the HRSA-ILA Welfare Fund in 2010. (CX 4 at 6-8).

An earnings statement from April 7, 2011 stated that Claimant had been paid \$14,219.50 year to date. (CX 4 at 10). A pay stub from March 27, 2011 stated that Claimant's year to date net pay was \$214.79. (CX 4 at 11). For the period dated October 1, 2010 to September 30, 2011, Claimant earned gross payments of \$2,948.40 for vacation, \$15,278.80 for container royalty, and \$3,166.72 for holiday. (CX 4 at 13-15).

Claimant's eligibility certificate from November 22, 2011 contained the information in the chart below. (CX 4 at 16).

|                         | Work  | Comp  | Training | Total  |
|-------------------------|-------|-------|----------|--------|
| Life Ins.               | 842.5 | 690.8 | 4.0      | 1537.3 |
| Short Term Dis.         | 842.5 | 717.4 | 4.0      | 1563.9 |
| Pension                 | 842.5 | 531.4 | 4.0      | 1377.9 |
| Container Royalty       | 842.5 | 531.4 | 4.0      | 1377.9 |
| Vacation & Holiday Fund | 842.5 | 584.4 | 4.0      | 1430.9 |

The form indicated that the container royalty entitlement was for the 2010-2011 contract year. (CX 4 at 16).

### Hampton Roads Shipping Manual

On July 14, 2005, Claimant signed a document indicating that he attended the HRSA/VIT Orientation Class and received the HRSA-ILA Port Policies and Procedures. (EX 26 at 1). The fourteen page packet of policies and procedures contained a port policy on the specific rules for forklift trucks in the Port of Hampton Roads. (EX 26 at 9). The section contained a long bullet list of rules. One of these rules stated, "if the load is too high or too wide to see around, drive in reverse." (EX 29 at 9).

## **DISCUSSION**

### Position of the Parties

#### Claimant's Position

Claimant submitted a post-hearing brief on August 28, 2013. Claimant first addressed Employer's assertion that the situation is governed by the zone of danger test. Claimant stated that the zone of danger test derives from negligence principles and is not applicable to the LHWCA. (Claimant's Brief at 3). Furthermore, Claimant argued that his claim would not be barred by the test, as he was subjected to risk of physical harm while operating a forklift on a busy pier. (Claimant's Brief at 3).

Claimant noted that Dr. Georgi-Guarnieri and Dr. Newfield diagnosed him with Post Traumatic Stress Disorder. (Claimant's Brief at 1). In addition, Claimant noted that Dr. Thrasher opined that Claimant suffers from PTSD. Claimant noted that Dr. Mansheim did not diagnose

PTSD, but argued that Dr. Mansheim's report is unreliable. (Claimant's Brief at 4). Specifically, Claimant explained that Dr. Mansheim relied upon a computer graded personality assessment inventory. In addition, Claimant stated that Dr. Mansheim's testing was not authorized as the District Director only directed Dr. Mansheim to interview the Claimant and file a report. (Claimant's Brief at 5). Therefore, Claimant argued that the opinions of Drs. Georgi-Guarnieri, Newfield, and Thrasher should be credited over the opinion of Dr. Mansheim. Regarding average weekly wage, Claimant asserted that container royalty payments should be included. In his conclusion, Claimant requested permanent total disability benefits from March 28, 2011 to the present and continuing. (Claimant's Brief at 6).

### Employer's Position

Employer submitted a brief on September 10, 2013. Employer conceded that Claimant met his prima facie case under section 20, but argued that Dr. Mansheim's report rebutted the presumption. (Employer's Brief at 24). Employer argued that Dr. Mansheim's opinion should be given dispositive weight because of his status as the section 7(e) independent examiner. (Employer's Brief at 25). In making this assertion, Employer cited to *Cotton v. Newport News Shipbuilding*, 21 BRBS 55 (A.L.J. 1988). Employer also stated that the legislative history demonstrated that Congress intended that the administrative law judge afford exclusive weight to the independent examiner's opinion. Furthermore, Employer characterized Dr. Mansheim's credentials as impressive and characterized his opinion as well-reasoned. (Employer's Brief at 27). Employer characterized Claimant's treating psychologist as biased because of the psychologist's hope that Employer will pay the outstanding treatment bills.

In addition, Employer argued that Claimant cannot recover due to the zone of danger test. (Employer's Brief at 28). Employer noted that recovery for emotional distress under the Federal Employer's Liability Act is limited to plaintiffs who sustain physical impact due to the defendant's negligent conduct or plaintiffs who are placed in immediate risk of physical harm. (Employer's Brief at 29). Employer also cited *Barker v. Hercules Offshore, Inc* for the proposition that a bystander cannot recover for psychological injury under the LHWCA. 706 F.3d 680, 697 (5th Cir. 2013).

