

Re: Wade E Dill (dec'd)
File Number: 13-104350

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS
LONGSHORE AND HARBOR WORKERS' COMPENSATION
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DATE: 02/12/2013

From: Rebecca Pano
Phone No: (415) 625-7669

RE: Barbara Dill, (Wade, dec;d) Decision and Order
OWCP NO: 13-104350

Pages: 30, Including cover sheet

TO:	FAX:
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Thank you.

U. S. DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAM
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Division of Longshore and Harbor Workers
90 7th Street, Suite 15100
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February 12, 2013

OALJ FILE NO: 2008-LDA-00259
OWCP Case: 13-104350
Injured Employee: Wade E Dill (dec'd)
Date of injury: 07/16/2006
Employer: Kellogg Brown &
Root Services, Inc.
ACT: Defense Base Act
Country of Injury: Iraq

AIG Gloval Claim
600 North Paul Street , Ste. 700
Dalls TX 75234

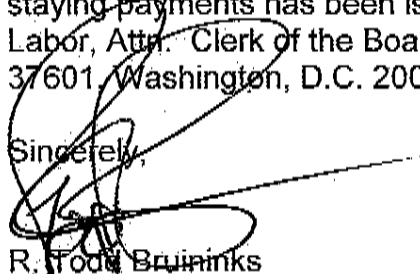
Gentlemen:

The enclosed **Decision and Order on Remand of the Administrative Law Judge Steven B. Berlin dated February 7, 2013** is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order have been dated and filed in the District Director's Office. Procedures for appealing are described on Page 2 of this letter.

The employer/insurance carrier is hereby advised that if the order awards compensation benefits, the filing of an appeal does not relieve that party of the obligation of paying compensation as directed in this order. The employer/insurance carrier is also advised that an additional 20 percent is not withstanding the filing of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U. S. Department of Labor, Attn: Clerk of the Board, 200 Constitution Ave. N. W., Room S-5220, P. O. Box 37601, Washington, D.C. 20013-7601.

Sincerely,


R. Todd Bruininks
Director, Districts 13/15
(415) 625-7479

RTB/rp

Enclosure

Re: Wade E Dill (dec'd)
File Number: 13-104350

A petition for reconsideration of a decision and order must be filed with the Office of the Administrative Law Judge, Who issued the attached decision and order, within 10 days from the date the District Director files the decision and order in his/her office.

Any notice of appeal shall be sent by mail or otherwise presented to the Clerk of the Benefits Review Board in Washington, D.C., within 30 days from the date upon which the decision and order has been filed in the Office of the District Director, or within 30 days from the date final action is taken on a timely-filed petition for reconsideration. If a timely notice of appeal is filed by a party, any other party may initiate cross-appeal or protective appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed or within the 30 day period described above, whichever period last expires. A copy shall be served upon the District Director and on all other parties by the party who files a notice of appeal. Proof of Service shall be included with the notice of appeal.

The date compensation is due is the date the District Director files the decision and order in his/her office.

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

**Issue Date: 07 February 2013**

CASE NO.: 2008-LDA-00259

OWCP NO.: 13-104350

In the Matter of:

BARBARA DILL
o/b/o **WADE DILL, DECEASED,**
Claimant,

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.,
Employer,

and

AIU HOLDINGS (FORMERLY AIG),
Carrier.

Appearances: Scott J. Bloch, Esq.
Joshua T. Gillelan, II, Esq.
for Claimant

Michael W. Thomas, Esq.
Lara D. Merrigan, Esq.
Thomas, Quinn & Krieger, LLP
for Employer/Carrier

Lawrence Brewster, Esq.
David M. Kahn, Esq.
Isabella M. Finneman, Esq.
U.S. Department of Labor
Office of the Solicitor
for the Director, Office of Workers'
Compensation Programs

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER
ON REMAND

Introduction and Procedural History

This Defense Base Act case is before me on remand from the Benefits Review Board. Claimant Barbara Dill alleges that her husband Wade Dill sustained a psychological injury while working for government contractor SEII in the war effort in Iraq, and that the injury led to his suicide. In a Decision and Order issued on January 21, 2011, I awarded death benefits. SEII appealed. Claimant was represented by counsel on appeal, and her counsel failed to file a brief. On February 28, 2012, the Board vacated the Decision and Order and remanded. BRB No. 11-0395 (unpub.).

