

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 20 May 2015**

CASE NO.: 2014-LDA-00624, 2014-LDA-00625  
OWCP NO.: 02-228164, 02-30188

*In the Matter of:*

**ADRIANO N. MANUEL,  
Claimant,**

v.

**DYNCORP TECHNICAL SERVICES/  
CONTINENTAL CASUALTY COMPANY  
c/o CNA INTERNATIONAL,  
Employer/Carrier.**

**DECISION AND ORDER  
AWARDING BENEFITS**

This proceeding involves a claim for benefits under the Defense Base Act extension to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (hereinafter "the Act"). A formal hearing was scheduled in this claim, but on January 20, 2015, I issued an Order cancelling the hearing, and establishing a schedule for the submission of evidence on the record. On April 13, 2015, I issued an Order admitting Claimant's Exhibits (CX) 1 through 26, and Employer's Exhibits (EX) 1 through 10, and providing the parties time to submit written briefs. The Claimant and Employer/Carrier submitted briefs on May 6, 2015.

**Statement of the Case**

*Claimant's Testimony*

The Claimant, Adriano Manuel, signed an affidavit dated February 4, 2015 (CX 1). Mr. Manuel stated that he was receiving regular biweekly benefits from the Carrier, until November 21, 2012, when he suddenly received a large out of the ordinary amount. He inquired of the Carrier, and was told that his benefits ended on November 21, 2012 because he had not followed up with his therapy.

According to the Claimant, this was “completely incorrect.” He went to physiotherapy, but on his last visit to Dr. Rinna De Jong he was told that they were advised to halt therapy until they received authorization from the United States. The Claimant informed Mr. Alex West, from the in-country third party administrator hired by the Carrier to deal with his case, of this situation, and Mr. West said that he would get back to him. But this never happened, and the Claimant was without treatment and funds ever since.

The Claimant stated that he hired Mr. Bloch, who explained to the Carrier that their nonpayment through the third party administrator in South Africa had caused the therapist to refuse to see the Claimant, and it was no fault of his. The Carrier did not deny this, but did not pay. The Carrier never corrected the situation.<sup>1</sup>

An investigation by Mr. Block’s South African paralegal showed that the last note on Dr. De Jong’s file was November 12, 2012, stating “Awaiting Approval.”

The Claimant described the incidents that resulted in his current injuries.<sup>2</sup> The Claimant worked in Iraq as a Personal Security Detail member from April 15, 2004 to November 29, 2011, for DynCorp International. With three friends, the Claimant arrived in Baghdad, and stayed at the Gardenia Hotel for three weeks for training in weapon manipulation, radio communication, GPS navigation, and Iraq orientation. He then started serving on the PDS teams.

In the first incident in which he was involved, in May 2004 the Claimant and one of his friends traveled to Mosul to their base, Camp Diamond Back, where their task was to transport and protect the WGI Engineers in charge of maintaining the power station that supplied power to Iraq. On their way to Mosul, they had to stop and ask the military to clear an IED. Somehow the round went off, but no one was injured.

Later that May, as they were transporting their clients to Baghdad, they passed Tikrit, a “very bad town filled with many bad people,” and the birthplace of Saddam Hussein. An IED struck the convoy’s second vehicle, killing all four of the locational national team members. There was blood all over, and body parts and brain matter were scattered everywhere. The Claimant stated that to this day, he can still see the blood when he closes his eyes, and smell the cordite; this incident became a constant flashback.

The Claimant was not injured, as the shrapnel from the IED missed his head by about a half inch. They had no form of communication to contact their base and inform the incident, and at the end of the day the U.S. Army came to give them support, and called in the Iraqi Police to help clean up the bodies. They returned to base, still in shock. There was no form of psychological treatment provided to the Claimant or any of the other team members after this incident.

---

<sup>1</sup> The Claimant attached email correspondence between himself, Mr. Bloch, and the Carrier’s representative, attempting to determine why his temporary total disability benefits were stopped, and why his physician had not been authorized to treat him.

<sup>2</sup> The Employer submitted a drastically shortened and edited version of this statement, which did not include the Claimant’s description of incidents number six through twenty (EX 1).

On May 13, 2004, the Claimant was transporting a colleague to forwarding operating base K2. En route, an IED discharged between the lead vehicle and the one the Claimant was in. His vehicle's windows were shattered. The explosion was extremely loud; the Claimant felt as if it was meant for him, but he was spared. No one was injured. Later that night the Claimant closed his eyes, and the full impact of the incident hit him. He realized how close it was, and how badly it could have ended. No form of psychological treatment was provided to the Claimant or any of the other team members after this incident.

On June 27, 2004, the Claimant was part of a Quick Reaction Force Team. Part of his job was to stop traffic so the convoy could pass through without having to stop. As the Claimant stopped his vehicle to slow down traffic, and gave the communication to his team at camp, telling them they could start to move out, he saw a young Iraqi boy pushing a trolley to the traffic circle where the lead vehicle stopped to slow down traffic. The boy was pretending to sell ice cream. He placed his trolley very close to the traffic circle, which did not make sense to the Claimant, and he told the Iraq guard who was part of their team that the boy was in the way, and needed to move away so that the Claimant could clear the area of danger. The Claimant asked the Iraqi guard to check what was inside the boy's trolley; he was aware that young children were often used in Iraq to place IED's, and were sometimes suicide bombers.

The Claimant advised his team back at the base to fall back until he gave the all clear, but the team leader did not listen to him. The next second, the Iraqi guard was running towards him shouting "It's a bomb!" The convoy was about 360 meters away from the traffic boom where the Claimant was waiting with his vehicle. The Claimant grabbed his radio to tell his team to stay back, but he did not even have the chance to finish his second word when he heard a loud bang, and all he saw was dust and smoke everywhere. His team members were uninjured, and the vehicles were unharmed. But it was a very close encounter, and could have gone so horribly wrong. To this day the incident haunts him, what could have been; he can still hear the loud bang, which echoes in his mind over and over, daily. After this incident, he started sleeping poorly and had constant flashbacks; he was always on edge. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

On August 16, 2004, a coworker and countryman, Harry Pretorius, was traveling with his convoy when they were ambushed, and Mr. Pretorius was abducted and dragged away. He has never been seen again. This incident made the Claimant realize that it could happen to any of them anytime, anywhere. They might not be killed, but captured and possibly tortured until death. The Claimant stated that he got chills down his spine thinking about what the kidnappers possibly did to Mr. Pretorius, but he will never know, and his family's suffering must be so much worse with the unknown, no body to bury, and no grave to visit. It truly upset the Claimant and so many others. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

On October 31, 2004, the Claimant's coworker Johann Hatting and his team were hit while coming out of the Baghdad Hotel. Mr. Hatting was killed instantly; he had been in the country for one week, and this was his first mission. Mr. Gavin Holtshauzen was very badly injured, and sent home to South Africa for treatment. They were all trying to get over Mr. Hatting's death, and the fact that he had been there for such a short time that not many of them

got the chance to know them. The Claimant learned on January 3, 2005 that Mr. Holtshauzen had died in South Africa, after being in the hospital for two months with brain injuries sustained in the incident. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

On November 20, 2004, the Claimant's convoy was hit with a car bomb on their way to the Baghdad Hotel. The lead vehicle and lead limo were directly hit with a car bomb; the driver of the lead limo, Mr. Leon Botha, sustained injuries on his cheek, and some of the passengers were very badly hurt. The lead vehicle's passengers sustained a lot of injuries; some of them were sent home and never came back. Those who sustained minor injuries got a pat on the back, and some bandages slapped on. The next day they were given new vehicles, and it was on to the next mission. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

In March 2005, one of the hotels where the contractors stayed, the Al-Sadeer hotel, was hit by a dump truck bomb that managed to breach security. The blast was so horrific that it blew the contractors off their beds in their rooms, shattered all of the windows, and ripped the curtains to shreds. Many of the contractors were injured, and 20 PSD vehicles were damaged beyond repair. They went to help with further security and take the injured contractors to the hospital. The Claimant stated that it was horrific to see the injured lying in pain and begging for help. The Claimant could still remember the look on the faces of his team members as they arrived to assist; it mirrored his own, shock, confusion, and then the adrenalin hit and they knew they were there to help the ones who could not help themselves. They took action and did what they had to do. The Claimant still remembers that it looked like a horror scene from a bad war movie. He would wake up with a feeling of wanting to scream for someone to stop the killing, but then he would fully wake up and realize he was alone, with no blood or bodies around him, and no one who needed help. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

Also in March 2005, the Claimant's convoy had a mission to a camp outside the city on a road called Tampa. As they came to a turnoff, one of their vehicles collided with another vehicle, and they were stranded on the highway for more than 7 hours, because they did not have any Shark teams on standby to help them. They had to help the injured team members; they kept telling them that help was on the way. But this was all they could tell them, and to simply hang on. They also had to provide security for themselves until help arrived hours later, and they still had to drive back in the dark with no visibility, knowing anything could happen next. After this incident, when they went out onto the road, the Claimant always had the feeling that something bad was following them, and wondered what would happen if they got stuck again, and would they be rescued in time and make it back to the base alive. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

In July 2005, there was a second bombing of the Al-Sadeer hotel, at the front gate where all of the convoys and contractors enter to get into the hotel. A lot of local nationals working for the company were killed, and some of the contractors received minor injuries, although it could have been much worse for them. The Claimant's team went to the hotel to try to prevent another attack and help with security, and the injured. The dead bodies were tossed all over the place by

the blast; it was as if they were dummies used to stage a scene, but looking closely you could see the blood and intestines. "A person that use [sic] to be alive and well, lying in a puddle of blood, senseless act." No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

On September 8, 2005, one of the teams that drove daily to and from the airport to take contractors going on leave to the airport was driving out of the Al-Sadeer Hotel when they were hit with a roadside bomb. It was not a normal roadside bomb, but a shape charge, an Explosive Formed Projectile, one of the worse kinds. The driver of the vehicle, a good friend of the Claimant's Tim Newman, was blown out of the vehicle and lost his leg. The Claimant's QRF team arrived at the scene. Mr. Newman was practically dead; the Claimant will never forget seeing him lying there, unmoving; he truly thought he was dead. It was a very traumatic event to see. The contractor sitting next to Mr. Newman was killed on impact. He was not recognizable; all that remained was burnt flesh. To this day the Claimant can still smell it. He will not even attend a barbeque because of his memory of burning flesh. The other two contractors in the vehicle sustained only minor injuries. The Claimant has had many flashbacks over the years; he sees the flesh as it was peeled back from the body and left to rot. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

On November 14, 2005, the Claimant's friend Migual Tablai was traveling with his convoy when they were hit by an IED on Haifa Street. All of them knew that this was a no go zone, but the team was still ordered to enter, and ended up paying with their lives. Mr. Tablai sustained 100% burns, and died five days later in a hospital in Iraq. The Claimant was lost and sad. Mr. Tablai was one of his best friends, and he had a wife and two young children who would never see him again. He will never forget Mr. Tablai, and to this day he cannot get over the fact that he suffered so severely before he died.

Two coworkers who the Claimant knew were also instantly killed. The Claimant saw them daily, and they had become friends. He felt at a loss, and knew there was nothing anyone could say or do for their families back home. The Claimant started having more sleepless nights. He was afraid to close his eyes, afraid of the images that would come. He felt as if he were going insane, but at the same time he was not sure what was going on or what he could do about it. After this incident the management thought it best to give them a case of alcohol and told them to drink it off, and get out there the next day and get back to work. It was difficult for all of them to go back to work after this incident, and being told to drink it off was not the form of comfort they needed. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

On December 6, 2005, the Claimant was helping out on Shark Team 7; they were taking management to the Baghdad Police Academy after two suicide bombers, disguised as police recruits, detonated their explosives. One was standing between the crowd of new recruits awaiting training, and the second one ran after the panicked crowd into the bunkers, where he detonated his explosives, killing himself and those inside the bunker. As they arrived with management, the Claimant's team had to act as a security barrier while the manager was walking amongst the destruction and devastation. There was so much blood all around, and bodies everywhere. The Claimant's team could do nothing to ensure the safety of their principal, and

stick by him at all time, all the while seeing the death around them. This was one of the worst events the Claimant has ever experienced. He smelled the blood, and saw the intestines of one man lying on the ground next to his body, as if it was a puzzle waiting to be put back together. The Claimant could hear people shouting, and others outside the gates crying for their loved ones lost forever. The images of the incident with the Claimant's friend Mr. Newman came back to him in vivid technicolor. At that time he did not focus on the feelings of turmoil; he did his job. But later that evening as he lay in bed, it hit him, and he did not sleep at all. He became restless, anxious, and more on edge than before. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

On December 22, 2005, Shark Team 3 was hit at Baquba, just north of Iraq. The well gunner, Daniel Brink, lost his leg and fingers, and his stomach was ripped open by the blast. He almost died on the scene. Kyle Kazinski, a contractor, was beheaded in the blast, and the Claimant's very good friend Jannie Strauss, the driver of the vehicle, was killed. The Claimant's countryman and friend Mbusi Cele lost his arm. The Claimant's team was QRF that day, and arrived at the scene to assist. The Claimant stated that the images of the day have never left him. Mr. Brink was less than half the man he used to be. Mr. Cele was in very bad pain and missing an arm, and Mr. Strauss was just a lifeless body. It was shocking, and so surreal that the Claimant could hardly take it all in. He could not believe that this happened again and that more of his friends were going home in body bags, that more women and children would suffer and he could do nothing. It was horrific, terrifying, and gut wrenching. The Claimant's nightmares increased, and he did not understand what he could do to make it all go away, except for drinking, which was the only thing that seemed to dull the pain. The Claimant stated that this was not the answer but there was nothing else to do. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

On January 13, 2006, the brother of a team member who was killed by a roadside bomb in November 2005, was working as a static guard at the Al-Sadeer Hotel. He did all kinds of little tasks, and it seemed that he just wanted to stay busy and not think about his brother. This person committed suicide with his pistol in his room; the next day the Claimant's team had to take him to the morgue. The Claimant had the worst thoughts running through his mind as they drove his friend to the morgue in a bodybag. Ultimately it was the IED that killed his brother that also killed him. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