Employer argued that Claimant's average weekly wage calculation contained three flaws. First, Employer noted that Claimant included \$16,135.42 in workers' compensation disability benefits. Second, Employer argued that Claimant double counted his vacation pay and container royalties. Third, Employer noted that Claimant did not work enough hours to earn the vacation pay and container royalties. (Employer's Brief at 31). Employer cited *Universal Maritime v. Wright* and stated that container royalty payments earned based on disability hours are not wages. 155 F.3d 311 (4th Cir. 1998).

### Disability Benefits for Psychological Harm

In its brief, Employer contends that Claimant is ineligible for disability benefits because Claimant does not meet the requirements of the zone of danger test. According to Employer, a claimant may only recover for psychological distress if he sustains a physical impact or is placed in immediate risk of physical harm. Employer referenced *Barker v. Hercules Offshore, Inc.*, a

Fifth Circuit case, where the court applied the zone of danger test to a Longshore claimant. 706 F.3d 680, 697 (4th Cir. 2013).

It is well-settled that a psychological impairment which is work-related is compensable under the Act. *Pedroza v. Benefits Review Board*, 624 F.3d 926, 931 (9th Cir. 2010); *Sanders v. Alabama Dry Dock*, 22 BRBS 340, 342 (1989). The Section 20(a) presumption is applicable in psychological injury cases. *Sewell v. Noncommissioned Officers' Open Mess*, 32 BRBS 127, 128 (1997). When the case involves an allegation of stressful working conditions, the claimant is not required to show unusually stressful conditions. *Id.* The administrative law judge must determine whether employment events, which could have caused the harm sustained by claimant, in fact occurred. *Bath Iron Works Corps v. Preston*, 380 F. 3d 597, 606, 38 BRBS 60 (CRT) (1st Cir. 2004).

The Benefits Review Board has repeatedly approved of the granting of benefits to claimants who have suffered psychological injury without physical injury. In *Marino v. Navy Exchange*, the claimant argued, among other things, that his “psychological injury was the product of cumulative stress on the job due to supervising a number of locations, insufficient personnel to do the job, working more than the required number of hours, and performing the duties of his subordinates. . . .” 20 BRBS 166, 168 (1988). The Benefits Review Board determined that this cumulative stress could have resulted in a compensable psychological injury and remanded the case. *Id.* In *Sewell v. Noncommissioned Officers*, a claimant filed for disability benefits after she developed depression due to her stressful relationship with her supervisor. The Board reversed the administrative law judge’s determination that claimant’s psychological condition was not work-related, and clearly treated the psychological injury as one which qualified for disability payments. *Id.* Although Employer suggested in its brief that Claimant must suffer a physical injury or the threat of a physical injury to qualify for disability benefits for a psychological injury, the Benefits Review Board has not expressed such a requirement.

In *Pedroza v. Benefits Review Board*, the Ninth Circuit expressed its approval of the “Marino-Sewell line of cases.” 624 F.3d 926, 932 (9th Cir. 2010).

The court stated:

As a result of *Marino* and *Sewell*, the BRB constructed a doctrine that allows psychological injuries to be compensable, if the claimant can demonstrate that the psychological injuries are caused by general working conditions and not legitimate personnel decisions. This doctrine properly interprets the Act in light of its underlying policy.

*Id.* at 932.

In *Army and Airforce Exchange Service v. Drake*, the claimant asserted that he developed anxiety and depression due to the requirement that he perform work pursuant to the instructions of his supervisors. No. 96-4229, 1998 WL 869959, at \*2 (6th Cir. Dec. 3, 1998). The court noted that a claimant can receive benefits for psychological injuries. *Id.* However, the

court determined that claimant could not recover in this case because his psychological injury stemmed from a legitimate personnel action. *Id.* The court did not indicate that the lack of a physical injury or threat of physical injury would act as a bar to recovery. *Id.*

The Fifth Circuit is the only circuit that has applied a zone of danger test to deny claimants benefits for certain psychological injuries. As this case arises under the United States Court of Appeals for the Fourth Circuit, the Fifth Circuit's decision could only serve as persuasive authority. Under the zone of danger rule, a plaintiff may only recover if he was subject to actual impact or was within a dangerous zone. *Dierker v. Gypsum*, 606 F. Supp. 566, 568 (1985). In *Barker v. Hercules Offshore, Inc.*, the court considered whether the zone of danger test prohibited a bystander who was psychologically injured after observing a coworker's death from receiving benefits under the LHWCA. *Id.* The Fifth Circuit summarily stated that the claimant "is not entitled to recover under the LHWCA for the same reason that he cannot recover under the bystander rule under general maritime law." *Id.* at 697. The court cited *Dierker v. Gypsum Transportation* as its only support for this determination. 606 F.Supp. 566, 567-69 (E.D. La. 1985).