In the initial Decision and Order, I found that Claimant had produced sufficient evidence to raise the statutory presumption of causation, *see* 33 U.S.C. § 920(a); that although Employer/Carrier offered admissible evidence to rebut the presumption, the evidence was not substantial; that Employer/Carrier was liable unless it could rely on the exclusion for self-inflicted death or injury, *see* 33 U.S.C. § 903(c); that Employer/Carrier rebutted the statutory presumption against that exclusion, *see* 33 U.S.C. § 920(d); but that based on the record as a whole, the suicide was the result of an irresistible impulse and not a willful, intentional act, and that the exclusion did not apply. I therefore awarded Claimant compensation under the Act. *See* 33 U.S.C. § 909(b). I also awarded \$3,000 in funeral expenses. *See* 33 U.S.C. § 909(a) (setting maximum award of \$3,000 in funeral expenses).

The Board did not disturb the factual findings in the Decision and Order. On the legal conclusions, it affirmed that Claimant had raised the statutory presumption of compensability in section 20(a) of the Act. But it vacated certain of the remaining conclusions. It found that I erred when I excluded Employer/Carrier's psychiatrist's opinion and then construed the psychiatrist's diagnoses as merely provisional and thus not substantial. The Board held that I must revisit whether Employer/Carrier offered substantial evidence to rebut the section 20(a) presumption, whether the suicide was a willful act, and whether the family circumstances decedent Wade Dill found on his return from Iraq amounted to an intervening cause that relieved Employer/Carrier of liability. It also found that, as the parties had stipulated to funeral expenses of \$1,115, the award of \$3,000 was excessive.¹

On remand, another attorney appeared for Claimant, and the parties submitted briefs that I considered. Taking into account the Board's instructions, and having reevaluated the evidence as a whole, I conclude that the amount of funeral expenses awarded must be reduced but that the remaining compensation awarded in the initial Decision and Order is correct, albeit for different reasons.

¹ The Board affirmed other legal conclusions and procedural matters that need not be addressed on remand. *See, e.g.,* Board Decision at 8 n.7.

The initial Decision and Order includes more than 20 pages of detailed findings of fact. The Board has not disturbed those findings. I will not repeat them here, except to the extent necessary to address the issues on remand.

Discussion

I. Employer/Carrier Rebutted The Section 20(a) Presumption Of Compensability.

Once a claimant introduces sufficient evidence to raise the section 20(a) presumption, the burden of production shifts to the employer. To rebut the presumption, the employer must produce substantial evidence that is "specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651 (9th Cir. 2010); see *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280-81 (1994) (burden of persuasion remains on the claimant; burden of production shifts). The administrative law judge's task is to decide, as a matter of law, whether the employer submitted evidence that could satisfy a reasonable factfinder that the injury was not work-related; weighing of credibility has no place in determining whether the employer has met its burden of production at this step of the analysis. See *Hawaii Stevedores*.

"Substantial evidence as used in the Act 'is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Matter of D.C. Workmen's Comp. Act*, 554 F.2d 1075, 1084 (D.C. Cir. 1976), cert. denied sub nom. *J. Frank Kelly, Inc. v. Swinton*, 429 U.S. 820. See *Avondale Industries v. Pullman*, 137 F.3d 326, 328 (5th Cir. 1998); *Orteo Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003). The proof required is less than the ordinary civil requirement that a party prove a fact by a preponderance of evidence. See *Avondale, supra*; *Charpentier, supra*. When there has been a work-related incident followed by an injury, the employer can rebut the presumption by introducing medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation. *Stevens v. Todd Pac. Shipyards*, 14 BRBS 626 (1982), aff'd mem., 722 F.2d 747 (9th Cir. 1983), cert. denied, 467 U.S. 1243 (1984); *Champion v. S & M Traylor Bros.*, 14 BRBS 251 (1981), rev'd and remanded, 690 F.2d 285, 15 BRBS 33 (CRT) (D.C. Cir. 1982). The testimony of a physician given to a reasonable degree of medical certainty that no relationship exists between an injury and the employment is sufficient to rebut the presumption. See *O'Kelley v. Dep't of the Army*, 34 BRBS 39 (2000).