In March 2006 the Claimant's team was QRF when they went to assist Shark Team 7. The Claimant's very good friend Johann Steenberg was on this team; they were told Shark Team 7 had been hit and needed assistance. On the way, the Claimant prayed that he would not be sending another friend home in a bodybag. When they arrived, the Claimant saw that the lead vehicle had been hit, and Mr. Steenberg was pulling Francois Van Rensburg out of the vehicle. Mr. Van Rensburg had blood spewing from his neck; he had been hit by shrapnel from the blast of the car bomb. Another team member, Schalk Bruwer, was injured with shrapnel wounds to his arm. Mr. Steenberg rushed them away for medical assistance; with so much blood coming from his Mr. Van Rensburg's neck, they were not sure he would be okay. They recovered the lead vehicle, returned to base, and hoped for good news. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

On June 5, 2006, the Claimant's team was traveling to Rasafa, a prison at the Baghdad Police Academy, when their convoy came under attack from snipers/insurgents shooting at them with small arms. No one was injured, but it was traumatic as any of the bullets could have hit any of them. That month they also went out to assist a Shark Team that had been hit by a roadside bomb on Olympic Bridge; only one team member was sent home for injuries. They assisted with the recovery and went back to base. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

In January 2007, another team was hit on the Olympic bridge on their way back from the Police Academy. There were only minor injuries, and the Claimant's team was sent to help recover personnel and vehicles. In his mind, the Claimant knew it could have been much worse; the terror built more and more each day. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

In February 2007, a static guard at the Baghdad Hotel was killed by an incoming mortar when he was at his post. He used to be on the teams with the Claimant, and drove the roads every day, but decided to go to static guard because it was much safer than being on the roads. His body was brought into the hotel lobby, where it left blood everywhere. They all could only stand and watch as his life drifted away. The sight was truly horrific, and something the Claimant prayed he would never see again, watching yet another team member going home in a bodybag. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

Between February 2007 and September 2009, there were only incidents involving attacks on their convoys by small arms fire, and incoming mortar fire daily. There was no loss of life on their teams, but the uncertainty caused a stress, and the realization that any one of them could check out at any time.

In September 2009, at Checkpoint 12, the entrance to the Greenzone, one of the teams went on a mission; as they entered the Greenzone the Iraqi National Military started yelling at the team, and started hitting them. They arrested five of the team members. They could not do anything, because they were the military, and the Claimant and his team members were always told that if the Military wants to arrest you, you let them. Some of the arrested team members were sent home because of the injuries they sustained in the arrest. The Claimant and his team members drove that check point every day, and had no idea when it might happen again or to whom, and if the outcome the next time might be death. No form of psychological treatment was given to the Claimant or any of the other team members after this incident.

Between September 2009 and December 2011 they suffered daily attacks of improvised mortar fire on Camp Butler, where they were based. They knew they might never make it back out on the road or home.

On his visits to see his family on R&R, the Claimant knew it could be the last time he would see them, and that they would suffer terrible pain with his loss. He did not want to remain emotionally attached to anyone, and started distancing himself more and more with every visit

home. Even with his coworkers, he no longer really interacted with them except when it was work related, as he knew they might be gone in a minute.

Since his return home, the Claimant's nightmares have gotten worse, and it has affected him severely. His wife is suffering; the Claimant has uncontrollable outbursts that can happen at any moment. He does not know how to handle the situation. The Claimant stated that right after his return, he and his wife had a disagreement, and he got so lost in the argument that he felt as if he was going to hit his wife. Because of his training, the Claimant knew he could kill her with one hit, and he remembers looking around and spotting a fire extinguisher. He emptied the entire contents on her. His wife called the police and the claimant was arrested and spent the night in jail. While he was in jail, he could not remember why they had an argument, and still cannot remember anything but losing it and spraying his wife with foam.

The Claimant suffers from nightmares daily. He tries not to sleep as he knew the dram will come, the blood, the bodies, the smoke, the screams, and the terror. If he falls asleep he sometimes wakes up with his wife yelling at him to wake up, that it is only a nightmare. He has no control over his actions. He has had an argument with his wife, and lost control so badly that he destroyed anything close by, and afterwards cannot remember why he was so angry. The Claimant suffers from memory loss; he cannot always remember everything he is meant to do. The sleepless nights do not help, and seem to make it worse. He is always tired, helpless and lost, and stressed out. He cannot even drive down the road to the store without looking for IEDs.

The Claimant realizes there is a problem and he needs help, but he does not know how to go about getting it, or what is really wrong with him. His wife has told him more and more that he needs to seek help, and she cannot take much more. He realizes his wife is right, and he needs help.

The Claimant testified by deposition on September 26, 2014 (CX 8). He was born on September 27, 1962, in Angola; he grew up in Namibia. He completed the fourth grade in school. The Claimant entered the South African Army in 1981; he remained for 13 or 14 years, rising to the rank of sergeant. He had no accidents or injuries while he was in the Army. In the Army, the Claimant was a diver, working with mining and sabotage, trying to prevent explosions. He thought his work was comparable to that of an American Navy SEAL. The Claimant received basic training, and training in diving. It was special forces training.

The Claimant speaks mainly Afrikaans, and a little bit of English; he is not fluent. He has lived in South Africa since 1981. The Claimant learned Afrikaans when he was in the Army; he spoke Portuguese when he entered the Army.

When he left the Army, the Claimant worked in Angola as a diver for diamonds, for Branch Energy, from 1995 to 2000. He stated that he left the Army because of politics; he did not enjoy it anymore, and he left to start a new life. This was at the time when the government in South Africa was changing. The Claimant left his job diving for diamonds when the company was having finance problems. He went back to South Africa and worked for a security company. He guarded diamonds for Coin Security Company from 2001 to about the middle of 2004. The



Claimant left this job because he had friends who had contact with companies like DynCorp. He started with DynCorp in 2004, and worked for them until 2011, as a Personal Security Detail (PSD). He worked in Iraq. After 2011, the Claimant worked as a static security guard, for not more than four months. He thought this was about April 2011, also in Iraq.

As a PSD team member, the Claimant's job was to protect generals and other dignitaries, including important people from the Department of Defense. He was based at the Baghdad Hotel, from 2004 until 2008. After that, he was assigned to SATCO B, near the airport. The Claimant stated that he was required to wear protective gear when he was on duty. As part of his duties, he traveled to different provinces in Iraq.

The Claimant stated that when he worked as a PSD team member, they had combat situations. He described one situation where there would be a car bomb; or there might be explosives on the roads, known as IEDs. The claimant indicated that the report he signed was typed up by one of his attorney's secretaries. He agreed that the report described six IED events, but he stated that there had been others after November 2005. There were several incidents, but he was not able to remember all of them. He thought the last one was in 2009. The last IED explosion he recalled happened at Checkpoint 12 in 2009. The Claimant was in a Chevy Suburban; he was a shooter on the right side in the back. They were the last car in the four car convoy. They were towing a car to the Green Zone. The car that was being towed was hit by the IED; there was no one inside. There was a very loud explosion, but there were no injuries.

The Claimant continued to work for DynCorp for another two years, mostly as a PSD member. After the 2009 incident, he did not come under attack while on his missions. There was a bomb that fell on part of the base, but no one was hurt. He was inside, about 400 to 500 meters from the explosion.

The Claimant stated that from November 2005 until he left Iraq, he took regular leave; he worked three months, and then had 24 days out of the country. In November 2009 the Claimant started drinking a lot; he tried to avoid making close friendships with people. He thought maybe in 2011, he did not want to be close to people who might go home in body bags. His nightmares became a real problem in 2010 or 2011. When he went home, he would perspire in his sleep, and his wife would tell him he was dreaming, and ask him why he was always thinking about the war.

The Claimant talked with a friend, Johann Steenberg, after he returned from Iraq for good. Mr. Steenberg told him that he needed help, and recommended that he see Dr. Gericke. He first started having flashbacks, and noticing that he was especially vigilant, in 2005 or 2007; it happened while he was at home on leave. He has been treated by Dr. Cecilia Gericke, and Dr. Frans Korb. He sees Dr. Korb every three months. He could see Dr. Gericke every week, but he does not have enough money for gas for his car.

The Claimant stated that in 2011 he was told that the PSD members had to be U.S. citizens; that was when he became a static security guard. He signed a new one year contract. His pay was reduced from \$16,000 a month to \$4,100 a month.<sup>3</sup>

The Claimant discussed the incident in February 2008 when the Chevy Tahoe he was in was involved in a crash into a checkpoint boom. He stated that because of the noise, at first they thought it was an IED; then they realized that the boom was up. He hit his left eye and his arm, and displaced his neck. He was put in a stretcher and taken to a clinic, where he got a painkiller shot, and support for his neck. He was told by a doctor that a bone in the back of his neck was displaced, and it causes nerve pain and electrical shocks down his arm to his hands. He did not have problems before the accident. He got painkillers for the pain, but kept working. The pain began to get worse in 2010, and he had a harder time working. He could not stay still; he had to change position.

The Claimant sought medical care for his neck, shoulder, and arm when he returned to South Africa. He takes medication for pain, and for his mind, and a sleeping tablet, all prescribed by Dr. Korb.

The Claimant has been married for about five years; he does not have children. He knows how to drive, but cannot because his arm is not strong enough. His wife drives if it is too long, more than 20 kilometers. The pain starts in the back of his neck, and travels down his arm.

The Claimant is not working, and has not looked for work, because he cannot manage to do much. He used to ride a race bicycle, but can no longer do that. He used to do spear fishing and snorkeling, but cannot now. When he worked in Iraq, he was required to undergo a physical test every three months, involving running and lifting. He was able to lift more than his own weight; he always qualified.

The Claimant's resume appears at Claimant's Exhibit 21. It includes a Certificate of Service from the South African National Defence Force, reflecting that the Claimant received the Honorus Crux, the Pro Patria Medal, the Southern Africa Medal, the General Service Medal, the Unitas Medal, the Bronze Good Service Medal, and the Special Forces Headquarters Commendation Certificate.

### Johann Steenberg

Mr. Steenberg prepared a sworn statement dated February 4, 2015 (CX 3). Mr. Steenberg worked in Baghdad from September 2004 to March 2008 as a Personal Security Detail Officer. His duties were to protect contractors, themselves, and other clients during transportation from point to point, as well as while they were at the location. Mr. Steenberg confirmed a number of the incidents described by the Claimant.

---

<sup>3</sup> A letter from DynCorp dated February 27, 2012 advises him that his employment was being terminated without cause (CX 25).

Mr. Steenberg confirmed that Mr. Manuel was part of the team whose convoy was hit with a car bomb on November 20, 2004, and that he was directly involved with the incident.

Mr. Steenberg also confirmed that the Claimant was at the Al-Sadeer hotel when it was bombed in March 2005, and that he ran outside just after the explosion to assist the team. The Complainant was also part of the team whose convoy was in a collision on the highway and was stranded for more than seven hours in March 2005.

Mr. Steenberg confirmed that the Claimant was part of the QRF that went out to assist with the July 9, 2005 bombing at the Al-Sadeer hotel. The Claimant was also part of the QRF that went out to assist with the convoy that was hit with a roadside bomb on September 8, 2005. The Complainant was also part of the QRF that went out to assist when the convoy was hit by an IED on November 14, 2005.

Mr. Steenberg confirmed that the Complainant was part of the team that went to assist after two suicide bombers detonated their bombs at the Police Academy in December 2005. He was also part of the QRF that assisted on December 22, 2005 when Shark Team 3 was hit. Mr. Steenberg stated that the Complainant was in the hotel on January 13, 2006 when a team member committed suicide in the hotel.

Mr. Steenberg confirmed that the Claimant was part of the QRF on March 15, 2006 when it responded to assist him and his team after they were hit. Mr. Steenberg stated that when he arrived, the Claimant had an expression of shock and utter disbelief on seeing him trying to stop the blood flowing from his team member's neck. The Claimant kept staring back and forth to the vehicle that was engulfed in flames. Mr. Steenberg stated that none of them received any psychological treatment from management after this incident, they just had to suit up and get back to work.

Mr. Steenberg stated that the Claimant was part of the QRF that assisted in January 2007 when a team was hit on the Olympic bridge. He was also at the Baghdad Hotel in February 2007 when a guard was killed with a mortar.

Mr. Steenberg confirmed the Claimant's statement about the period from February 2007 to September 2009, but only until March 16 when he was sent home after he sustained injuries.

#### Leon Botha

Mr. Botha prepared a sworn statement dated February 4, 2015 (CX 4). He worked in Baghdad from October 2004 to August 2010 as a Personal Security Detail Officer, protecting contractors, themselves, and other clients during transportation from point to point, and while they were at the venue. He confirmed incidents described by the Complainant in his statement, starting with the bombing of the Baghdad Hotel on October 31, 2004

Mr. Both confirmed that the Complainant was part of the team that was hit with a car bomb on November 20, 2004. He had a picture from this incident. Mr. Botha stated that head personnel put some bandages on the persons who were hurt, and sent them on their next mission

the next day as if nothing had happened. They got new vehicles and were told, off you go. He stated that the shrapnel that hit him in the left cheek also went into Mr. Stephanus Du Preez's arm, breaking it and causing severe pain and trauma. According to Mr. Botha, the company motto was no work no pay, or you can choose window or aisle. There was no psychological treatment given to anyone involved in this incident.

Mr. Botha stated that he, the Claimant, and many others have felt the after effects of incidents such as these over and over, and they are all scarred for life. Mr. Botha has been diagnosed with PTSD arising from this and other incidents he was involved in with DynCorp; the Carrier has been paying him disability and medical bills for PTSD for the last several years.

Mr. Botha confirmed that the Claimant was at the Al-Sadeer hotel when it was bombed by a dump truck bomb, and he ran outside to assist the team. The Complainant was also on the team that was involved in a collision and stranded for over seven hours in March 2005. He was part of the QRF that went to assist at the second Al-Sadeer hotel bombing in July 2005, and the QRF team that assisted with the convoy that was hit on the way to the airport on September 8, 2005.