The court in *Dierker v. Gypsum Transportation* analyzed whether a longshoreman was entitled to disability benefits when he sustained a psychological injury after observing a coworker's death. *Id.* at 567. The court characterized the filing for benefits under the Longshore Act as a "negligence action." *Id.* Therefore, the court borrowed the zone of danger test from the Restatement (Second) of Torts. Despite the characterization by the U.S. District Court in *Dierker*, longshore cases are not negligence actions. *Adams v. Metro Machine, Ben. Rev. Bd. Nos. 98-0550 and 98-0550A, slip op. at 5 (Jan. 1999)(unpub.)*. Therefore, general negligence principles or principles derived from acts such as the Federal Employees Liability Act are often inapposite. *Id.* Longshore case law has established that a claimant can obtain benefits for a work-related psychological injury. See *Pedroza v. Benefits Review Board*, 624 F.3d 926, 931 (9th Cir. 2010); *Dir., OWCP v. Potomac Electric Power Co.*, 607 F. 2d 1378 (D.C. Cir. 1979); *American National Red Cross v. Hagen*, 327 F. 2d 559 (7th Cir. 1964); *Sewell v. Noncommissioned Officers' Open Mess*, 32 BRBS 127, 128 (1997); *Sanders v. Alabama Dry Dock*, 22 BRBS 340, 342 (1989); *Marino v. Navy Exchange*, 20 BRBS 166 (1988). It would be contrary to the purposes of the Act to carve out a negligence law based exception whereby claimants are not entitled to benefits if they are emotionally harmed without being physically harmed or threatened with physical harm. I therefore reject Employer's contention that a claimant cannot recover for psychological injury unless he sustains a physical injury or is placed in immediate risk of harm.

### Causation

Section 20(a) provides a claimant with a presumption that his condition is causally related to his employment if he establishes a prima facie case by proving that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. See *U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley)*, 455 U.S. 608, 615, 14 BRBS 631, 633 (1982), rev'g *Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980). A claimant's subjective complaints of symptoms and pain can be sufficient to establish the elements of

physical harm if such complaints are found credible. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981).

If the claimant invokes the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Swinton v. J. Frank Kelly Inc.*, 554 F.2d 1075, 1081, 4 BRBS 466, 474-475 (D.C. Cir), cert. denied, 429 U.S. 820 (1976). If the presumption is rebutted, it falls out and the administrative law judge must weigh all the evidence and render a decision that is based on the record as a whole. *Id.* at 1082, fn. 35. This rule is an application of the “bursting bubble” theory of evidentiary presumptions, derived from the Supreme Court’s interpretation of Section 20(d) in *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). See *Brennan v. Bethlehem Steel Corp.*, 7 BRBS 947 (1978) (applying *Del Vecchio* to Section 20(a)).

Under Section 556(d) of the APA, the claimant bears the ultimate burden of persuasion by a preponderance of the evidence. See 5 U.S.C. § 556(d). Because of this allocation of the burden of proof, the United States Supreme Court has concluded that an injured worker claiming compensation must prove the elements of his claim by a “preponderance of the evidence.” The “true doubt” rule under which the claimant wins if the evidence is evenly balanced, is inconsistent with the APA, 5 U.S.C. § 556(d). *Director, OWCP v. Greenwich Collieries, [Maher Terminals]*, 512 U.S. 267, 280-81 (1994).

#### Prima Facie Case

The Claimant may establish a prima facie case by showing a harm and working conditions, or an accident, which could have caused, aggravated, or accelerated the condition. Claimant has submitted sufficient evidence to demonstrate that he suffers from a psychological harm. Dr. Newfield has diagnosed Claimant with PTSD, with accompanying anxiety and depression. (CX 2 at 147). Dr. Thrasher diagnosed Claimant with posttraumatic stress disorder, chronic. (CX 5 at 5). Claimant testified that he avoids others and engages in self-destructive patterns. (TR 27). During the hearing, Claimant testified that he feels he must remain in the house because of his outbursts. (TR 63). During his October 2011 deposition, Claimant testified that he has “problems with everything,” and that he went into a frenzy when he saw a shipping container. (EX 19 at 51). Dr. Newfield regularly monitors Claimant for suicidal thoughts and ideations. (CX 2 at 21). Claimant informed Dr. Newfield that the police came to his home after he decided to commit suicide with a gun. (CX 2 at 21).

To establish a prima facie case, Claimant must also demonstrate that working conditions existed, or an accident occurred, which could have caused, aggravated, or accelerated this psychological condition. Claimant testified that, while at work, he veered his forklift to the left, and hit one of the women working as a spotter. (TR 17). He further testified that he saw the decedent pinned underneath the forklift with a portion of her body poking out from beneath the machine. (TR 18). According to Claimant, the decedent’s arm was burned and mangled, her leg was wrapped around the axle, and she was bleeding from the mouth. (TR 19).

Claimant has consistently depicted a gruesome scene when describing the accident to administrative officials, attorneys, and medical professionals. Dr. Newfield attributed

Claimant's psychological problems to the work accident, and certainly believed that Claimant's experience could have led to psychological trauma. (CX 2 at 63). Dr. Thrasher opined that Claimant has PTSD and major depression, both of which he related to the work accident. (CX 5 at 5). Even Dr. Mansheim, who does not believe that the work accident could have caused PTSD, did not opine that the accident would not have caused, aggravated, or accelerated Claimant's psychological condition. I find that Claimant has established that a work accident occurred which could have caused his psychological harm. Therefore, Claimant has established his prima facie case.