Here, Employer/Carrier relies on the opinion of its expert psychiatrist Dr. Whyman to rebut the statutory presumption of compensability. Essentially, Dr. Whyman opines that Wade Dill's work in Iraq did not affect him psychologically, that any effect the physical separation of Wade and Barbara might have had is speculative, and that Wade's suicide was a progression of his pre-existing personality defects and non-work-related stressors. Dr. Whyman based his opinion on a "psychological autopsy" of Wade Dill. Wade Dill having died, obviously Dr. Whyman could not examine him or have psychological testing performed. Wade had no history of mental health treatment; thus Dr. Whyman never treated him, nor could he review any treatment records of others.

Nonetheless, I admitted Dr. Whyman's "autopsy"-based opinion. See D&O, 2 n.2 (admitting E.Ex. 44), 30 (opinion is admitted; question is weight it should be accorded). In determining whether the opinion amounted to substantial evidence and thereby rebutted the presumption of compensability in section 20(a), I considered carefully the language Dr. Whyman chose to use in his diagnoses. He recited those diagnoses as:

- Axis I: Probable Major Depressive Episode.
 Probable Dysthymia.
 Relationship Problem.
- Axis II: Probable narcissistic personality features.

E.Ex. 44 at 30.

As Dr. Whyman used the "axis" diagnostic framework in the industry standard DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4th ed., Text Revision (DSM-IV-TR) (American Psychiatric Association), *id.* at 35, I consulted that publication and found that it does not provide for diagnoses designated as "probable." I looked in the DSM for the technically accepted modifier closest to "probable" and found it to be the term, "provisional," which indicates "significant uncertainty." *Id.* at 4-5. Based on this and other factors, I concluded that Dr. Whyman's opinion did not amount to the substantial evidence required to rebut the presumption in section 20(a).

The Board rejected this conclusion and held that Dr. Whyman's use of the modifier "probable" in his diagnoses must be construed, not as a term of art under the DSM, but in its ordinary, lay dictionary sense, meaning "apt to be true" or "relatively likely but not certain." BRB at 8 n.7.

This does not entirely answer the question whether Dr. Whyman's "probable" diagnoses amount to substantial evidence. The standard for substantiality of a physician's testimony is that it be given to a reasonable degree of medical certainty. See *O'Kelley, supra*. Does "relatively likely but not certain," as the word "probable" denotes, amount to reasonable certainty?

I find, however, that I need not parse this conundrum. For Dr. Whyman provided testimony from which I conclude that his opinion is sufficiently substantial to rebut the section 20(a) presumption. At trial, Dr. Whyman conceded that he would have greater comfort had he interviewed Wade Dill before the suicide. Tr. 334. But he opined that:

A person with a substantial knowledge and experience in the field of psychiatry can, I think, bring to bear a – a useful analysis if, indeed, they collect enough relevant information. You can learn an awful lot from talking to the – to the mother, to the daughter, to the son, to the cousin, to all the relevant family members about that individual. You'd learn more if they were there. But I think you can still make – draw a valid set of conclusions, at least medically reasonable.

Tr. 334-35. As to the role of a record review, he stated:

There have been times when I've simply been sent records, and I'm always saying, "If there's anybody living, I need to interview that person." Sometimes, on rare occasions, all you get to do is look at the records. And sometimes there are no medical records per se. There are all kinds of other records. You want as many medical records as you can come up with as well. That -- it's an accrual kind of phenomenal. The more facts you have, the more comfortable you are. And the less facts you have, the more you are ending up speculating.