Mr. Botha stated that the Claimant was part of the QRF that responded when a convoy was hit on Haifa Street on November 14, 2005. He was also part of the QRF that responded on December 22, 2005 when Shark Team 3 was hit at Baquba, and was part of the team involved in the January 13, 2006 suicide of a team member. He was part of the QRF that responded on March 15, 2006 to assist Shark Team 7, which was hit. The Claimant was part of the team that was attacked by snipers on June 5, 2006 while traveling to Rasafa, and part of the team that came under small arms fire on September 19, 2006. Mr. Botha confirmed that the Claimant was part of the QRF that responded to the Olympic bridge in January 2007. He was also part of the team involved in the February 2007 incident where a guard at the Baghdad Hotel was killed by an incoming mortar.

Mr. Botha also confirmed that between February 2007 and September 2009, there were attacks with small arms fire and mortar fire daily. He confirmed the Claimant's statement about the team members arrested in September 2009, and that there were daily attacks of mortar fire between September 2009 and December 2011.

#### DynCorp Records

On April 4, 2007, the Records Administrator certified that the Claimant was employed as a PSD Team Member from April 15, 2004 to that date (CX 9). He earned an annual basic salary of \$130,910, with a 10% completion bonus. His in country transportation, housing, meals, and logistics support were provided.

A Report of Injury or Disease was completed with respect to the February 20, 2008 incident, which reflects that the Claimant suffered injuries to his neck and chest on the right side, and his right arm (CX 10).

A Report of Occupational Injury or Disease dated November 20, 2004 reflects that the Claimant was a passenger in a vehicle traveling through the red zone, en route to the Baghdad Hotel, when a vehicle laden with explosives pulled in front of the convoy and detonated (CX 11). The Claimant stated that he had no injuries at the time; 8 other employees in the accident had hearing loss or headaches.

Dr. Tg Tshitake

Dr. Tshitake examined the Claimant on May 10, 2012, in connection with his February 20, 2008 injury (CX 12). He noted the Claimant's account of the accident, and that he sustained a soft tissue injury of the neck and upper back. The Claimant was seen by a medical officer, who noted that he complained of upper back and right arm pain. The pain and tenderness in his upper back was judged to be due to a soft tissue injury or "whiplash." The Claimant was given analgesics, and a neck collar, which he wore for about two weeks.

Currently, the Claimant had neck and upper back pain, radiating to his right upper arm, with frequent episodes of numbness on his outer forearm and arm. He also had headaches. He did not have any history of neck or upper back pain before the accident; he did not have any chronic illnesses. The Claimant had an ankle fracture in 1993 that required surgery.

The Claimant was in the South African National Defense Force, in the special forces, for about 13 years. From 1995 to 1997 he was a commercial driver, and from 1997 to 2004 he was a security officer. He worked for DynCorp from 2004 to February 2012, as a personal security detail.

Dr. Tshitake reported that the Claimant walked with a normal gait. He had no foot or ankle abnormalities related to the accident. Both knees were non-tender with full range of motion, and no ligament instabilities. He had full pain free range of motion in his hips, with no tenderness.

Dr. Tshitake detected no shoulder abnormalities; both elbows had full pain free range of motion. There were no hand abnormalities. There was no abnormal neck deformity. The Claimant reported tenderness in his neck posteriorly. His cervical spine ranges of motion were reduced. The Lhermitte sign, for the presence of an electric shock type sensation radiating into the limbs with cervical flexion, was negative. The Spurling maneuver was positive on the right side. Extending, rotating, and laterally bending the head to one side reproduced the radicular symptoms on the affected side. The axial compression test was positive, with axial compression of the head producing axial neck pain.

There were no abnormal deformities in the thoracic spine. The Claimant reported some tenderness at the cervico-thoracic region of the spine. There were no abnormalities detected in the lumbar spine. The chest was clinically clear with normal breath and heart sounds. There were no abnormalities detected in the abdomen. The Claimant had normal cranial nerve function, with normal power, reflexes, and sensation in the lower and upper extremities.

An MRI of the cervical spine done on April 11, 2012 showed degenerative changes, and disc bulges at C3/C4, C4/C5, and C6/C7.

Dr. Tshitake noted that the Claimant had acute severe pain for about two weeks after the accident, which then became moderate, and waned; it came on a recurrent basis. He currently suffered from chronic neck and upper back pain. The Claimant's neck pain has affected his general enjoyment of life; he had difficulty participating in sporting activities as a direct result of this injury.

Dr. Tshitake stated that the Claimant was not temporarily or permanently disabled by his injury. Using the AMA Guide to the Evaluation of Permanent Impairment, he put the Claimant into Class 2 of the cervical spine regional grid, with a 11% whole person impairment due to his neck symptoms associated with radicular symptoms, with multiple levels of disk herniations. He recommended a report from an occupational therapist to determine the full impact of the impairment on the Claimant's function and work ability.

According to Dr. Tshitake, the Claimant has incurred medical costs. He also thought it was fitting to assume that the Claimant would not be able to fairly compete in the labor market. Dr. Tshitake stated that the Claimant would benefit from analgesic medications, physiotherapy and possibly radiofrequency neurotomy. There was a 5% chance that he would require cervical spine surgery in the long run.

Dr. Tshitake stated that it is well established that persons with a whiplash injury may have symptoms similar to the Claimant's; typically the predominant symptom is neck pain, with neck stiffness. Headaches have been reported, as well as shoulder and arm pain, and thoracic and lumbar back pain. The Claimant's MRI showed degenerative changes that could be age related. But it was reasonable to link his history of trauma to his current presentation using the "Hill criteria" for causality analysis. According to Dr. Tshitake, it is biologically plausible that the injury is responsible for the pain, as it was in exactly the same area that was painful at the time of the 2008 injury. He felt it was important that the Claimant showed no signs of symptom magnification or malingering.

Dr. Tshitake stated that up to 50% of whiplash injuries do not show full recovery even one year after the injury. Considering the duration of the Claimant's symptoms, it was reasonable to predict that he would continue to suffer pain, and would benefit from analgesia, physical therapy, and radio-frequency rhizotomy, with the remote possibility of surgery if his pain is intractable.

#### Arcadia MR

Dr. Willem Fourie reviewed the cervical spine MRI done on November 4, 2012 (CX 13/EX 4). He reported that the C3/4 level showed a small concentric disc bulge. The C4/5 level also showed a concentric disc bulge, but no evidence of spinal or foraminal stenosis. At level C6/7, there was a right para-central disc bulge, and bilateral mild bony foraminal stenosis, due to posterior osteophytosis.

Dr. Andre Van Niekerk

Dr. Van Niekerk examined the Claimant on February 8, 2012 (CX 14). He reported that the Claimant suffered an injury to his neck, head, and upper thoracic spine. He complained of pain in his cervical spine all day. His right eye was painful and formed tears; he has headaches all the time. He also has pain in the right shoulder and between the shoulder blades, pain in his right arm, which goes numb at times, paresthesias in the fingers on the right, and sometimes weakness of the arm and hand. He has visual deterioration, with his right eye often painful and tearful. He has tinnitus on the right, and personality changes as a result of depression.

Previously, the Claimant was injured in a parachuting accident in 1983, injuring his right ankle. Otherwise, his health was in order.

Dr. Van Niekerk reported that the Claimant was in a motor vehicle accident on February 20, 2008, in Baghdad. He was treated at the first aid center, with a diagnosis of neck and upper thoracic spine injury. He received pain medication and a neck collar. The Claimant was in the South African National Defense Force from 1981 to 1995. He went to work for Dyncorp International in 2004. Before the accident, the Claimant cycled and did diving.

On examination, Dr. Van Niekerk noted that the Claimant had pain in his neck on movement. He had pain and some spasm of his right arm. His axial compression was positive. He experienced warmth and pain in his right arm with neck flexion; the Spurling test was positive with the neck in external rotation and lateral bending to the right. Reflexes, power, and arm sensation were in order.

Using the "Rule of Five," Dr. Van Niekerk determined that there was no indication for surgical intervention. There was tenderness paravertebrally in the whole cervical spine, and between the shoulder blades over the proximal thoracic spine. The x-rays and MRIs showed a concentric bulge and slight narrowing at C3/4. C4/5 was also mildly narrowed, with disc degeneration and a concentric bulge. At C6/7 there was disc height loss, with a right paracentral disc bulge.

Using the AMA model, Dr. Van Niekerk assessed a 14% impairment of the cervical spine. He was extremely reluctant to recommend any surgery to the spine, stating that the only reason to do so would be because of severe instability and compression of the spinal cord. He preferred treatment with physiotherapy, including gentle cervical/lumbar mobilization, and myofascial release, electrotherapy and heat, cervical/lumbar exercises to strengthen the back and neck, and postural counseling. He felt a treatment period of six weeks to three months, repeated as necessary, was appropriate.

Dr. Van Niekerk stated that the Claimant would suffer from pain and discomfort, sometimes rather severe. He needs treatment, and only after treatment can it be determined if he will be able to work. In Dr. Van Niekerk's opinion, the Claimant will not be able to perform his job any longer. He might be able to do security work, but he cannot stand or sit for long hours. He needs to be seen by an occupational therapist, but it is imperative that he be referred for therapy.

Dr. Charles Edelstein

Dr. Edelstein examined the Claimant and prepared a report dated May 30, 2013 (CX 15/EX 2). Dr. Edelstein noted that the Claimant was involved in a road accident on February 20, 2008. The Claimant was the driver, when his vehicle crashed into a barrier and he was thrown forward into the steering wheel. Dr. Edelstein's synopsis of the injuries was a soft tissue injury to the neck. He stated that since the accident, the Claimant's symptoms were typical of whiplash associated disorder. He had disturbances of his right eye, and a stiff neck and pain radiating down his right arm. This affects his sleep. The Claimant feels that he cannot carry heavy packages, even shopping bags, for any time with his right arm before he has to change to his left arm. The Claimant described the sensation as pinching, with pain radiating down into his upper thoracic spine.

Dr. Edelstein stated that after the accident, the Claimant returned to work, but there were visa issues and he last worked in 2012. He reported that he enjoyed scuba diving and cycling in the past, but has not done any sport recently. He had no history of previous problems or injury. There was no history of unresolved neck or low back pain, or injury to the skeletal parts that were injured.

On his examination of the Claimant, Dr. Edelstein noted that he was a fit, healthy man. He was very muscular, although he was beginning to lose some abdominal tone. He spoke English well, and was clearly well educated. The Claimant had a normal neck posture, and willfully moved his neck as expected in normal conversation. He did not have rigidity and obvious stiffness of his neck in terms of his posture. There was no muscle wasting of his right arm compared to his left; his shoulder girdle had normal bulk and contours.

On palpation, there was absolutely no muscle spasm and no real trigger points of the Claimant's cervical spine. Reflexes were normal. The Claimant's neck movements were normal, and in the range of what would be expected at the Claimant's age, and the degree of degenerative change seen on x-ray.

Dr. Edelstein did not think it was necessary to do x-rays, which he stated would be a waste of time. It was clear from the MRI report that he had marked age-related degenerative changes. He felt that the treatment to date was justified and reasonable. The Claimant had reached MMI. His treatment in the future would consist of analgesics, anti-inflammatories, and physical therapy on an intermittent basis. There was no indication to recommend surgery.

Dr. Edelstein felt that it was not clear whether the Claimant had a temporary impairment resulting in disability after the injury, but it was probably days rather than weeks, if at all. He had a minor disability, and should avoid contact sports. According to Dr. Edelstein, the documentation indicated that the Claimant sustained a soft tissue injury of his upper back which required limited conservative treatment for some time. He assessed the Claimant to be mildly impaired and or disabled as a result of the accident.



Dr. Edelstein estimated that the accident resulted in at most a 5% loss of work capacity. He could not determine whether the Claimant was fit to cope with his previous work; he needed assessment by an occupational therapist. If he is not, the accident played but a small part. The accident may have resulted in the Claimant giving up his work a little earlier than otherwise, probably by a year or possibly two years.

Dr. Edelstein felt that there were several complicating and conflicting factors involved in determining the causality of his symptoms and severity of his problems, and his prognosis and treatment. He did not agree with the assessments by Dr. Tshitake or Dr. Van Niekerk, as he felt that did not appropriately attribute or apportion the Claimant's symptoms and disability to the accident, as opposed to natural causes.

Dr. Edelstein stated that the Claimant did not have a typical so-called whiplash injury. He drove into a barrier; his vehicle was not struck from behind. This would have caused some sort of impact, and possibly a strain or sprain affecting the facet joints of his neck and back. But he may have seen this about to happen, and he would have tensed up protectively.

According to Dr. Edelstein, the Claimant apparently did not sustain an injury that was considered significant in the first place, and his symptoms really developed afterward. He was not immediately sent for special treatment or scans.

Dr. Edelstein noted that the Claimant trained in the Special Forces in the SANDF, which was rigorous training, and ultimately equipped him for the job he did in Iraq. He would be conditioned to absorb an impact of this nature, and on the balance of probabilities, recover fully or nearly so.

Dr. Edelstein stated that the Claimant's body posture was normal, and suggested, at worst, benign disability. He did not find the Claimant to have significant loss of neck motion. He found no objective signs of disability.

Dr. Edelstein felt it was very important to note that by the Claimant's age, more than 50% of individuals would have had a severe episode of neck pain, and would have MRI changes of degenerative disease. The Claimant's degenerative changes were fairly severe, and perhaps a little worse than average. Dr. Edelstein stated that the link between so-called whiplash injuries and degenerative change is very tenuous indeed, and by and large, there is no real proof that degenerative change is caused by or significantly hastened by soft tissue injuries of the spine. Natural degeneration, and especially considering the Claimant's training and work in the special forces carrying heavy equipment, parachuting, and taking considerable "battering" would be far more likely to account for the MRI changes of his neck, than an impact that did not result in him complaining of neck pain at the time.