#### Employer Rebuttal

Once the presumption is invoked, Section 20(a) places the burden on the employer to come forward with substantial countervailing evidence to rebut the presumption that the injury was caused by the claimant's employment. Swinton, 554 F.2d at 1081. The United States Supreme Court has defined "substantial evidence" as "more than a mere scintilla," or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951); Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1145, 25 BRBS 85, 87 (CRT) (9th Cir. 1991); Abosso v. D.C. Transit Sys., 7 BRBS 47, 50 (1977); Avignone Freres Inc. v. Cardillo, 117 F.2d 385, 386 (D.C. Cir. 1940).

Dr. Mansheim conducted an independent medical examination of the Claimant on December 8, 2012. (EX 11 at 1). Dr. Mansheim opined that the event experienced by Claimant was not a qualifying event under the PTSD diagnosis criteria. (EX 1 at 7). In addition, he expressed some concern with malingering. (EX 11 at 8). Furthermore, Dr. Mansheim noted that there was no "psychiatric contraindication to vocational training and to employment in any field for which [Claimant] is qualified by virtue of education, training, or experience." (EX 11 at 8). As Dr. Mansheim opined that Claimant does not have PTSD and is able to work from a psychiatric perspective, I find that Employer has presented substantial countervailing evidence to rebut the presumption that Claimant's injury was caused by his employment.

#### Weighing of the Evidence

As the presumption is rebutted, it falls out, and I must weigh all the evidence and render a decision that is based on the record as a whole. Of the opining medical professionals, Dr. Newfield and Dr. Thrasher have diagnosed Claimant with PTSD. Dr. Giorgi-Guarnieri provided progress notes on Claimant's medications but did not provide an opinion of Claimant's psychological state. In contrast, Dr. Mansheim opined that Claimant demonstrated "significant evidence of malingering, attempting to appear more ill than is actually the case," and was not suffering from PTSD. (EX 11 at 8).

At the outset, I will address Employer's contention that I should give Dr. Mansheim's opinion dispositive weight because Dr. Mansheim is the section 7(e) medical examiner. Employer argued that the administrative law judge in *Cotton v. Newport News Shipbuilding* determined that Congress intended that the reports of the independent medical experts be given dispositive weight. 21 BRBS 55 (A.L.J. 1988). However, Employer's counsel neglected to

further explain that the Benefits Review Board reversed the administrative law judge's determination. The Board noted that "such reports are not binding on the fact-finder; rather, they are designed to provide the fact-finder a means to obtain a reliable, independent evaluation. . ." Cotton v. Newport News Shipbuilding, 23 BRBS 380, 387 (1990). The Board remanded the case and directed the administrative law judge to weigh the opinions of the independent medical examiners "along with the other medical opinions of record and explain his basis for crediting the evidence upon which he relies." Id. Employer's counsel cited only one Longshore case to support his argument that an independent medical examiner is entitled to dispositive weight. As the cited case was overturned by the Benefits Review Board, I do not find Employer's argument persuasive. Cotton v. Newport News Shipbuilding, 23 BRBS 380, 387 (1990). As an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner, I will weigh the conflicting medical reports.

Dr. Newfield and Dr. Thrasher expressed their opinions that Claimant is suffering from PTSD and is incapable of working. In contrast, Dr. Mansheim opined that Claimant is not suffering from a serious psychological injury and is capable of returning to work.

Dr. Newfield provided his understanding of Claimant's psychological condition:

Overall then, it is my clinical opinion, and the clinical opinion of other clinicians, that [Claimant] is suffering from Severe Post-Traumatic Stress Disorder. This is consistent with the clinical data, and he is appropriately being treated for his condition. I believe that Dr. Mansheim's interpretations are incorrect, in that there is no consistent evidence for malingering. . .

(CX 2 at 13).

Dr. Mansheim premised his belief that Claimant was not suffering from PTSD, at least in part, on his opinion that Claimant's work experience did not constitute a qualifying diagnostic event. (EX 11 at 7). Dr. Mansheim stated that Claimant "did not experience a threat to himself, he was never in danger, and if someone had not told him to stop his vehicle, he would not have known that something happened." (EX 11 at 7).

Dr. Mansheim noted that a diagnosis of Post-Traumatic Stress Disorder (PTSD) is predicated on an event where:

The person experienced, witnessed, or was confronted with an even (sic.) or events that involved actual or threatened death or serious injury, or threat to the physical integrity of self or others.

(EX 11 at 7).

In response to Employer's questions about the incident, Dr. Mansheim opined:

First of all, the event itself in my opinion did not meet criteria for a diagnosis of post-traumatic stress disorder. And the reason was, first of all, that the most common kind of event for post-traumatic stress disorder is one in which the individual himself experiences the possibility of death or serious injury. In this case that didn't occur. Secondly, in a situation in which an individual learns of the death or serious injury of somebody else, it's supposed to be somebody as close as a family member. That wasn't the case either. Thirdly, [Claimant] didn't even find out about this until after it had happened, which I think calls it in to play.