Tr. 336.

Applying these considerations to the present case, Dr. Whyman testified that he was "very comfortable" with his opinion. Tr. 336. To me, this means that he was reasonably certain.

I will take issue with Dr. Whyman's opinions below. But, at this stage, I must not evaluate Dr. Whyman's credibility or determine the weight that can be assigned to his opinions. I therefore find that Employer/Carrier has offered medical evidence to a reasonable certainty to rebut the presumption of compensability.

II. The Evidence Taken As A Whole Establishes That Wade Dill's Death Is Compensable.

If the employer rebuts the section 20(a) presumption, the presumption no longer controls, and the issue of causation must be resolved on the evidence as a whole, with the claimant bearing the burden of persuasion. *Hawaii Stevedores, supra; Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994).

A. Psychiatric autopsies in general and as conducted here.

The parties' psychiatric experts reached opposing conclusions on causation. Each performed a "psychological autopsy." Their initial challenge was to develop adequate data from which to reach an opinion. While I found in the initial decision that a psychological autopsy generally can help determine the cause of a suicide, the limitations of the particular data sources here hampered both experts' efforts.

As Dr. Whyman described them, psychological autopsies originally were a discussion among mental health professionals about a former patient who had subsequently committed suicide. They were essentially a mortality and morbidity review to help mental health professionals more successfully treat future patients. The professionals would have their treatment records, and the discussion would likely include some of those who had directly treated the decedent. Absent direct contact with the decedent, other sources would be family members who knew the decedent, treatment records of other professionals, and other medical or non-medical records.

But as Wade Dill had no treatment history, neither psychiatrist had treated him, nor could either refer to the records of others who had. Looking to other sources, neither expert referred to any non-psychiatric medical records. There were some court records about Wade, including two

convictions and a bankruptcy, and there were some workers' compensation records, but neither expert discussed any findings based on these.

This left both experts to rely extensively on the interviews they conducted of Barbara and Sara Dill. Even Dr. Whyman, who said he was "very comfortable" about this, admitted that it posed major risks of error and that he would be more comfortable had he treated Wade or seen treatment records from someone else who had. He stated, however, that an expert under these circumstances could still give a useful analysis if he could collect "enough relevant information" from sources such as family members, especially if the family had been around to observe the deceased in the time leading up to the suicide. Tr. 334. As it turns out, however, Barbara and Sara were seldom around to observe Wade, and Barbara (who knew much more than Sara) was not entirely candid and forthcoming with what information she did supply.

In particular, Barbara and Sara had only limited contact with Wade in the 18 months before the suicide. They saw him only during his three short visits home and then infrequently during the last three weeks of his life after he had returned from Iraq for the last time. Wade was gone in Puerto Rico during one of those last weeks, was not living with Barbara during the other two weeks, and saw Barbara only twice.

Apart from direct contact, there were emails and phone calls. During the first year Wade was in Iraq, Barbara and Wade spoke on the telephone daily and exchanged emails, and Sara occasionally talked on the phone with her father. But the frequency of the phone conversations between Barbara and Wade decreased in the last several months before Wade returned home the last time, as Barbara began avoiding or refusing Wade's calls or was away when he called. E.Ex. 30 at 55; Tr. 279.

In all, Barbara and Sara had some basis for commenting on Wade's experiences, feelings, and thoughts while he was working in Iraq and on his returns to California, but they knew far less than they would have known had Wade been living with them and not gone to Iraq. Thus, Dr. Whyman acknowledges: "The data provided by Barbara and Sara Dill, but particularly Barbara Dill, indicates that neither of them were particularly aware of the details of Wade Dill's overseas activities in Iraq." E.Ex. 44 at 31.