According to Dr. Edelstein, whiplash or soft tissue injuries of the neck almost invariably heal, unless there are secondary gain factors. His special interest has been disorders of the spine and whiplash disorders for the past 20 years. He has assessed several thousand people with WAD, and has not ever had a single patient with post-whiplash symptoms unless they had a compensation claim. He stated that "So, to some extent, one could virtually consider whiplash to

be a ‘legal’ or compensable disorder.” He attached a study on whiplash associated disorder. Dr. Edelstein claimed that whiplash is by and large a very benign injury in circumstances where it is not compensable or where there are no other secondary gain factors at play such as dissatisfaction with the work environment.

Dr. Edelstein stated that one must accept the principle that soft tissue injuries of the neck that do not have radiological or other objective signs, in the vast majority of people, heal as well as any other injuries, such as the ankle fracture the Claimant sustained. Residual subjective symptoms are then due to WAD to some extent, but in the Claimant’s case, most probably to the natural history of degenerative changes in his neck. But giving the Claimant the benefit of any doubt, he proposed that the accident may have precipitated the onset of symptoms that were inevitably going to occur sooner rather than later. He may have had some mild to moderate residual difficulties as a result of the whiplash injury, which should only be treated conservatively.

Dr. Edelstein stated that the Claimant had a number of “non-organic” symptoms, including headaches, visual and eye changes, and paraesthesia.

Dr. Edelstein prepared a supplemental report dated May 30, 2015 (EX 3). Dr. Edelstein received a request from Sandra Maez, with CNA, to address the Claimant’s ability to return to work, in light of their discovery that the Claimant had been working since June 2013 at Galafin Security, as the senior in charge of the diving division.<sup>4</sup>

Dr. Edelstein stated that the Claimant had severe age related degenerative changes, not due to the accident, which probably precipitated symptoms that have long since converged with symptoms due to natural causes. He thought it was fair to say that the effects of the accident had resolved, and there were no restrictions on the Claimant returning to his original occupation attributable to the injury. But he is getting older, and his neck is “degenerate,” and he may not be fit for certain types of heavy work. But this is not due to the accident or injury, but due to natural causes. Dr. Edelstein felt that he was better suited to supervisory work, and that an occupational therapist could assess him. Again, he stated that the Claimant displayed non-organic symptoms common in compensation claims, that result in magnification of symptoms. It was hard to say whether the Claimant was deliberately trying to withhold information or mislead him; there were undoubtedly secondary gain factors at play.

#### Dr. Cecile Gericke

Dr. Gericke is the Claimant’s treating psychologist.<sup>5</sup> Several of her reports appear at Claimant’s Exhibit 16. Dr. Gericke prepared a psychological report dated September 16, 2013, after evaluating the Claimant over several days, beginning on August 30, 2013. She noted that in 1981 he joined the South African Defense Force, and in 1982 was elected to the Special Forces, Battalion 32, the crème de la crème. He was awarded a medal by Prime Minister Botha for saving 32 white South African men, an outstanding achievement for a black man at the time. With the change in government, he was kicked out of the Army in 1995, and worked for two

---

<sup>4</sup> The Employer/Carrier did not submit any evidence to substantiate this claim.

<sup>5</sup> Dr. Gericke’s and Dr. Korb’s billing statements appear at Claimant’s Exhibit 18.

different security companies. He went to Iraq in 2004, where he worked until 2011. He was involved in 20 incidents until 2009. When he returned home on holiday in November 2011 he decided that his values had changed, and he could not leave his family anymore. He was never aware that he was entitled to help until 2013. He experiences flashbacks, nightmares, temper tantrums, aggression, insomnia, and memory loss.

Dr. Gericke conducted a Psychometrical Evaluation using a clinical interview, a 15 factor questionnaire, the MCM-III, the MMPI-2, the Purpose in Life Test, the Beck Depression Inventory, and the Amen Anxiety questionnaire. She stated that during the clinical interview, the Claimant was open, honest, and cooperative. He looked her in the eye, and she did not get the sense he was trying to fool her. He talked openly about his anger outbursts when he is drunk. She stated that in Iraq and even South Africa, when men in war had a chance to party, they went overboard and got drunk. The Claimant never drank during the week or while he was on duty; his alcohol dependence was occasional.

Based on the results of her testing, Dr. Gericke stated that it was clear that the Claimant suffers from severe C-PTSD with all of the co-morbid side effects, including pure anxiety, pure depression, and mixed anxiety and depression. The disassociation split that he experiences was very clearly described with the incident when he opened the fire extinguisher on his wife when they were fighting, and he could not even remember what the fight was about. She stated that he needed to see a psychiatrist as soon as possible, and to see her twice a month for a year, and to continue with his medication, with re-evaluation after a year.

On January 8, 2014, Dr. Gericke wrote to Alex West at C International about her consultation with the Claimant on January 3, 2014. The Claimant had been notified that he had to go for an independent medical examination with Dr. Henk Swanepoel. He was very scared due to the language barrier, and she assured him that there would be a translator. They worked on conflict and anger management.

Dr. Gericke wrote a letter dated January 27, 2014, stating that the Claimant had been in therapy with her for the last couple of months. He had had ten sessions, of which two were assessment sessions. Dr. Gericke stated that the Claimant was very open and receptive, and determined to make a success of his life and marriage. He showed absolute remorse for what he did. She stated that he would be in therapy for the next number of months.

On January 30, 2014, Dr. Gericke wrote to Mr. Alex West, of C Rick International, about her consultations with the Claimant on January 3, 10 and 17, 2014. She stated that the Claimant was still struggling with neck and shoulder stiffness. She was not sure if his stress increased the stiffness in his neck or vice versa. He also suffered from nightmares, night phobias, PTSD, anxiety, and depression. Dr. Gericke noted that the Claimant came from a very active life, to an almost stationary life. He was a highly qualified diver and soldier, in a real prestige position. She stated that recently the Claimant did not have gasoline to come for his session. She speaks with him two to three times a week to at least find out how he is doing.

Dr. Gericke stated that the Claimant's current symptoms were nightmares, mood swings, irritability, major depression, and shoulder and knee problems. Her objective findings were irritability, mood disorder, and PTSD and its co-morbid side effects. Her diagnosis was PTSD, major depression, general anxiety disorder, negativistic, and dependency. Her treatment plan was cognitive behavior therapy every second week. Dr. Frans Korb, psychiatrist, handled the Claimant's medications. She stated that it was not known whether the Claimant would be able to resume full or light duty work, or whether he would be expected to make a full recovery or reach MMI.

In a report dated March 7, 2014, Dr. Gericke stated that the Claimant suffers from C-PTSD and all of its co-morbid side effects. He was on the brink of a total meltdown, and needed therapy once a week for three months, and depending on his progress, maybe twice a month thereafter. He also needed his medications urgently. Without his medication and therapy, the Claimant totally disassociates from reality, and is a danger to himself and others.

According to Dr. Gericke, the Claimant has a dysthymic pattern that is atypical, and signs indicate that he is undergoing an acute major depression, probably characterized by agitation and erratic qualities. Shifts are probably evident between expressions of self-deprecation and despair, mixed with thoughts of suicide and expressions of hopelessness and futility that may be accompanied by outbursts of bitter discontent and irrational demands. She stated that circumstances may have imposed constraints beyond the Claimant's abilities. He feels trapped and powerless to control raging inner tensions. Periods of loathing for self-perceived deficits and weaknesses may be interspersed with momentary acts of defiance, if not brutality. His typical grumbling and periodic provocations provide a vehicle for discharging tension, for reasserting self-confidence, albeit briefly, and for relieving the buildup of resentment and anger.

Dr. Gericke stated that at times the Claimant's brooding resentment breaks out of control, often resulting in stormy and destructive consequences. He subsequently expresses genuine feelings of guilt and contrition, but the destructive and injurious effects of his behavior are likely to persist. She discussed the criteria for Posttraumatic Stress Disorder in the DSM, and stated that it was clear that the Claimant suffers from severe PTSD with all of the co-morbid effects, including pure anxiety, pure depression, and mixed anxiety and depression. Without medication and therapy, he is a candidate for self-destruction.

On May 1, 2014, Dr. Gericke wrote to Sandra Maez at CNA Global, reporting on her consultations with the Claimant on April 22 and 30, 2014. She noted that the Claimant could not come for sessions for the past few weeks because he did not have money for gas; he also had to stop his medication for lack of funds. This put him back to where he was when he first came to her for consultation. She stated that most of the session on April 22 was spent working on the Claimant's inner strength to carry on to the light at the end of the tunnel. They also spent time on the Claimant's short term memory recall, which was very bad, in fact dangerous. They learned the day before that the Claimant's money was authorized. She stated that she needed to see him three times a month for four months, and then twice a month for another four months. She would re-evaluate at that time.

Dr. Gericke wrote to Sandra Maez at CNA Global on June 20, 2014, to report on her June 18, 2014 consultation with the Claimant. She stated that, once more, she could only see him when he had the money to pay for gas to come to see her. On this date, he organized a few people who needed to be in Johannesburg, and covered the cost of his gas. She stated that the Claimant said he was “out and down,” and that there was no light at the end of the tunnel for him anymore. He and his wife live in a back room in his mother in law’s house; people around them are now collecting money for him. They have no income, they do not even know if they have bread for the next day. She stated that the Claimant was a very proud man, and this was almost as bad for him as the original PTSD. Many of the people he befriended are still there in Iraq.

Dr. Gericke stated that the Claimant needed financial help as soon as possible so she could work with him, and he could come twice a week. She asked that his case be escalated, and said that she would next see the Claimant in July when he could afford the gas. He could also call her at any time if needed.

Dr. Frans A. Korb

Dr. Korb is the Claimant’s treating psychiatrist. His reports are at Claimant’s Exhibit 17. Dr. Korb saw the Claimant on September 16, 2013, and diagnosed post-traumatic stress disorder as a result of his seven and a half years in Iraq, where he was exposed to ongoing violence and trauma in a war situation, and witnessed several car bomb incidents. His findings included the PTSD checklist – disturbing dreams, insomnia, anger and irritability, poor concentration, flashbacks, blunted emotions, and hypervigilance. He needed medication and focused psychotherapy. He was not able to work.

Dr. Korb saw the Claimant on November 4, 2013, and diagnosed post-traumatic stress disorder. The Claimant reported that his symptoms had improved on medication. He had improved mood and emotional reactivity, some flashbacks and memories, poor energy, slight social isolation, and had started exercise. He needed medication and focused psychotherapy. He was not able to work.

Dr. Korb saw the Claimant on January 10, 2014. The Complainant had complaints of anger, aggression and irritability; he had physically assaulted his wife. Dr. Korb found that he had poor impulse control, reacted with anger and aggression with slight provocation, had flashbacks, was hypervigilant, and had poor cognitive function. He continued to feel that the Claimant needed medication and focused psychotherapy. He was not able to work.

Dr. Korb examined the Claimant on October 10, 2014, in connection with his post-traumatic stress disorder. He stated that this condition was brought on by several episodes where the Claimant was witness to severe violence in a war situation. He had somatic complaints, frequent flashback, and poor memory and concentration. Dr. Korb’s objective findings included physical stress reactions (sweating and palpitations), angry outbursts, startle response, flashbacks and memories, and avoidance behavior. He stated that the Claimant should receive medication and focused psychotherapy. He did not anticipate any changes in the next 12 months. The Claimant was currently not functioning, and not able to work at all. He was not able to function

in the open labor market. Dr. Korb thought that the Claimant had reached MMI, with permanent disability. He indicated that the Claimant would be re-evaluated in about two months.

Dr. Michael Catalanella

Dr. Catalanella completed the medical clearance form for the U.S. Department of State for the Claimant's deployment to Iraq (CX 20). He certified that he examined the Claimant, and he had no psychiatric conditions that required medical supervision or access to emergency or specialized care, or that required follow up more frequently than yearly.

Dr. Henk J. Swanepoel

The Claimant was evaluated by Dr. Swanepoel on January 14, 20, and 22, 2014 at the Employer's request (EX 5). Dr. Swanepoel also reviewed Dr. Gericke's January 8, 2014 report. He discussed the Claimant's background, noting that the book describing the operation where the Claimant saved 32 South African men describes the South African Special Forces as among the best military units in the world due to their exceptional training. Dr. Swanepoel described the traumatic incidents the Claimant experienced in Afghanistan and Iraq; this description appears to be taken from the Claimant's narrative at Claimant's Exhibit 1.

Dr. Swanepoel noted that in 2008 the Claimant was in a motor vehicle accident where he injured his neck. He went for medical treatment and received pain killers. He did static work after the accident, and requested to consult a doctor for the neck pain. The pain was chronic, and he could not sit properly; at times his right eye was unable to open, and his right arm went numb. The Claimant was instructed to return to South Africa for a medical opinion on his neck. He returned to South Africa in November 2011, for his 26 day holiday leave, but he was not ready to return to Iraq because of his neck pain, which had escalated. He saw a specialist who advised him not to return to Iraq. The MRI was also sent to the USA. The Claimant intended to return to Iraq and hand in the MRI results, and get a referral to a specialist in South Africa for treatment. He would have returned for a limited time, and then looked for a job in South Africa.

Once the Claimant was in South Africa, he was informed that his visa was not approved to return to Iraq in 2012. He was also told that his contract was cancelled due to the visa refusal. He was disappointed that his salary payments for 2012 were terminated. He was surviving financially on savings.

Dr. Swanepoel stated that on the Claimant's return visits to see his family, he had a fear it would be the last time he saw them. He did not want to remain emotionally attached to anyone, and started distancing himself from family, as well as coworkers. The Claimant stated that his colleagues were sent for psychological treatment, but never him. He was never aware that he was entitled to treatment until 2013.

Since his return to South Africa, the Claimant's nightmares escalated. He suffered from sleeplessness due to his neck pain. Dr. Swanepoel recounted the assault on the Claimant's wife, which again appears to come from the Claimant's narrative.

Dr. Swanepoel summarized Dr. Gericke's report of her December 2013 consultations, including her testing results.

According to Dr. Swanepoel, the Claimant was of the opinion that he was not employable, as he was only trained as a soldier; he never studied further and therefore can only work in a military context. He stated that during 2011 he applied for a PSD position in South Africa, but was not hired due to his neck injury, which he feels is preventing him from working. If not for his neck injury, he would look for work. The Claimant thought that he could easily find employment because of the good reputation of the 32<sup>nd</sup> Battalion and the South African Defense Forces. If not for his neck injury, he could easily find employment at cash-in-transit or PSD companies. He thought that he could be an advisor for PSD training, but he did not want to return to Iraq because it is too dangerous.