(EX 13 at 26).

Dr. Mansheim also expressed his opinion that:

I don't think it meets the criteria because it was a question of being upset by a scene which could only be described as disgusting. No one wants to see mangled bodies, but if everybody that presented with that sort of image were diagnosed with post-traumatic stress disorder, more than half the population would meet the criteria for the diagnosis.

(EX 13 at 27).

Dr. Mansheim noted that a diagnosis of PTSD is also contingent on resultant symptoms. Dr. Mansheim stated that Mr. Griffin noted some symptoms, but explained that these symptoms "were not severe and the prognosis appeared favorable." (EX 11 at 7). Dr. Mansheim stated that Claimant's symptoms became progressively more serious and included suicide concerns and nightmares. (EX 11 at 7). Dr. Mansheim noted that, despite the fact that nightmares usually taper off after six to twelve months, Claimant continued to have nightmares three or four times per week. (EX 11 at 7). Furthermore, Dr. Mansheim stated that any attempt to gain more objective data about Claimant's condition has led to "significant evidence of malingering, attempting to appear more ill than is actually the case. . ." (EX 11 at 8). Mr. Mansheim's ultimate conclusion was that "there is no psychiatric contraindication to vocational training and to employment in any field for which [Claimant] is qualified by virtue of education, training, or experience." (EX 11 at 8).

I place substantially less weight on Dr. Mansheim's opinion than I do on Dr. Newfield's opinion. First, in determining the weight to be given to conflicting medical opinions, one factor that may be considered is whether a physician rendering an opinion is the claimant's treating physician. In *Black Lung Cases*, the Fourth Circuit, whose authority is controlling in this case, has stated that a treating physician is entitled to "great, although not necessarily dispositive weight." *Grigg v. Director, OWCP*, 28 F.3d 416, 420 (4th Cir. 1994); *King v. Califano*, 615 F.2d 1018, 1020 (4th Cir. 1980). The considerations in *Longshore* cases are nearly identical. In *Longshore* cases, the opinion of the treating physician is generally accorded greater weight, as the treating physician is employed to cure and has the opportunity to know and observe the

claimant. *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998). Dr. Newfield began treating Claimant in July of 2011 and continues to treat Claimant, meeting with him once or twice per week. (CX 2 at 1-147). Accordingly, in forming his opinion, Dr. Newfield had the benefit of observing Claimant's condition over an extended period of time. Dr. Newfield's well-reasoned and well-documented letters and records indicate a more comprehensive understanding of Claimant's psychological condition. By contrast, in forming his opinion that Claimant is likely malingering, Dr. Mansheim relied on a one hour interview, a standardized test called a Personality Assessment Inventory, and various medical records. (EX 11 at 1). I note that one of Dr. Newfield's documents should have been obtained through deposition with cross-examination and not through a report. Nevertheless, I find that the treating physician considerations are more important than the format of the evidence. I find that it is appropriate to place more weight on the opinion of Dr. Newfield, the treating health care provider, as he has observed Claimant's psychological status on a once or twice per week basis, rather than during a one-hour interview.

An unsubstantiated statement by Dr. Mansheim during his deposition also lessens the weight I afford to his opinion. Dr. Mansheim discussed whether killing someone in an accident and viewing their mangled body could qualify as a traumatic event under the diagnostic criteria. (EX 13 at 27). Dr. Mansheim opined that such an event could not qualify. He noted that such a scene "could only be described as disgusting," but also stated that "if everybody that presented with that sort of image were diagnosed with post-traumatic stress disorder, more than half the population would meet the criteria for the diagnosis." (EX 13 at 27). Dr. Mansheim presented no support for his opinion that half of the population has witnessed an image as traumatizing as a patient's first hand observation of a mangled body produced in an accident caused by that patient. (EX 13 at 27). Especially given the surprising nature of this statement, it would be important for Dr. Mansheim to cite a source for his opinion. Dr. Mansheim did not give any indication of how he reached such a conclusion. Even if one were to credit Dr. Mansheim's apparent suggestion that Claimant's role in the death is irrelevant, Dr. Mansheim's estimates on population experience raise concerns that his report is not well-reasoned and well-documented. (CX 2 at 9).

I also place slightly lessened weight on Dr. Mansheim's report based on his considerable reliance on a standardized test. During the deposition, Dr. Mansheim was asked whether the Personality Assessment Inventory was interpreted by his psychologist. (EX 13 at 36). Dr. Mansheim explained that the test "hasn't really been interpreted." (EX 13 at 36). Dr. Mansheim noted that he relied on "the report as it is generated by the computer after the individual fills out the form and answers the questions." (EX 13 at 36).

A disclaimer on the front page of the Personality Assessment Inventory reads:

The interpretive information contained in this report should be viewed as only one source of hypothesis about the individual being evaluated. No decisions should be based solely on the information contained in this report. The material should be integrated with all other sources of information in reaching professional decisions about this individual.