Barbara's limited fund of knowledge proved to be of still less value because she was not consistently candid or truthful when she spoke to the experts. As I observed in the initial decision and order, Barbara admitted to memory problems. Tr. 183. Beyond memory, however, some of her statements were false or misleading. Barbara admitted that her statement to Claimant's psychiatric expert, Dr. Seaman, about Wade's throwing cats was false. Her descriptions of the evening in June 2006 when Wade arrived from Iraq the last time repeatedly neglect that Messrs. Kerr and Lewis (Sara's boyfriend and Barbara's male "friend") were in the house, which undoubtedly is the real reason she did not let Wade come in. Her testimony and other statements were inconsistent about whether Wade threatened suicide toward the end. Her statements about the chronology of her developing relationship with Mr. Lewis raise questions about whether the two were having an affair. Barbara told Dr. Seaman that Wade smoked marijuana in the 1980's but discontinued it when they got married in 1989; she neglected that both she and Wade were arrested for possession of marijuana with intent to sell *after* they were

married and that Wade had to serve jail time. She exaggerated Wade's weight loss and other physical changes while in Iraq. She told Dr. Whyman that Wade was at a Marine base in Fallujah when it was in the news, E.Ex. 44 at 5, which would implied that Wade was exposed to the stress of being near or in the battles for which Fallujah was notorious. But there is no record of Wade's being assigned to Fallujah, Barbara never mentioned this to anyone else, and the battles of Fallujah concluded by mid-December 2004, when Wade first arrived in Iraq.² Barbara told Dr. Whyman that she and Wade had a \$50,000 line of credit on the house (in addition to the \$160,000 mortgage), but she did not mention that she used the line of credit to post Sara's boyfriend's bail on cocaine charges or that the boyfriend was arrested in the Dill's home. E.Ex. 17, 44 at 14.

I do not suggest that Barbara and Sara's limited knowledge and Barbara's limited reliability was so thoroughgoing as to invalidate the expert opinions entirely. As I detailed in the initial decision and order (and will not repeat here), other witnesses confirmed much of what Barbara and Sara related about Wade's experiences in Iraq³; Wade's emails and notes confirm other material; Sara's boyfriend's testimony verifies a few facts; and the concurrence of Barbara's and Sara's details on such facts as Wade's impulsive spending, together with the absence of any evidence to the contrary, leave those facts adequately established.⁴ I accept that both psychiatrists had minimally adequate facts from which to draw conclusions that, if they sensibly address the facts and are not undermined by false or misleading information, could be accorded some weight. Bearing these considerations in mind, I turn to the experts' opinions.

B. Dr. Seaman's opinion.

Looking first to Dr. Scaman's analysis, I discussed this in the initial decision and order and will not repeat all the details here. I found that when Dr. Scaman interviewed Barbara Dill, she gave him considerable information that either was uncontradicted or was consistent with other evidence on the record and that I found credibly described portions of Wade Dill's history and of the events surrounding the suicide. These included some details about Wade's family history (his mother's serial marriages, his siblings' deaths), Wade's history with marijuana (not including the conviction), Wade's control of the family finances and how he could be verbally abusive in the way he did it, his history of frequent angry outbursts, and Barbara's starting on anti-depressants and occasional pain pills before Wade left (partly because he was verbally abusive at times).

Barbara also provided Dr. Seaman with useful information both about Wade's decision to take the job in Iraq, and about the 18 months he worked there until his return and suicide. This included a description of Wade's phone call about the mortar attack and his call about the clean-

² See http://en.wikipedia.org/wiki/Fallujah_during_the_Iraq_War. Initially, Wade was working at the Al Asad Air Base, C.Ex. 72 at 10, which is not a Marine base, and is nearly 60 miles from Fallujah; his work in vector control was at that base, not outside the wire in Fallujah. Later, he was transferred to Mosul. E.Ex. 30 at 28. That is about 300 miles from Fallujah.

³ See, e.g., findings about observations of Wade Dill's co-workers Finto, Olson, and Anstead.