According to Dr. Swanepoel, the Claimant felt much better since he started seeing Dr. Gericke and Dr. Korb. He thought that his monthly treatment with Dr. Gericke, and every two months with Dr. Korb, was sufficient. His flashbacks were improving since he was prescribed medication by Dr. Korb. The Claimant characterized his lifestyle as passive; he remained at home most of the time.

Based on his assessment of the Claimant, and the testing results, Dr. Swanepoel stated that the evaluation indicated that the Claimant had a below average level of cognition. His verbal ability seemed to be lowered, but he was not assessed in his native language. His short term auditory memory, attention span, and concentration were significantly lowered, typical symptoms of PTSD. His social judgment and ability to anticipate is elevated, indicating an appropriate awareness of socially acceptable behavior.

Dr. Swanepoel felt that the MMPI-2 was probably not valid. The results of the CAPS PTSD scale showed that the Claimant had moderate and chronic symptoms of PTSD. The results of the test of memory malingering indicated that the Claimant was not exaggerating memory impairment, and his score was within expected clinical boundaries. On the SIRS-2 testing, the Claimant had one elevated score, indicating an unsophisticated attempt to appear impaired in communications. But he classified the Claimant as "indeterminate – General, a classification that did not indicate any increased likelihood of feigning.

Dr. Swanepoel noted that the Claimant was ready to return to Iraq in 2011 after his leave, but had also considered employment in South Africa in the security setting. He did not get the position because of his neck problems. It seemed to Dr. Swanepoel that, as found by his evaluation, the PTSD symptoms were indeed moderate, as the Claimant was prepared to return to Iraq, or get a job in the security setting in South Africa.

According to Dr. Swanepoel, the evaluation results suggest that the Claimant has below average reasoning ability. His short term auditory memory, attention span, and concentration are significantly lowered, typical symptoms of PTSD. His social judgment and ability to anticipate is elevated, indicating an appropriate awareness of socially acceptable behavior. For example, he had the self-control not to assault his wife, but to spray her with a fire extinguisher.

The MMPI-2 results were invalid, but the CAPS results indicate that the Claimant has moderate symptoms of PTSD, which seem to be chronic. The results of the TOMM and SIRS-2 indicate that the Claimant was not exaggerating impairment. The Claimant's PTSD was caused by his most recent employment in Iraq. He is not motivated to return to work, due to his physical complaints and his fear of dying. As the Claimant is not earning anything in a claim, secondary gain is not a factor. The Claimant will not be able to work in Iraq due to his moderate PTSD, but as the Claimant noted, if not for his neck injury he would have returned to Iraq, or gotten a job in South Africa in security. The Claimant is at present not capable of performing any aspects of his occupation.

Dr. Swanepoel stated that the Claimant is currently occupationally impaired, but it was likely that after extended psychological and psychiatric treatment he would reach a stage where he was capable of returning to work on a part-time basis. He is temporarily disabled from returning to active duty in Iraq. His current treatment for PTSD is optimal, as the Claimant reports improvement. However, he will need at least another six months to a year's treatment. He has not reached MMI.

Dr. Swanepoel wrote to Karin Frederick, with the Carrier, on March 21, 2014, in response to her inquiry (EX 6).<sup>6</sup> He confirmed that the Claimant verbally advised him that he was not working at the time of his evaluation. Dr. Swanepoel stated that he does not usually ask a client to provide written "under takings" about employment status, but if Ms. Frederick thought it would be helpful he would do so. If the Claimant had told him of his employment status, it would have changed his approach to his diagnosis and/or treatment, because he would be viewed as a "functional person." It appeared that the Claimant misrepresented his employment situation. Based on this new information, Dr. Swanepoel did not feel that the Claimant needed six months to a year of psychological treatment. It would appear that he is at MMI, and would probably only require ad hoc treatment from his psychologist and psychiatrist. Since the Claimant has been working for a security company as Ms. Frederick claimed, it would appear that he could be released to return to work with no restrictions, doing his previous job as a security guard.

### Facebook Pages

The Employer/Carrier submitted undated screenshots apparently from a Facebook account for a person named "Manuel Adriano." (EX 7). These pages include a number of photographs of a wide variety of people, in addition to Manuel Adriano. There is nothing in these screenshots that provides any information, reliable or otherwise, on any issues relevant to this claim.

In his written brief, the Claimant stated that this Facebook account does not belong to him, and pointed out that his name is "Adriano Manuel." He also submitted a photograph of himself for comparison.

---

<sup>6</sup> The Employer/Carrier did not provide the "inquiry;" it is reasonable to infer that it was the same "inquiry" sent to Dr. Edelstein.



Based on the photographs, it is not possible for this Court to determine if the Facebook account from which these screenshots were taken actually belongs to the Claimant.<sup>7</sup> Regardless, I find that this exhibit has no evidentiary value. Even if it were reliable, the photographs provide no information about Mr. Manuel's physical or psychiatric condition, or his ability to work. Even absent Mr. Manuel's strenuous denial, I find that this exhibit has no indicia of reliability or authenticity, and I accord it no weight.

### LinkedIn Pages

Similarly, the Employer/Carrier provided undated pages 3 and 4 of 8 from a LinkedIn account belonging to Adriano Nelson Manuel, reflecting that he is a "Security and Investigations Professional VIP Protection." (EX 8). This excerpt provides Mr. Manuel's experience with DynCorp and the Military, and lists his skills, expertise, and education.

### Jaqui Taylor, PVRA

Ms. Taylor, an Injury Management Consultant, prepared a "Global Labour Market Report" dated September 17, 2013 (EX 9).<sup>8</sup> She noted that the Claimant was seen by Occupational Therapist Maureen Leibenberg on August 16, 2013; Ms. Leibenberg reported that the Claimant had pain in his neck and right upper limb and hand, limiting activities including lifting, carrying, and elevated arm activities, and forward bending in standing. His decreased fine motor coordination may be due to his neck and right upper limb pain. She determined that the Claimant was limited to work at the light level.

Ms. Taylor concluded that the Claimant has transferable skills in security work, especially in management. This role would offer flexibility, with the ability to motivate, engage, and develop and monitor teams. Given the Claimant's previous experience with the Army he has the necessary skills. He would require a Security Industry Authority license; a driver's license is also normally required. Security Management qualifications would be beneficial to his employability, and given him a competitive edge. He might want to consider Training Officer roles, but they would require him to "source qualifications," such as the "Preparing to Teach in the Lifelong Learning Sector" and some relevant work experience in this sector.

Ms. Taylor identified a number of positions by performing an internet search on a number of job websites. Many of the positions she identified were in the United Kingdom; some were in parts of the world other than South Africa. They are as follows:

1. Security Managers (2), Security Area Manager. These positions are in London. Ms. Taylor contacted the company by email on three occasions but did not receive a response. She did not provide the salary, or a description of the work duties. The hours were "full time."

---

<sup>7</sup> I note that one of the photographs, in an entry dated July 19, 2011, depicts a helicopter with the caption "life in afghanistan." The Claimant worked for the Employer in Iraq.

<sup>8</sup> Although the report is dated September 17, 2013, Ms. Taylor stated that she attempted to contact the employers for a number of the positions on several dates after September 17, 2013.

2. Close Protection Instructor, Clearwater. This position is in London. On her inquiry, Ms. Taylor was advised that the position was not physical, needed no previous experience in Close Protection, and that SIA qualifications would be advantageous. The salary was not disclosed; the hours were “flexible.”
3. Security Manager, G4S. This position is in all areas of the United Kingdom. Ms. Taylor requested information several times, but received no response. The salary was not disclosed. This job entailed responsibility for “the efficient operation and management of our Cash Processing operations and staff groups.” Experience in people managing, knowledge of high speed processing and driving performance through people, and standard operational practices was desirable, and previous experience in cash management or “appropriate lean environment” was advantageous.
4. Security Operations Manager, AWD online. This position is located in Coventry. Ms. Taylor made three attempts to contact this employer, but received no response. The salary was \$45,355 a year, with a bonus. Ideal candidates would have an SIA frontline Security Guarding Licence, a full UK driving license, and a good understanding of IT systems, particularly Microsoft Office. The hours were not disclosed.
5. Security Manager, Ultimate Security Services Ltd. This position is located in London; it is permanent, full time. Ms. Taylor made three attempts to contact this employer but was unsuccessful. The salary was not disclosed. Although the description of the job requirements includes ensuring that all security personnel are fully trained and SIA licensed, it does not indicate whether this position requires an SIA license.
6. Security Manager, Momentum Security Services. This position is located in London, Stockholm, and the Middle East. Ms. Taylor attempted to contact this employer three times, but was not successful. Key requirements included an SIA Door Supervisor License, previous experience in the security sector, ideally in the hospitality/events and licensed premises sector, and experience managing a large security team. The salary was \$54,871 a year.
7. Security Manager, Next. This job is located in London. Ms. Taylor made three attempts to contact this employer but was unsuccessful. Desirable (but not essential) criteria included more than two years of retail management experience, experience working with figures, and “GCSE Maths and English or equivalent.” The Salary was “competitive.”
8. Security Supervisor, Balfour Beatty. This job is located in London. Ms. Taylor made three attempts to contact this employer but was unsuccessful. The salary was up to \$45,366 a year depending on experience. It was expected that the candidate would be able to demonstrate an understanding of the unique features of the industry, including licensing. Requirements included complete working knowledge of all systems, events/crowd management experience, excellent report writing and analytical skills, and excellent computer literacy. A Door Supervisor SIA license was required, and a CCTV license was desirable.
9. Security Manager, Stallion Security Ltd. This position was located somewhere in South Africa. Ms. Taylor made three attempts to contact the employer but was not successful. The salary was not disclosed. Requirements included computer literacy, PSIRA Registration, and previous experience on GM (country manager level).
10. Site Security Manager, Holham Placements. This position is located in Emelo. Again, Ms. Taylor did not receive a response to her three inquiries. The salary was not indicated. Requirements included a Grade A PSIRA qualification, SAPS experience, and

willingness to relocate to Ermelo. The applicant needed to be available to start on October 1, 2013.

11. Security Manager, Stallion Security. This position was located in Witbank. Ms. Taylor did not receive a response to her three separate inquiries. Requirements of the position included computer literacy, PSIRA Grade B registration, three years in a senior position in security, relevant experience in an aviation environment, and a valid driver's license with own transport. The salary was not disclosed.
12. Area Manager, Recruit 24. This position was located in Cape Town. Ms. Taylor's report indicates she attempted contact on three occasions; there is no indication she received a response. The salary was "R15K + Car/Cell & Petrol all." Requirements included computer literacy, a valid driver's license and vehicle, FCA, and PSIRA.
13. Safety Security Manager, Jassie and Company Ltd. This position was located in Tanzania. Ms. Taylor did not receive a response to her three attempts to contact the employer. The salary was not disclosed. A degree in health and safety or related field, and at least five years' experience in the area of construction and health and safety or a related field. The duties included planning, creating, and implementing the company's occupational health safety program.
14. Assistant Unit Security Supervisor, Commissionaires. This position was located in Petawawa. Again, Ms. Taylor did not receive a response to her three attempts to contact the employer. The salary was not disclosed. Requirements included experience and knowledge of all federal and military security related policies incorporating classified IT systems, restricted access areas, and sensitive discussion areas, ability to use the Microsoft Office Suite, the internet, and email, and experience with the Web Security Clearance Processing System or a similar program database.
15. Security Manager, Security Resource Group Inc. These two positions were located in Winnipeg and Manitoba. Ms. Taylor received a response to her contact, indicating that the job was in a fast paced environment under pressure, with tight deadlines and the ability to pay attention to detail. It paid \$12 to \$14 an hour. Requirements included some college or vocational training, ability to read, speak, and write English, and a valid drivers license.
16. Security Supervisor, Guardsmark Canada. This position was located in New Westminster, British Columbia, and was part time. Ms. Taylor received no response to her three attempts to contact the employer. The pay was \$14.50 an hour. Requirements included a high school diploma or GED, and a Security License.
17. Security Supervisor, Cenovus Energy. This position was located in Calgary. Ms. Taylor received no response to her three requests for more information. The salary was not disclosed. Requirements included being legally entitled to work in Canada, Standard First Aid with AED, licensure as a Security Guard in Alberta with a minimum of two years of experience delivering security services, experience working with P2000 or an equivalent Access Control System, and Microsoft Office Suite, and technical knowledge of physical security systems, and knowledge of the Criminal Code of Canada, Provincial Statutes, security legislation, and fire and life safety regulations.
18. Manager Security and Safety, CBS Television Network. This position was located in Los Angeles. Ms. Taylor did not receive a response to her two attempts to contact this employer. The salary was not disclosed. The position required extensive operational

experience in security, law enforcement or a related field, and three years of experience in building and managing a high performance team.

19. Security Operations Manager, Sneider International. This position was located in Green Bay, Wisconsin. Ms. Taylor received a response to her email request, indicating that the position would involve some walking and standing, and bilateral arm movements. The salary was not disclosed. No job requirements were listed.

Finally, Ms. Taylor provided information she obtained from the internet about security licensing in the United Kingdom, Canada, and South Africa.

### Notice of Final Payment

The Employer/Carrier submitted a Notice of Final Payment or Suspension of Compensation Payments dated January 30, 2013 (EX 10). This form reflects that the Employer/Carrier paid the Claimant temporary total disability benefits from August 2, 2012 through November 21, 2012, based on an average weekly wage of \$1,328.67, or \$866.32 a week, with respect to his February 20, 2008 injury. The reason for termination of payments was that the Claimant had refused therapy after November 21, 2013.<sup>9</sup>

### Stipulations

The parties have not stipulated to any issues presented by this claim.