(EX 12 at 1).

Dr. Mansheim did not submit any documentation on the reliability of the computer generated responses supplied by this standardized test. Given the lack of information about the test's reliability, it is concerning that Dr. Mansheim placed significant weight on the report. Given the concerns with Dr. Mansheim's limited interview with Claimant, his unsubstantiated statement on experiences within the population, and reliance on a standardized test, I place limited weight on his opinion.

I place greater weight on Dr. Newfield's opinion that Claimant suffers from a severe psychological impairment, because it is supported by Claimant's credible complaints and Dr. Thrasher's opinion. Both Dr. Thrasher and Dr. Newfield diagnosed Claimant with PTSD in well-documented and well-reasoned opinions. In addition, these reports reflect Claimant's consistent complaints of isolation, sleep disturbance, vivid dreams, flashbacks, anxiety, and depression. Claimant provided consistent accounts of the accident and his resultant psychological symptoms to medical professionals and those involved in his claim for benefits. I place significant weight on Dr. Newfield's opinion because it is complemented by Dr. Thrasher's report and reflects Claimant's credible complaints. As I place the greatest weight on Dr. Newfield's opinion, I find that Claimant is suffering from work-accident related PTSD.

#### Extent of Disability

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. Under current case law, the employee has the initial burden of proving total disability. 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. During a September 18, 2012 appointment, Dr. Newfield addressed Employer's concerns regarding when Claimant could return to work. (CX 2 at 85). Dr. Newfield reminded Employer that Dr. Thrasher felt that it would take at least a year of treatment. (CX 2 at 85). Dr. Newfield indicated that it was too soon to even make predictions regarding a return to work. (CX 2 at 85).

In contrast, Dr. Mansheim opined that Claimant can return to his regular employment. Dr. Mansheim had Claimant complete a Personality Assessment Inventory on November 21, 2012. (EX 11 at 7). Dr. Mansheim noted a "tendency to endorse items that presented an unfavorable impression or which represented extremely bizarre and unlikely symptoms." (EX 11 at 7). Dr. Mansheim opined that Claimant could return to work because he was malingering and not suffering from PTSD.

As noted above, Dr. Newfield and Dr. Thrasher characterize Claimant as incapable of working.

In a June 11, 2012 report, Dr. Newfield responded to Dr. Thrasher's comments:

Dr. Thrasher concludes by answering a number of questions, stating that he feels that [Claimant] continues to suffer from a chronic Post-Traumatic Stress Disorder with a Major Depression of the Severe Range. He felt that

[Claimant] was psychiatrically disabled from any employment at this time. He notes that ‘his fear, shame, guilt, depression, and anger make social interactions intolerable for him currently.’ He felt that [Claimant] could not return to work as a longshoreman at this time, and it appeared ‘unlikely’ that [Claimant] would be able to return to full duty as a longshoreman at any time. . . He felt that ‘in the best case’ that when the acute psychiatric symptoms are well managed with medication and psychotherapy, it would likely take ‘1 to 2 years of effort and extremely strong motivation on [Claimant’s] part to be able to desensitize him to work.’ I am certainly in agreement that any job at the waterfront would be extremely difficult and probably unlikely for [Claimant], although return to some form of meaningful employment continues to be a direction of therapy.”

(CX 2 at 104).

As noted above, I place less weight on Dr. Mansheim’s opinion, as Dr. Mansheim spent only one hour with Claimant, relied heavily on a standardized test, and provided an opinion that was not well-documented. As I place the greatest weight on Claimant’s treating professional, I find that Claimant has demonstrated that he cannot return to his usual employment.

If the claimant establishes his prima facie case that he is unable to return to his usual employment, the burden shifts to the employer to demonstrate the availability of suitable alternative employment (“SAE”) for the claimant in order to avoid a finding that the disability is a “total” disability under the Act. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP (Chappell)*, 592 F.2d 762, 765, 10 BRBS 81, 83 (4th Cir. 1979). To satisfy this burden an employer may either itself make SAE available to the injured employee or present evidence demonstrating that SAE is available to the injured worker in the relevant labor market. *Norfolk Shipbuilding and Dry Dock Co. v. Hord*, 193 F.3d 797, 800 (4<sup>th</sup> Cir. 1999).

To establish suitable alternate employment, the employer must show the existence of realistic job opportunities that Claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *Trans-State Dredging*, 731 F.2d at 201, 16 BRBS at 76 (CRT) (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042–43, 14 BRBS 156, 164–65 (5th Cir. 1981)). To satisfy this burden, the employer must demonstrate that a range of jobs exists that is reasonably available and can realistically be secured and performed by the disabled claimant. *Lentz*, 852 F.2d at 131, 21 BRBS at 112 (CRT). Employer did not present any evidence of SAE. Therefore, Claimant is entitled to total disability benefits.