⁴ Dr. Seaman also interviewed Wade Dill's co-worker Mr. Anstead, and Dr. Whyman reviewed Anstead's deposition.

up following the soldier's suicide. Barbara described how Wade's behavior changed, both while communicating from Iraq and also while on his successive visits home: that over time he became angrier, more distant, and threatening; that when he threatened to throw Barbara and Sara out of the house, Barbara changed the locks and saw a divorce lawyer; that the marriage was stressed in other ways; and that Wade and Barbara separated upon Wade's last return home. Barbara said that soon before his suicide, Wade acknowledged that he needed psychological help, but he wanted Barbara to return to living with him, and she was unwilling to do that at least until Wade completed treatment. All of this is recited in Dr. Seaman's initial report of January 2008. *See* C.Ex. 34.

But, as I mentioned above, Barbara neglected to tell Dr. Seaman that Sara's boyfriend Jamie Kerr and Barbara's male "friend" Steven Lewis were at the house when Wade arrived from Iraq in June 2006; she did not mention Wade's interaction with Jamie the next day; she made up a story about Wade's throwing her cats; and she attributed to Wade a history amounting to hypervigilance, yet later, at trial, claimed not to know about this.

Turning to Sara, Dr. Seaman reported that her information was limited because her parents had not shared much about their disputes and concerns. She confirmed Barbara's renditions about the mortar incident and suicide clean-up. She also confirmed that, by Wade's second return home, he was preoccupied with financial problems. She told Dr. Seaman that her parents seldom fought before her father went to Iraq, but after Wade went, he became unreasonable about money, and they fought about that. *Id.* at 7. She related that shortly before the suicide, Wade blamed Sara for his problems with Barbara. *Id.* at 8.

Dr. Seaman concluded to a reasonable medical certainty that severe dysfunction in Wade's marriage was the major cause of his suicide and that a primary reason for the dysfunction was the physical separation between Wade and Barbara, a condition that Wade's job imposed on them. In his opinion, the conflicts in the marriage that pre-existed Wade's deployment to Iraq "significantly and rapidly intensified" once he and Barbara were physically separated. As Dr. Seaman explained, being away, Wade's information about Barbara's activities and feelings became limited, as did his awareness of the changing home situation. Wade was left to speculate about what was happening at home and to feel a loss of "significance or control in the family other than providing a paycheck."⁵ Dr. Seaman concluded that the stresses of the work in Iraq, when combined with the stress of the physical separation, produced increasing emotional distance, emotional intensity, distortion, erratic behavior, and finally Wade's suicide.

Dr. Seaman also cited statistics that the U.S. Army developed for 2007. ALJ Ex. 11. The Army's report shows that:

50% of completed suicides in Army personnel were associated with failed marital/intimate relationships. Other failed relationships (non-intimate) were reported for another 15% of completed suicides. The report indicates a failed intimate or spousal relationship was the most common association with completed

⁵ Dr. Seaman viewed the money problems as a symptom of the marital dysfunction caused by the physical distance between them.

suicide. Moreover, the report indicates only 24% of Army suicide victims had direct combat experience compared to 37% with no combat experience. The data suggest exposure to combat was less of a risk factor for suicide than relationship failure.

Id. at 1.

Commenting on the contribution to Wade Dill's mental condition from the stress of his job duties in Iraq, Dr. Seaman wrote that the cause of Wade's condition

is the totality of all the stressors combined since the reactions to one identified stressor is affected by other major or minor stressors. In Wade Dill's case, a number of stressors contributed to his relationship failure and his relationship [failure contributed to the other stressors]. Furthermore, having to cope with one identified stressor frequently diminishes the individuals' ability to cope with other major or minor stressors When there are multiple causal stressors involved in the cause of a [condition such as Wade's], they are inter-related and act synergistically.