### Issues

The following issues are contested by the parties:<sup>10</sup>

1. Whether Mr. Manuel gave timely notice of his injuries, and filed timely notices of his claims for compensation.
2. Whether Mr. Manuel's injuries or illnesses arose out of and in the course and scope of his employment with the Employer.
3. Whether Mr. Manuel has reached maximum medical improvement with respect to his injuries or illnesses.
4. The nature and extent of Mr. Manuel's disability.
5. Mr. Manuel's average weekly wage.
6. Mr. Manuel's entitlement to Section 7 medical benefits.

## **DISCUSSION**

### Applicable Standard

---

<sup>9</sup> This appears to be a typographical error – the correct date would be November 21, 2012.

<sup>10</sup> There does not appear to be any dispute that the LHWCA, 33 USC § 901 *et seq.*, as amended, and as extended by the Defense Base Act (DBA), 42 U.S.C. § 1651 *et seq.* applies to this claim, and that there was an employer/employee relationship at the time of the injuries.

It is well-settled that the judge, in arriving at a decision in the claim, is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165, 167 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 22 (1989); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Seaman v. Jacksonville Shipyards*, 14 BRBS 148.9 (1981); *Brandt v. Avondale Shipyards*, 8 BRBS 698 (1978); *Sargent v. Matson Terminals*, 8 BRBS 564 (1978).

Section 2 of the Act states that the injury must “arise out of and in the course of employment.” It is presumed that a claim comes within the provisions of the Act unless substantial evidence is presented to the contrary. The Supreme Court has held that a prima facie claim for compensation “must at least allege an injury that arose in the course of employment as well as out of employment.” *U.S. Indus./Fed. Sheet Metal v. Director, OWCP*, 455 U.S. 608 (1982).

To invoke the presumption, the Claimant must first establish a prima facie case – he must prove that he suffered some harm or pain, and that an accident occurred or working conditions existed that could have caused the harm. The Claimant bears the burden of establishing each element of his prima facie claim. To satisfy the harm element, the Claimant must offer affirmative evidence that something “went wrong within [his] human frame.” *Shoener v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 630, 632 (1978). Complaints of subjective symptoms and pain may suffice as affirmative proof to establish this element; he need not show that some external force acted on him to cause the harm.

While a Longshore claimant must introduce affirmative evidence of the existence of working conditions that could conceivably have caused the harm alleged, under the Defense Base Act, the causation element is broadened, such that the requisite “working conditions” include the entire “Zone of Special Danger” created by the Obligations or conditions” of the claimant’s employment abroad.<sup>11</sup> *O’Keefe v. Smith, Hinchman & Grylls Assocs.*, 380 U.S. 359 (1965); *O’Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). As Judge Pulver noted,

The Zone of Special Danger is so broad, in fact, that it encompasses nearly any harm sustained while abroad in the employ of a covered employer, including harm that results from purely recreational activities, e.g. *O’Leary*, 340 U.S. 507; *Smith v. Board of Trustees, S. Ill. Univ.*, 8 BRBS at 199 (1978) (gastrointestinal attack during off-duty round of golf).

*Daley v. Service Employees International*, 2009-LDA-406 (March 17, 2011). As Judge Pulver stated, the Ninth Circuit has reversed the Board’s previous view that the Zone of Special Danger doctrine applies only to peculiar risks arising in foreign settings. *Id.*

---

<sup>11</sup> In its responses to the Claimant’s requests for admissions, the Employer/Carrier admitted that the Court had jurisdiction of this Defense Base Act Claim, that the Claimant worked in Iraq for the Employer pursuant to an employment contract, and that he was working for the Employer in August 2011 (CX 11).

Mr. Manuel argues that he suffered injuries to his neck, back, and arm on February 20, 2008, when the vehicle he was driving in a convoy struck a boom at a checkpoint. He also argues that he suffers from a mental impairment as a result of his repeated exposure to violence and bloodshed over the seven years he worked for the Employer in Iraq. In addition to routine exposure to mortar attacks and small arms fire, Mr. Manuel described several horrific incidents that he witnessed or was involved in, which resulted in serious injury and death. These incidents, as well as the daily stress, caused Mr. Manuel to have nightmares and flashbacks, and to suffer from anxiety and hyper-vigilance. Mr. Manuel's account of these incidents is corroborated by the statements of Mr. Botha and Mr. Steenberg.

Mr. Manuel left his employment with the Employer in November 2011, when his contract was terminated by the Employer, allegedly on the grounds of unspecified visa issues.<sup>12</sup> At home, Mr. Manuel's problems continued, causing tension and anger, and fights with his wife. In 2013, Mr. Manuel asked friends who had also been in Iraq if there was something wrong with him, and sought help from Dr. Gericke. Dr. Gericke has diagnosed Mr. Manuel with PTSD, as a result of his experiences in Iraq.

Dr. Gericke first evaluated Mr. Manuel in August 2013, and conducted extensive interviewing and testing. She noted that Mr. Manuel was involved in 20 incidents up until 2009; when he went home on holiday in November 2011, he decided that his values had changed, and he could not leave his family anymore. Mr. Manuel was not aware that he was entitled to help until 2013. He experienced flashbacks, nightmares, temper tantrums, aggression, insomnia, and memory loss. Dr. Gericke concluded that it was clear Mr. Manuel suffers from severe C-PTSD with all of the co-morbid side effects, including pure anxiety, pure depression, and mixed anxiety and depression. She noted the disassociation split involving the incident when he opened the fire extinguisher on his wife when they were fighting, and he could not even remember what the fight was about. Dr. Gericke felt that Mr. Manuel needed to see a psychiatrist as soon as possible, and to see her twice a month for a year, and to continue with his medication, with re-evaluation after a year.

On January 30, 2014, Dr. Gericke reported to the Carrier, describing her consultations with Mr. Manuel on January 3, 10 and 17, 2014. She reported that her treatment plan was cognitive behavior therapy every second week, with Dr. Korb handling Mr. Manuel's medications. However, recently Mr. Manuel did not have gasoline to come for his sessions. Dr. Gericke reported that it was not known whether Mr. Manuel would be able to resume full or light duty work, or whether he would be expected to make a full recovery or reach MMI.

In her report dated March 7, 2014, Dr. Gericke stated that Mr. Manuel was on the brink of a total meltdown, and needed therapy once a week for three months, and depending on his progress, maybe twice a month thereafter. He also needed his medications urgently. Without his medication and therapy, Mr. Manuel totally disassociated from reality, and was a danger to himself and others. She stated that without medication and therapy, he was a candidate for self-destruction.

---

<sup>12</sup> Mr. Manuel testified that he last worked for the Employer on November 29, 2011, when he was told not to come back, even though his contract as a static guard was not yet expired. The Employer provided written notice on February 27, 2012, terminating Mr. Manuel's employment without cause effective February 29, 2012 (CX 26).

Dr. Gericke also advised the Carrier about her April 22 and 30, 2014, and June 18, 2014 consultations with Mr. Manuel. She noted that Mr. Manuel could not come for sessions for the past few weeks because he did not have money for gas; he also had to stop his medication for lack of funds. Unfortunately, this set him back to where he was when he first came to her for consultation. Mr. Manuel's last visit was on June 18, 2014, when he was able to find friends to cover the cost of gas to drive to see her. Dr. Gericke asked that his case be escalated.

Dr. Gericke wrote to Sandra Maez at CNA Global on June 20, 2014, to report on her June 18, 2014 consultation with the Claimant. She stated that, once more, she could only see him when he had the money to pay for gas to come to see her. On this date, he organized a few people who needed to be in Johannesburg, and covered the cost of his gas. She stated that the Claimant said he was "out and down," and that there was no light at the end of the tunnel for him anymore. He and his wife live in a back room in his mother in law's house; people around them are now collecting money for him. They have no income, they do not even know if they have bread for the next day. She stated that the Claimant was a very proud man, and this was almost as bad for him as the original PTSD. Many of the people he befriended are still there in Iraq.

Dr. Korb, Mr. Manuel's treating psychiatrist, concluded that he had post-traumatic stress disorder due to the severe violence he witnessed in Iraq, in a war situation. Mr. Manuel had physical stress reactions (sweating and palpitations), angry outbursts, startle response, flashbacks and memories, and avoidance behavior. Dr. Korb thought that Mr. Manuel should receive medication and focused psychotherapy; he did not anticipate any changes in the next 12 months. According to Dr. Korb, Mr. Manuel was not functioning, and not able to work at all, or function in the open labor market. Dr. Korb thought that Mr. Manuel had reached MMI, with permanent disability.

Based on the detailed reports of Dr. Gericke and Dr. Korb, as supported by the evaluation results of Dr. Swanepoel, who concluded that Mr. Manuel was suffering from post traumatic stress disorder as a result of his experiences in Iraq, I find that Mr. Manuel has established that the incidents he witnessed, and his working conditions in Iraq, which exposed him to the daily threat of violence and bloodshed, caused, aggravated, and accelerated his psychological condition. I find that Mr. Manuel's working conditions were extremely stressful – he was subject on a daily basis to the threat of mortar attacks and bombings, and he witnessed many horrific incidents involving attacks and bombings, and death and injury - and that these working conditions could have caused his psychiatric symptoms or aggravated any underlying conditions.

Nor has the Employer/Carrier rebutted the presumption by establishing that Mr. Manuel's condition is not related to his employment. Indeed, Dr. Swanepoel, who examined Mr. Manuel at the Employer/Carrier's request, concluded that Mr. Manuel was suffering from post traumatic stress disorder as a result of his experiences in Iraq.

I also find that Mr. Manuel has established that his current complaints of neck, back, and arm pain are causally related to the February 2008 injury he suffered while working for the Employer in Iraq. Dr. Tshitake, who examined Mr. Manuel in March 2012, concluded that he had an 11% impairment due to his neck and radicular symptoms, with multiple levels of disc

herniations. Dr. Tshitake thought that Mr. Manuel's symptoms were consistent with a whiplash injury. Although Mr. Manuel's MRI showed degenerative changes that could be age related, Dr. Tshitake thought it was reasonable to link his history of trauma, *i.e.*, his vehicle accident in February 2008, to his current symptoms. He stated that it was "biologically plausible" that the 2008 injury was responsible for the pain, as it was in exactly the same area that was painful at the time of the 2008 injury. He felt it was important that Mr. Manuel showed no signs of symptom magnification or malingering.

Dr. Tshitake stated that Mr. Manuel was not temporarily or permanently disabled by his injury, and he assessed him with a 11% whole person impairment due to his neck symptoms associated with radicular symptoms, with multiple levels of disk herniations. Dr. Tshitake also thought that Mr. Manuel would not be able to fairly compete in the labor market. He would benefit from analgesic medications, physiotherapy and possibly radiofrequency neurotomy. There was a 5% chance that he would require cervical spine surgery in the long run.

Dr. Van Niekerk examined Mr. Manuel in November 2012, and reported tenderness paravertebrally in the whole cervical spine, and between the shoulder blades over the proximal thoracic spine; the x-rays and MRIs showed a concentric bulge and slight narrowing at C3/4. The C4/5 was also mildly narrowed, with disc degeneration and a concentric bulge. At C6/7 there was disc height loss, with a right paracentral disc bulge. He assessed a 14% impairment of the cervical spine, and recommended non-surgical treatment. He noted that Mr. Manuel had pain and discomfort, which was sometimes severe. Dr. Van Niekerk did not discuss the relationship between Mr. Manuel's condition and his February 2008 vehicle accident.

Dr. Van Niekerk was extremely reluctant to recommend any surgery to the spine, but preferred treatment with physiotherapy, including gentle cervical/lumbar mobilization, and myofascial release, electrotherapy and heat, cervical/lumbar exercises to strengthen the back and neck, and postural counseling. He felt a treatment period of six weeks to three months, repeated as necessary, was appropriate. Mr. Manuel needed treatment, and only after he received treatment could it be determined if he will be able to work. In Dr. Van Niekerk's opinion, Mr. Manuel was not able to perform his job any longer; he might be able to do security work, but he could not stand or sit for long hours.

Dr. Edelstein concluded that Mr. Manuel suffered a soft tissue injury as a result of the February 20, 2008 accident, which required limited conservative treatment for some time. He also noted that the MRI showed marked age-related degenerative changes. He thought that Mr. Manuel was mildly impaired and/or disabled as a result of the accident. The Claimant had reached MMI. His treatment in the future would consist of analgesics, anti-inflammatories, and physical therapy on an intermittent basis. There was no indication to recommend surgery.

Dr. Edelstein felt that it was not clear whether the Claimant had a temporary impairment resulting in disability after the injury, but it was probably days rather than weeks, if at all. He had a minor disability, and should avoid contact sports. Dr. Edelstein estimated that the accident resulted in at most a 5% loss of work capacity. He could not determine whether Mr. Manuel was fit to "cope" with his previous work; he needed assessment by an occupational therapist. If he



was not, the accident played but a small part. The accident may have resulted in the Claimant giving up his work a little earlier than otherwise, probably by a year or possibly two years.

Dr. Edelstein disagreed with Dr. Tshitake and Dr. Van Niekerk, because he felt that they did not properly apportion Mr. Manuel's symptoms and disability to the accident, as opposed to natural causes. He felt that, given his "rigorous training," Mr. Manuel would be "conditioned" to absorb the impact of the collision, and "on the balance of probabilities," recover fully or nearly so. He found no objective signs of disability, and noted that more than 50% of persons Mr. Manuel's age would have a severe episode of neck pain and MRI changes of degenerative disease. He claimed that soft tissue injuries of the neck almost invariably heal unless there are secondary gain factors, and are "by and large" a very benign injury if it is not compensable or there are no other secondary gain factors. He claimed that residual subjective symptoms can then be the result of a whiplash injury to some extent, but in Mr. Manuel's case, were "most probably" due to the natural history of degenerative changes in his neck. He did concede that, giving Mr. Manuel the benefit of any doubt, the accident may have precipitated the onset of symptoms that were inevitably going to occur sooner rather than later. He might have some mild to moderate residual difficulties as a result of the whiplash injury, which should only be treated conservatively.<sup>13</sup>

Thus, although the physicians disagree about the severity of Mr. Manuel's condition, and his need for treatment, Dr. Edelstein, Dr. Van Niekerk, and Dr. Tshitake clearly attributed Mr. Manuel's current symptoms to the February 20, 2008 vehicle accident. Both Dr. Van Niekerk and Dr. Tshitake stated that Mr. Manuel's neck, back, and arm condition would preclude him from performing his previous work for the Employer; in his first report, Dr. Edelstein did not offer an opinion on Mr. Manuel's ability to perform his previous job.<sup>14</sup>

I find that the Employer/Carrier has not rebutted the Section 20(a) presumption. The Employer/Carrier has not presented any evidence to sever the connection between Mr. Manuel's working conditions in Iraq and his psychiatric condition, or between his 2008 motor vehicle accident and his current neck, back, and arm problems. I find that Mr. Manuel has established that he sustained compensable injuries during the course and scope of his employment with the Employer, and thus is entitled to benefits under the Act.