#### Average Weekly Wage

Claimant and Employer provide different figures for Claimant’s average weekly wage. Claimant proffered an average weekly wage of \$1,736.25, whereas Employer proffered either \$1,067.17 or \$771.06. Employer argued that the Claimant incorrectly added container royalties from two years and mistakenly included vacation pay and container royalties earned through disability credits. (Employer’s Brief at 30). Employer argued that the \$40,095.00 in wages should be divided by either 52 or 37.5714 to yield an average weekly wage of either \$771.06 or \$1,067.17. Employer argued that dividing the wages by 52 weeks would be more appropriate. It

argued that the Board has stated that when there are two successive injuries, the average weekly wage for the second injury should be based on the remaining wage earning capacity after the disability due to the first injury. (Employer’s Brief at 31).

Claimant provided the below chart to outline his calculation of his average weekly wage:

| Source  | Amount             |
|---|--------------------|
| LS-208 March 28, 2010- July 6, 2010<br>Workers’ Comp Back Injury Benefits from<br>Unrelated Claim                   | \$16,135.42        |
| W2 Earnings July 7, 2010 to March 28, 2011  | \$40,926.50        |
| Vacation Pay, Holiday Pay, and Container<br>Royalties paid in December of 2010                                      | \$15,125.91        |
| Vacation Pay, Holiday Pay, and Container<br>Royalties earned through March 28, 2011 but<br>not paid until Dec. 2011 | \$18,096.95        |
| <b>Total Annual Earnings</b>  | <b>\$90,285.08</b> |

Claimant argued that the \$90,285.08 should be divided by 52 weeks to arrive at an average weekly wage of \$1,736.25.

Section 10 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. The computation methods are directed towards establishing a claimant's earning power at the time of injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978); *Barber v. Tri-State Terminals*, 3 BRBS 244 (1976), *aff'd sub nom. Tri-State Terminals v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee’s average annual wage where an injured employee’s work is regular and continuous. Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). However, if neither of these two methods “can reasonably and fairly be applied” to determine an employee’s average annual earnings, then resort to Section 10(c) is appropriate. *Wright*, 155 F.3d at 327, 33 BRBS at 28 (CRT); *Gatlin*, 936 F.2d at 821, 25 BRBS at 28 (CRT).

Section 10(a) can be used when the claimant worked in the same employment for substantially the whole of the year immediately preceding the injury. 33 U.S.C. § 910(a). In this case, a Notice of Final Payment of Compensation demonstrates that Claimant was out on total disability compensation from January 6, 2010 to July 6, 2010. (CX 4 at 2). As Claimant did not work during April, May, or June of 2010, Claimant was not working for substantially the whole

of the year preceding the injury. In addition, I cannot use Section 10(b), as there is no information in the record regarding the earnings of employees in the same class. As neither of the two methods can reasonably and fairly be applied, I will determine Claimant's average weekly wage using Section 10(c).

Section 10(c) provides:

If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services off the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 USC § 910(c).

In calculating annual earning capacity under Section 10(c), the judge may consider: the actual earnings of the claimant at the time of injury; the average annual earnings of others; the earning pattern of the claimant over a period of years prior to the injury; the claimant's typical wage rate multiplied by a time variable; all sources of income including earnings from other employment in the year preceding injury, overtime, vacation or holiday pay, and commissions; the probable future earnings of the claimant; or any fair and reasonable alternative.

Section 10(c) "explicitly provides that a claimant's average annual earnings under this subsection shall have regard for his earnings at the time of the injury...." *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), vac'd in part on other grounds, 24 BRBS 116 (CRT) (5th Cir. 1991); 33 U.S.C. § 910(c). Accordingly, it may be reasonable to focus only on the actual earnings of the claimant at the time of injury. *Hayes*, 23 BRBS at 393; *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-45 (1988). See also *Dangerfield v. Todd Pac. Shipyards Corp.*, 22 BRBS 104 (1989).

In addition to hourly wages, various payments are included within the average weekly wage. Generally, container royalty payments are included when calculating average weekly wage. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). In addition, vacation and holiday payments are included. *Sproull v. Stevedoring Services of Amercia*, 25 BRBS 100 (1991).

#### Vacation, Holiday, and Royalty Pay

Claimant argues that his vacation, holiday, and royalty payments should be considered in calculating average weekly wage. In *Universal Maritime v. Wright*, the court determined that vacation, holiday, and royalty monies earned on the basis of disability credit are not wages and therefore are not included when calculating average weekly wage. 155 F.3d 311, 318 (4th Cir. 1998). The court remanded the case to the administrative law judge to determine whether Claimant received royalty payments because of a disability credit, in which case the payments would not be "wages" because they would not have been awarded for services. 155 F.3d at 331.

The court explained:

When holiday, vacation, and container royalty payments are earned through disability credit and not work, however, they are not wages and the capacity to earn them as wages has not been lost.