* * *

The available information indicates Wade Dill had a number of work-related stressors. Some of these appear to be separate from his marital problems, but they, no doubt, also exacerbated his marital problems or reduced his ability to cope with them. [For example, when Carrier's representative interviewed Barbara Dill in December 2006, she] recalled a conversation with Wade, around March 2006, when he stated, "I'm sorry, we wouldn't have to have many of these angry conversations, it's just that I'm . . . working these two jobs and I'm under tremendous stress . . . you know, I'm sorry, you're my whipping post, I take it out on you." Wade's comment clearly shows his stress of working long hours aggravating the stress of his marital problems.

Id. at 2.

Dr. Seaman diagnosed (on Axis I) an Adjustment Disorder with Mixed Disturbance of Emotions and Conduct (DSM 309.4).⁶ C.Ex. 34 at 13. He explained that the adjustment disorder was associated with the dysfunction of Wade's marriage, and the mixed disturbance of emotions and conduct reflected Wade's emotional history of anxiety, depressed mood, anger, frustration, and intense emotional needs and his conduct history. Dr. Seaman stated that adjustment disorders are associated with suicide attempts and suicide. *Id.* at 14. He found that the most prominent work-related stressor that aggravated the marital dysfunction was Wade's prolonged separation from Barbara. ALJ Ex. 11 at 2. "Less prominent, but not less significant, were other stressors that

⁶ Dr. Seaman added a "v-code" of Partner Relational Problem (v. 61.10). *Id.* He offered a provisional diagnosis on Axis II of Obsessive-Compulsive Personality Features. *Id.* He found insufficient evidence to diagnose Posttraumatic Stress Disorder or Major Depressive Disorder, and he did not posit a Global Assessment of Functioning (Axis V). *Id.*

include the weather, conflicts with his supervisor, and exposure to rockets and mortar attacks.”
*Id.*⁷

C. Dr. Whyman’s opinion.

Although Dr. Whyman recites more detail in his report than did Dr. Seaman, *see* E.Ex. 44, Barbara gave both doctors similar information about Wade’s history (employment, family, schooling, military service including honorable discharge from the Marines, medical history which amounted to one knee surgery in the 1980’s) and relevant events during his last 18 months. *Id.* at 12-15. Unlike Dr. Seaman, Dr. Whyman elicited from Barbara that Wade had served three months for growing marijuana in their garage shortly after they were married, and also that he got fined \$150 for fighting with his sister’s ex-boyfriend. *Id.* at 16.

Barbara said that Wade was happy when the opportunity to work in Iraq appeared because he had been concerned about paying for Sara’s college education, and this was an answer. *Id.* at 2, 3. She stated that they were not having any problems meeting their bills, and she had tried to convince Wade not to go. *Id.* at 2, 6.

Some of Dr. Whyman’s recitations from his interview of Barbara appear to be erroneous or that he failed to reconcile some inconsistencies. He recites in two succeeding paragraphs that Barbara said Wade’s plan was to work in Iraq for five years and that she also said his plan was to be in Iraq for only one year. *Id.* at 2. Apparently, Dr. Whyman did not resolve the discrepancy. Dr. Whyman states that when Wade traded in his BMW 530 on his first trip back, the new BMW for which he traded cost an additional \$50,000. *Id.* at 3. But Barbara told Dr. Whyman that they owed only \$5,000 or \$6,000 on the BMW 530 that they traded in, *id.* at 14, which means that the additional money needed could not have been anywhere near \$50,000; this is never clarified.⁸ Barbara told Dr. Whyman that she and Wade were \$300,000 in debt when he left for Iraq. *Id.* at 14. But she also told Dr. Whyman that, by the time Wade died, the debt was down to \$150,000. *Id.* at 15. Dr. Whyman did not inquire about this, and it appears to require an explanation: If Wade was earning about \$55,000 more per year working in Iraq and was there for 18 months, there is no way he and Barbara could have paid down their debts by \$150,000 during that time (after paying taxes, living and travel expenses,⁹ and mortgage payments).