#### Extent of Disability

It now falls to Mr. Manuel to establish the nature and extent of his disability, if any. "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss

---

<sup>13</sup> I find Dr. Edelstein's suggestion that Mr. Manuel was lying about his symptoms, because in his experience soft tissue injuries to the neck healed unless the victim had something to gain, to be completely speculative and entitled to no credence. I note that Dr. Tshitake, who performed an extensive evaluation, stressed that he found no signs of symptom magnification or malingering.

<sup>14</sup> I do not credit Dr. Edelstein's statement, on being advised that Mr. Manuel had been working since June 2013, that "It is fair to say the [sic] any effects of the accident have resolved and there are no restrictions on him returning to his original occupation attributable to the injury." (EX 4, p. 2). Again, the Claimant has repeatedly stated that he is not working, and the Employer has not offered a shred of evidence to the contrary.

coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss.

The definition of “disability” given in Section 2(10) has been given a considerable gloss following the Supreme Court’s holding in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121 (1997). The Court expanded the traditional understanding of “disability” to include both current economic harm and potential economic harm as a potential result of a present injury and market opportunities in the future. *Id.*

If a claimant's employment aggravates a non-work-related, underlying disease or condition so as to produce incapacitating symptoms, the resulting disability is compensable. See *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). In addition, a claimant’s credible testimony alone, without objective medical evidence, on the issue of the existence of a disability may constitute a sufficient basis for an award of compensation. *Eller & Co. v. Golden*, 620 F.2d 71, 74 (5th Cir. 1980); *Ruiz v. Universal Mar. Serv. Corp.*, 8 BRBS 451, 454 (1978).

Dr. Gericke has repeatedly stated that Mr. Manuel cannot return to any employment, much less his previous position as a security guard in Iraq, and that it is not clear when his condition will improve such that he is considered to be stable. Indeed, his progress has been impeded by his inability to see Dr. Gericke as often as she has prescribed, because he does not have money for gasoline to travel to her office.

Dr. Swanepoel originally concluded that Mr. Manuel is not capable of performing any aspects of his occupation due to his moderate PTSD, although after extended psychological and psychiatric treatment he would reach a stage where he was capable of returning to work on a part-time basis. Dr. Swanepoel thought that Mr. Manuel had not reached MMI, and needed at least another six months to a year’s treatment.

However, on being provided additional information by the Carrier, he concluded that Mr. Manuel misrepresented his employment situation, and in fact he was a “functional person.” Thus, Dr. Swanepoel disregarded the results of his extensive testing over several days, and on the basis of the Employer’s report that Mr. Manuel was working, and without any further examination of Mr. Manuel, he concluded that Mr. Manuel was “functional,” had reached MMI, and would “probably” require only “ad hoc” treatment from his psychologist and psychiatrist. He could be released to return to work with no restrictions, doing his previous job as a security guard. I do not accord any weight to Dr. Swanepoel’s revised conclusions.<sup>15</sup>

---

<sup>15</sup> The basis for the Employer/Carrier’s representation that Mr. Manuel is currently working comes from an email sent by Sandra Maez, forwarded to Dr. Edelstein on April 4, 2014, representing that the carrier had “discovered” that Mr. Manuel had been working since June 2013 at Galafin Security as the senior in charge of the Diving division. The Employer/Carrier submitted no actual evidence to support this claim. As it is based on an unsupported claim that Mr. Manuel is employed, I find Dr. Edelstein’s revised opinion, that the effects of Mr. Manuel’s accident have resolved and he can return to his previous position, to be completely unreliable.

Dr. Korb, Mr. Manuel's treating psychiatrist, concluded in October 2014 that Mr. Manuel was not functioning, and not able to work at all. He thought that Mr. Manuel had reached MMI, and was permanently disabled.

I rely on the conclusions of Dr. Gericke and Dr. Korb, Mr. Manuel's treating physicians, as supported by Dr. Swanepoel's original conclusion, based on his extensive evaluation and testing, that Mr. Manuel is not able to return to his former employment with the Employer as a security guard in Iraq, due to his psychiatric condition caused by his experiences while working for the Employer in Iraq.

I also rely on the conclusions of Dr. Gericke, who has seen Mr. Manuel on a number of occasions, and has stated that he has not yet reached MMI.<sup>16</sup> Dr. Swanepoel also concluded, in his original report, that Mr. Manuel had not yet reached MMI. Although Dr. Korb thought Mr. Manuel had reached MMI, and was permanently disabled, he also stated that he would re-evaluate him in two months, suggesting that there was the possibility of some improvement. I find that Mr. Manuel has not yet reached MMI with respect to his psychiatric condition.

With respect to Mr. Manuel's neck, back, and arm condition, Dr. Van Niekerk and Dr. Tshitake have stated that his pain and discomfort preclude him from performing his previous position for the Employer. Dr. Edelstein did not offer an opinion on the effect of Mr. Manuel's neck, back, and arm condition on his ability to work in general, or to perform his previous job with the Employer, leaving this to be determined by an evaluation by an occupational therapist. I find that Mr. Manuel has established that he cannot return to his previous position with the Employer in Iraq, as a result of the injuries he sustained on February 20, 2008 while employed by the Employer.

Thus, the evidence clearly establishes that Mr. Manuel cannot return to his former employment with the Employer as a result of his work-related injuries, and he has established a *prima facie* case of total disability.

Although Mr. Manuel has reached MMI with respect to his neck, back, and arm injury, he has not yet reached MMI with respect to his post traumatic stress syndrome. Dr. Gericke and Dr. Korb, Mr. Manuel's treating physicians, have stated that he is not capable of returning to work at this time, and needs additional treatment. But even if Dr. Gericke and Dr. Korb thought that there were some conditions under which Mr. Manuel would be able to hold a job, or particular types of jobs that he might be able to perform, it is the Employer/Carrier's burden to establish the availability of such jobs.

In other words, because Mr. Manuel has established his *prima facie* case of total disability, the burden now shifts to the Employer/Carrier to establish the availability of suitable alternative employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director*, OWCP, 8 F.3d 29 (9th Cir. 1993). Should the Employer/Carrier fail to satisfy its burden, the extent of Mr. Manuel's disability will be deemed to be total. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In order to

---

<sup>16</sup> One of the complicating factors appears to be the inability of Mr. Manuel to travel to see Dr. Gericke, because he does not have enough money for gas, which impedes his progress in therapy, and causes him to regress.

meet its burden to rebut this *prima facie* showing, the Employer/Carrier must show the availability of job opportunities within the geographical area in which Mr. Manuel was injured or in which he resides, which he can perform given his age, education, work experience and physical restrictions, and for which he can compete and reasonably secure. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042 at 43 (5<sup>th</sup> Cir. 1981); *see Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765, 10 BRBS 81, 86 at 87 (4<sup>th</sup> Cir. 1979) Employer/Carrier must also show the precise nature, terms and availability of the proposed positions. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988); *Price v. Dravo Corp.*, 20 BRBS 94 (1987); *Rieche v. Tracor Marine*, 16 BRBS 272 (1984); *Daniele v. Bromfield Corp.*, 11 BRBS 801 (1980).

Under the Act, once Mr. Manuel meets his burden to establish that he cannot return to his previous employment with the Employer, he is considered to be totally disabled, regardless of whether a physician has concluded he can “work.” Thus, Mr. Manuel need not establish that he cannot return to *any* employment, but only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984). *See Eastern S.S. Lines v. Monahan*, 110 F.2d 840, 841 (1st Cir. 1940) (“There is no actual inconsistency between a man being totally disabled for the purposes of the Longshoremen’s and Harbor Workers’ Compensation Act, and possessing a present ability to do work of a very limited nature.”). I note that no physician stated that Mr. Manuel was able to return to his previous position as a security guard with the Employer in Iraq, due to either his psychiatric condition or his physical condition.

The only way that the Employer/Carrier can rebut the presumption of total disability is to establish the existence of suitable alternative employment. For job opportunities to be realistic, an employer must establish the precise nature, terms, and availability of such positions. *See Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988); *Price v. Dravo Corp.*, 20 BRBS 94 (1987). I find that the Employer/Carrier has failed to meet its burden to establish the availability of suitable alternative employment.

The Employer/Carrier offered a “Global Labour Market Report” by Jacqui Taylor, PVRA.<sup>17</sup> I find that this report is flawed and deficient in many respects, and of no use in establishing the availability of any employment for the Claimant. It appears that the positions listed in this “Report” were obtained from an internet search, and with but three exceptions, for positions in London, Canada, and Wisconsin, Ms. Taylor did not speak to anyone connected with these advertisements to learn further details about the positions. The report is essentially the equivalent of copying “help wanted” advertisements from a newspaper. Thus, the descriptions of the positions provide no information on the nature of the duties, including the exertional and postural requirements; for most of the positions, the salary is not provided; and there is no information as to whether the positions are actually open and available.<sup>18</sup>

Most of the positions listed by Ms. Taylor are not in South Africa; a number of them are in the United Kingdom, and some of them are in Canada. Others are in areas of South Africa that do not appear to be close to the Claimant’s home. A number of these positions require the

---

<sup>17</sup> Ms. Taylor’s qualifications were not provided.

<sup>18</sup> No actual address is provided for any of these positions, or any contact name or number for an applicant.

applicant to have a driver's license, or other specialized licensing; some of them require the Claimant to have his own car.

Ms. Taylor did not perform any assessment of the Claimant's abilities or skills, other than to indicate that he should perform work at the light physical demand level. As noted above, she did not indicate the exertional requirements for any of the positions, or determine whether the jobs would accommodate the Claimant's physical restrictions.

Ms. Taylor determined that the Claimant had transferable skills in security work, particularly in management. She noted that the Claimant would require a Security Industry Authority (SIA) license, and probably a driver's license. As the Claimant has neither, it is difficult to understand how he would be qualified for those jobs that require such licenses. Many of the positions also require the applicant to be familiar with various computer systems, a skill that it is not clear the Claimant has.

In short, this compilation of job postings does not establish that there are realistic job opportunities within the area where the Claimant resides, which he can perform given his age, education, work experience, and physical restrictions, and for which he can compete and reasonably secure.<sup>19</sup>

Finally, Ms. Taylor did not even discuss Mr. Manuel's diagnosis of PTSD, and how it would factor into his ability to perform any of the so-called jobs she identified. Even assuming that Mr. Manuel is capable of returning to work, along with any restrictions imposed by his treating physicians, there is nothing to indicate that any of these alleged positions are suitable and available to him.

Accordingly, I find that the Employer/Carrier has not met its burden to establish the availability of suitable alternative employment, and thus Mr. Manuel's disability is total.

#### *Timeliness of Claims*

The Employer/Carrier argues that Mr. Manuel's claims for compensation are barred as untimely. Both claims were filed on August 12, 2013. According to the Employer, Mr. Manuel was aware of his physical injuries and psychological conditions well before he filed his claim for compensation.

Conspicuously absent from the Employer/Carrier's brief is any mention that it was paying Mr. Manuel temporary total disability compensation benefits of \$866 a week, in connection with his neck and arm injury.<sup>20</sup> The Employer/Carrier terminated those benefits in November 2012, claiming that Mr. Manuel did not keep appointments with his physiotherapist, a

---

<sup>19</sup> It is completely irrelevant that Mr. Manuel's LinkedIn page claims that he has skills and expertise in a number of areas. It is apparent from his previous employment that he does have such skills. But it is the Employer's burden to establish that there are **actual** jobs he can perform, and for which he can reasonably compete and secure, in the geographic area where he resides. Ms. Taylor's "Report" falls abysmally short of doing so.

<sup>20</sup> I find it disingenuous and misleading for the Employer/Carrier to make the argument that Mr. Manuel's claim based on his physical injuries suffered in the motor vehicle accident are untimely, without making any mention that the Employer/Carrier paid Mr. Manuel benefits for that injury up until November 2012.

claim that Mr. Manuel denies. The Act provides that a claim for compensation is timely if it is filed within one year of the termination of payment of compensation benefits. As Mr. Manuel filed his claim for compensation on August 12, 2013, it is timely.

With respect to his psychiatric condition, I find that although Mr. Manuel clearly began suffering from the effects of his working conditions while he was in Iraq, working for the Employer, it was not until he returned home, and spoke with others who had had similar experiences, that he realized he had a condition related to his employment, which needed treatment.<sup>21</sup> At that point, he began treatment with Dr. Gericke and Dr. Korb, at least when he had sufficient funds to do so.<sup>22</sup>

Section 13(a) states that, except as otherwise provided in the section, the right to compensation for disability or death shall be barred unless the claim is filed within one year from the time the claimant or the beneficiary becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment. If voluntary payments have been made, a claim may be filed within one year of the last payment. The time for filing a claim does not begin to run until the employer/claimant is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury/death and the employment. The statute of limitations begins to run only after the employee becomes aware of the full character, extent and impact of the injury. *Paducah Marine Ways v. Thompson*, 82 F.3d 130 (6<sup>th</sup> Cir. 1996).

Certainly the Claimant was aware that the stressful living and working conditions, and the horrific incidents he witnesses in Iraq while working for the Employer, were taking a toll on his mental state. But it was not until he returned home, had the opportunity to speak with colleagues going through the same process, and most importantly, met with Dr. Gericke, that the Claimant became fully aware that he was suffering from a mental condition as a result of his work-related experiences, and that he needed treatment for that condition. This occurred in August 2013, the same month that the Claimant filed his claim for benefits. I find that the Claimant's claim for compensation with respect to his psychiatric condition was timely filed.