155 F.3d at 330, fn. 10.

Claimant's eligibility sheet from 2011 explains Claimant's entitlement to container royalty, vacation, and holiday payments. (CX 4 at 16). Claimant qualified for container royalty payments because he worked 842.5 hours and received 531.4 hours in compensation credit. Claimant qualified for vacation and holiday payments because he worked 842.5 hours and received 584.4 hours in compensation credit. As Claimant was entitled to vacation, holiday, and royalty payments because of disability credits, and not because he worked the requisite number of hours to receive them, these payments are not included as wages in calculating Claimant's average weekly wage.

#### Calculation under Section 10(c)

In his brief, Claimant contended that he earned \$40,926.00 in wages from July 7, 2010 to March 28, 2011. (Claimant's Brief at 5). In its brief, Employer asserted that Claimant earned \$40,095.00 in wages. (Employer's Brief at 30). Employer's payroll records indicate that Claimant earned \$40,195.00. (EX 10).

Employer advocates that I use the \$40,095.00 figure, a figure which does not include Claimant's earnings with CP&O or the \$100.00 earnings from the day of the accident. Section 10(c) provides:

If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services off the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 USC § 910(c), emphasis added.

The language of Section 10(c) makes clear that the judge may consider wages earned with other employers during the relevant period when calculating average weekly wage. As I find that Claimant's figure better captures his earnings, I will use the \$40,926.00 figure, minus the \$100.00 earned by Claimant on the date of the accident.

Employer cites *Lopez v. Southern Stevedores* to support its argument that Claimant's earnings should be divided by 52 weeks, despite the fact that Claimant only worked 36.4 weeks.

23 BRBS 295, 299 (1990). However, Lopez dealt with a claimant who suffered an injury and then an aggravation of that same injury. *Id.* The Benefits Review Board addressed the calculation of average weekly wage and possible concurrent awards. In the instant case, however, the two injuries are unrelated. The most logical and reasonable method of calculating Claimant's average weekly wage under Section 10(c) is to base the AWW on time actually worked and to not include time when Claimant was not working.

Under Section 10(c), the administrative law judge must arrive at a figure which approximates an entire year worth of work. That figure is then divided by 52, to arrive at the average weekly wage. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). In this case, Claimant earned \$40,826.00 in wages. Employer's work records indicate that, in the 52 weeks preceding the accident, Claimant worked for 35.4 weeks for Employer. (EX 10). In addition, Claimant earned wages with CP&O, which was likely the result of approximately one week of work. Therefore, I find that Claimant worked for approximately 36.4 weeks. With yearly wages of \$40,826.00, Claimant was earning approximately \$1,121.59 per week. Therefore, Claimant would likely make approximately \$58,322.86 per year. When that figure is divided by 52, I arrive at an average weekly wage of \$1,121.59.

#### Temporary Total Disability Benefits

The parties stipulated that Claimant has not yet reached maximum medical improvement. (Employer and Claimant Pre-Hearing Statements). Therefore, Claimant is only entitled to temporary disability benefits. Employer failed to demonstrate suitable alternate employment to avoid a finding of total disability. Therefore, Claimant is entitled to temporary total disability payment from March 29, 2011 to the present and continuing. Section 8(b) of the LHWCA provides:

Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

33 U.S.C. § 908(b). I have determined that Claimant's AWW was \$1,121.59. Therefore, the Claimant is entitled to TTD benefits at a compensation rate of \$747.73 per week.

### CONCLUSION

Employer and Claimant disagreed about the existence of an injury, entitlement to compensation, entitlement to medical benefits, and average weekly wage. Regarding eligibility, Employer asserted that Claimant could not recover under the zone of danger doctrine. Based on Benefits Review Board and circuit law precedent, I found that the zone of danger doctrine was inapplicable and did not bar Claimant's claim for disability benefits. Claimant established a prima facie case by demonstrating that he suffered a harm and an accident occurred which could have caused the harm. Employer rebutted the prima facie case by providing Dr. Mansheim's opinion that Claimant does not have a serious psychiatric condition. In weighing the divergent medical opinions, I placed greater weight on Dr. Newfield's well-documented and well-reasoned opinion. By demonstrating that he could not return to his usual employment, Claimant established a prima facie case of total disability. As Employer did not present evidence of

suitable alternate employment, I found Claimant to be totally disabled. Analyzing the wage information, I determined that Claimant's average weekly wage is \$1,121.59. Claimant is therefore entitled to temporary total disability benefits at a rate of \$747.73 per week.

### **ORDER**

1. Employer shall pay Claimant temporary total disability benefits from March 29, 2011 to the present and continuing at a rate of \$747.73 per week.
2. Employer shall pay Claimant's Section 7 medical expenses.
3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).
4. All computations are subject to verification by the District Director.
5. Employer is entitled to a credit for any payments already paid to Claimant.
6. Claimant's counsel, within 20 days of receipt of this Order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have twenty (20) days to respond with objections thereto.

KENNETH A. KRANTZ  
Administrative Law Judge

KAK/ecd/mrc

### **NOTICE OF APPEAL RIGHTS**

If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is:

Benefits Review Board  
U.S. Department of Labor  
P.O. Box 37601  
Washington, DC 20013-7601

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed. At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).