#### Average Weekly Wage

Section 1 of the Defense Base Act states that "the provisions of the Longshore and Harbor Workers' Compensation Act...shall apply" to claims for injury or death under 42 U.S.C. § 1651 *et seq.* Section 10 of the LHWCA sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. 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);

---

<sup>21</sup> Mr. Manuel's psychiatric condition is not properly classified as an occupational disease, as argued by Claimant's counsel.

<sup>22</sup> Contrary to the Employer/Carrier's argument, the time period for filing a claim in connection with his psychiatric condition did not begin at the time of the last "incident" he described in his recounting of the conditions he endured in Iraq.

*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 wages where an injured employee's work is regular and continuous.

Section 10(a) applies if the employee "worked in the employment ... whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 135-36 (1990); *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1986).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" (within the meaning of Section 10(a)), before his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9<sup>th</sup> Cir. 1982), *vac'd in part on other grounds*, 462 U.S. 1101 (1983); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153 (1979).

Mr. Manuel worked regularly and continuously in Iraq for the Employer for seven years. His rate of pay as of March 2011 was \$186,285 a year. However, in March 2011 Mr. Manuel was transferred by the Employer to a position in "static security," where his pay was reduced to \$47,272 a year. This was his rate of pay when he was told not to return from his scheduled leave in November 2011.

The Employer/Carrier has not addressed the issue of the appropriate average weekly wage, nor has it explained how it calculated the \$866 a week that it paid Mr. Manuel for his neck and arm injuries up until November 2012. While Section 10(a) would normally apply, and provide the appropriate average weekly wage, I find that in this particular case, it does not result in a reasonable or fair wage, especially considering that Mr. Manuel worked for the Employer for seven years, almost all of that employment at a premium rate. It was only in March 2011, about 8 months before the Employer instructed Mr. Manuel not to return to Iraq, that the Employer essentially demoted Mr. Manuel to a position that paid a fraction of what he was earning before.

When neither subsection 10(a) nor subsection 10(b) can be "reasonably and fairly applied," subsection 10(c) mandates a calculation which would "reasonably represent the annual earning capacity of the injured employee." 33 U.S.C. § 910(c); *see Todd Shipyards Corp. v. Dir., OWCP*, 545 F.2d 1176 (9th Cir. 1976). The objective of subsection 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991).

Unlike Sections 10(a) and (b), subsection (c) contains no requirement that the previous earnings considered be within the year immediately preceding the injury. *Empire United*

*Stevedores v. Gatlin*, 936 F.2d 819, 823, 25 BRBS 26 (CRT) (5th Cir. 1991); *Tri-State Terminals v. Jesse*, 596 F.2d 752, 756 (7th Cir. 1979); *Anderson v. Todd Shipyards*, 13 BRBS 593, 596 (1981). Actual earnings are not controlling in this determination. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288 (1979), *aff'd in relevant part* 5 BRBS 290 (1977). Thus, the amount actually earned by the employee at the time of injury is a factor, but not the over-riding concern in calculating wages under 10(c). *Empire*, 936 F.2d at 823. Additionally, while the use of wages from the claimant's previous employment is permitted in the average weekly wage calculation, it is not required. *Proffitt*, 40 BRBS 41.

Section 10(c) of the LHWCA provides:

(c) 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 of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee. 33 U.S.C. § 910(c).

An ALJ must reach a fair and reasonable approximation of the claimant's annual wage earning capacity at the time of the injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823, 25 BRBS 26 (CRT) (5th Cir. 1991); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990); *Richardson v. Safeway Stores*, 14 BRBS 855, 859 (1982). The approximation represents an entire year of work (the average annual earnings) of the claimant. That amount is then divided by 52, in accordance with Section 10(d), to arrive at the average weekly wage.<sup>23</sup> All sources of employment income are considered in making a fair and reasonable determination of wage earning capacity. *Wayland*, 25 BRBS at 59; *Lobus v. I.T.O. Corp.*, 24 BRBS 137, 139 (1990); 10-19 *Lawson v. Atlantic & Gulf Grain Stevedores Co.*, 6 BRBS 770, 777 (1977). Section 10(c) determinations will be affirmed if they reflect a reasonable representation of earning capacity, and the claimant has failed to establish the basis for a higher award. *Richardson*, 14 BRBS at 859.

The judge has broad discretion in determining annual earning capacity under Section 10(c). *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 105 (1991); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137, 139 (1990); *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290, 293 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979).

Mr. Manuel's condition has cost him the ability to earn high wages, because it has prevented him from being able to continue to work at high-paying security jobs in other countries, as he did for many years. The Employer's purported reason for moving him from his high-paying position as a security guard to the drastically lower-paying position as a static guard

---

<sup>23</sup> Section 10(d)(1) of the LHWCA provides: (d)(1) The average weekly wages of an employee shall be one fifty second part of his average annual earnings.



had nothing to do with Mr. Manuel's abilities or qualifications to perform the higher-paying job. I find it is not reasonable or fair to calculate his average weekly wage based solely on his work as a static guard. In order to account for the significant amount of time Mr. Manuel worked as a much higher paid security guard, during which time he suffered his back and neck injury in February 2008, and began suffering the mental effects of his working conditions as early as 2005, I have added Mr. Manuel's wages for the two years before his employment ended in November 2011, and divided that sum by 104. This results in an average weekly wage of \$2,689.54.<sup>24</sup> I find that this is the best measurement of Mr. Manuel's average weekly wage, and represent sums that are both fair and reasonable approximations of Mr. Manuel's annual wage earning capacity at the time of his injuries and his average weekly wage.

#### Commencement of Compensation

A determination of just when Mr. Manuel became totally disabled due to his work related injuries is challenging in this case. Mr. Manuel did not miss work after his 2008 motor vehicle accident; indeed, he continued to work until the Employer terminated his employment without cause, for vague and unspecified "visa issues." But at some point, the Employer/Carrier determined that Mr. Manuel was totally disabled, and began paying him benefits for temporary total disability in August 2012; the Employer/Carrier stopped paying these benefits in November 2012, claiming that Mr. Manuel was not seeing his physician.<sup>25</sup>

The Employer's arguments on this issue are confusing and misleading. To begin with, commencement of payment of compensation to Mr. Manuel is not restricted to the date he first "sought" medical care for either of his conditions. Mr. Manuel's statements establish, and Dr. Gericke's reports confirm, that his problems with PTSD began well before he left his job in Iraq, and continued after he returned home. Similarly, his problems with pain in his neck, shoulder, and arm began in 2008, and continued when he returned home. Nor is the commencement of payment of compensation restricted to the time when Dr. Korb authorized him "off work."

The Employer/Carrier contends that the Claimant is not entitled to compensation until 2013, when he first "sought" medical care. According to the Employer/Carrier, the first "evidence" of any examination is Dr. Tshitake's, done on May 10, 2012.<sup>26</sup> According to the Employer/Carrier, Dr. Tshitake indicated that the Claimant did not suffer from any permanent disability. Dr. Tshitake's report reflects that he made this assessment using the AMA Guidelines. What the Employer/Carrier did **not** mention is that Dr. Tshitake stated that the Claimant would not be able to fairly compete in the labor market as a result of his back and neck condition, and he recommended a report from an occupational therapist to determine the full impact of the Claimant's impairment on his function and work ability.

Nor did the Employer/Carrier mention that Dr. Van Niekerk examined the Claimant on February 8, 2012, and that Dr. Edelstein examined the Claimant on May 30, 2013. The Claimant underwent an MRI before Dr. Tshitake's examination, and again on November 4, 2012. The

---

<sup>24</sup> This is computed by adding 16 months at \$186,285 and 8 months at \$41,000, and dividing by 104.

<sup>25</sup> According to Mr. Manuel, he was not able to see his physician because the Employer/Carrier had not paid her.

<sup>26</sup> The Employer/Carrier's brief mistakenly states that this examination was May 12, 2010; this appears to be a typographical error.

reports suggest that these examinations were done at the request of the Employer/Carrier,<sup>27</sup> and it is reasonable to infer that they were the basis for the Employer/Carrier's decision to commence paying the Claimant temporary total disability benefits in August 2012.

Apparently the Employer/Carrier believes that unless the Claimant himself "sought treatment," the opinions from these physicians do not count. I find, based on Dr. Van Niekerk's conclusions, that the Claimant was temporarily totally disabled as of February 2012; his disability became permanent in October 2014, when Dr. Korb determined that he had reached MMI.

On the other end, Mr. Manuel's compensation is not cut off on the date when the Employer/Carrier claims that he was "released" to return to work. According to the Employer/Carrier, because the last physician to release Mr. Manuel to work was Dr. Edelstein in April 2014, any compensation benefits would end at that time. I note that Dr. Edelstein's "release" was based on unsubstantiated and supported information provided by the Carrier about the Claimant's employment status. Moreover, Dr. Gericke and Dr. Korb have made it clear that Mr. Manuel is not yet capable of performing any job; no physician, including Dr. Swanepoel in his original report, has "released" Mr. Manuel to work from a psychiatric standpoint.

I note that Dr. Gericke and Dr. Korb have made it abundantly clear that Mr. Manuel is not yet able to return to work. But in any event, under the Act, even if his physicians determined that he could return to some kind of work, Mr. Manuel is considered totally disabled unless the Employer/Carrier establishes the availability of suitable alternate employment. They have failed to do so.

Similarly, with respect to Mr. Manuel's psychiatric condition, he continued to work even though he began suffering its effects as early as 2005. Certainly by August 2013, when he was evaluated by Dr. Gericke, the Claimant was unable to return to his previous security work because of his psychiatric condition. In the absence of any other evidence to pinpoint a specific time when Mr. Manuel was not able to return to his previous employment because of his psychiatric condition, I find that August 2013, when Mr. Manuel was evaluated by Dr. Gericke, is an appropriate date for the commencement of benefits with respect to this condition.

#### Medical Treatment

The Employer/Carrier's claim that the medical opinions "clearly demonstrate" that Mr. Manuel has healed from his injuries, because its examiners have shown that they no longer require medical care, is manifestly incorrect. With respect to Mr. Manuel's psychological condition, his treating physicians have clearly stated that he continues to require care, both therapy and medication. Dr. Swanepoel also thought that Mr. Manuel continued to require treatment, but changed his mind after considering information provided by the Employer, which I have found to be completely specious and unreliable. Even at that, Dr. Swanepoel thought that Mr. Manuel would require "ad hoc" treatment.

---

<sup>27</sup> Dr. Van Niekerk's report reflects that the Claimant was referred by C Risk International; both Dr. Van Niekerk's and Dr. Edelstein's reports contain a Carrier Claim Number.

The records from Mr. Manuel's doctors, particularly Dr. Gericke, reflect that Mr. Manuel has been working diligently on addressing his condition. But he has suffered setbacks because of his inability to see Dr. Gericke regularly, due to his lack of funds for travel. In fact, at one point, Dr. Gericke reported that he was a danger to himself and others. There is no question that Mr. Manuel continues to need consistent and regular medical care to address his psychological condition, which is the result of his employment with the Employer in Iraq.

The Employer/Carrier's statement that, "as his employment in Baghdad was terminated based upon the visa issues of the Iraqi government, any disability cannot be related to his injury, but would be related to non-injury factors, such as the Iraqi government's visa rules" reflects a blatant misrepresentation of the mechanics of the Act, as well as the evidence in the record (or not in the record) in this claim. Employer/Carrier's Brief at 9. The Employer/Carrier has not submitted any evidence to establish the reason it terminated the Claimant's employment, or to support its vague claims of "visa issues," or its claim that the Claimant was terminated because of "the Iraqi government's visa rules." But this is beside the point. Regardless of the reason for his termination, the Claimant's disability is not related to any "visa issues;" it is related to the motor vehicle accident he was involved in while working for the Employer, and his exposure over his seven years of employment with the Employer to the daily stress of an active war zone.

Contrary to the Employer/Carrier's claim, Mr. Manuel is entitled to continuing medical care for his work-related conditions.

#### Attorney's Fees

While the Claimant is entitled to attorney's fees, no award of attorney's fees for services to the Claimant is made at this time because no application for fees has been submitted by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. The Employer/Carrier have twenty (20) days following the receipt of such application within which to file any objections thereto.

#### **CONCLUSION**

Based on the foregoing, I find that the Claimant has established that he was injured during the course and scope of his employment with the Employer in Iraq, and that as a result, he is unable to perform his former job for the Employer. With respect to his February 20, 2008 injury, Mr. Manuel is therefore entitled to temporary total disability payments from February 8, 2012, to October 9, 2014, and to permanent total disability benefits from October 10, 2014 to the present and continuing, based on an average weekly wage of \$2,689.54, and to payment of related and ongoing medical expenses. With respect to his psychiatric condition, Mr. Manuel is also entitled to temporary total disability benefits from April 30, 2013, to the present and continuing, based on an average weekly wage of \$2,689.54, and to payment of related and ongoing medical expenses.<sup>28</sup>

---

<sup>28</sup> To the extent that the invoices from Dr. Gericke and Dr. Korb remain outstanding, Mr. Manuel is entitled to payment of those amounts due.

## **ORDER**

On the basis of the foregoing, the Employer/Carrier shall:

- A. Pay to the Claimant temporary total disability compensation benefits from February 8, 2012 to October 9, 2014, and permanent total disability benefits from October 10, 2014 to the present and continuing, based on an average weekly wage of \$2,689.54.
- B. Pay to the Claimant temporary total disability compensation benefits from August 30, 2013 to the present and continuing, based on an average weekly wage of \$2,689.54.
- C. Pay to the Claimant all medical benefits to which he is entitled under the Act.
- D. Pay to the Claimant interest on past due compensation at the rate provided at 28 U.S.C. §1961.
- E. Pay to the Claimant attorney fees and costs to be established by a supplemental Order.
- F. The District Director shall perform all calculations necessary to effect this Order.

**SO ORDERED.**

LINDA S. CHAPMAN  
Administrative Law Judge