But for the most part, Barbara gave Dr. Whyman much the same information as she gave Dr. Seaman. This included the information about the incidents with the incoming mortar and Wade’s diving into a bunker and later crying to Barbara about it; the clean-up after the soldier’s suicide; Wade’s long work hours and that he was working two jobs for a while; his getting soaked in toxic waste; and Wade’s characterizing Barbara as his “whipping post” to express his work frustration. *Id.* E.Ex. 44 at 5-8. Barbara described Wade’s anger with Sara about getting a

⁷ In support of this conclusion, Dr. Seaman cited Scott Anstead, Wade’s co-worker, who stated that “little things” would wear on Wade, such as the heat and being away from America and his family, and that Wade had conflicts with his supervisor in Iraq (Stacy Cole) and also was exposed to rockets and mortars. *Id.*

⁸ Apparently Wade traded in the BMW 530 for a BMW 545. *See* E.Ex. 44 at 29.

⁹ Wade told Barbara that the travel home and back was expensive.

"C" in one of her high school freshman classes; and that Wade tried to manage the family finances through phone calls. *Id.* at 6-7.

Barbara also offered details about Wade's trips home, describing the changes from the first trip, on which he was "so happy to be home," he bought another BMW, and he cried when he left, *id.* at 3-4; to the second visit, which was "quite nice" and included a trip with Sara to San Francisco, but Wade "seemed a little distant and maybe a little 'more angry' and maybe a little frustrated, maybe like anxious," and was not emotional about leaving for Iraq, *id.* at 5; and then by the third visit, Wade was "just numb," "didn't give a rat's ass about us," and "seemed 'strange,'" *id.* at 7. She similarly described how the phone calls devolved from managing family finances; to Wade's venting about his work experiences, the increasing problems with Sara, and the money; to venting that became "venom," "downright rude," things "that no man should say to his wife," "pathetically disgusting things." E.Ex. 44 at 8. Barbara reported Wade as saying in calls from Iraq toward the end that he was losing his feelings for her, that he might disappear, or that he would make sure she lost the house. *Id.* at 9. It was at this point, according to Barbara, that she stopped taking Wade's calls. *Id.* Barbara also told Dr. Whyman that Wade learned that Sara was cutting classes, doing drugs, and not always coming home from school. *Id.* She described the events on Wade's last arrival home from Iraq, neglecting that Sara's boyfriend and Barbara's male "friend" were in the house when Wade arrived. *Id.* at 10. As she had told Dr. Seaman, she described Wade as having lost weight, lost hair, and turned pale. *Id.* at 11. And she described how Wade had wrecked some household items, such as by cutting the wires in the refrigerator. *Id.*

When Dr. Whyman interviewed Sara Dill, much as she had told Dr. Seaman, Sara said that she was only 14 years old when Wade left for Iraq and that she did not know much about the events in question. E.Ex. 44 at 17. She described Wade as a "strict" father, who would get angry and yell at times. *Id.* at 18. He had a temper and would spank her. *Id.* She was not allowed to date or "party." *Id.* But Sara said that her father was never violent or aggressive. *Id.* As of the time Wade left for Iraq, Sara understood that all the bills were being paid; she felt her family was living well and not struggling. *Id.* at 16.

Sara said that, once Wade was in Iraq, he called daily and tried to control the finances. *Id.* at 17. She said it went "fine at first," although Wade got angry over "little things" such as Barbara's buying some shoes at the mall. *Id.* Sara recalled events on Wade's first two visits as "decent," but said she could not recall much; it was "all a blur." *Id.* She recalled Wade's trading in his BMW for a new 5-series. *Id.* at 17-18. She said that, when Wade returned for the last time, she had been "acting out," "hanging out not with the best crowd," had been expelled from school twice (once for drugs),¹⁰ had been using cocaine regularly, and was going out with an older man who introduced her to the cocaine. *Id.* at 18. She described Wade on his last visit as "really crazy," "extra angry," and that Barbara moved out. Unlike Barbara, she stated that, on the night Wade arrived, Sara's boyfriend Jamie was in the house. *Id.* at 19. She confirmed that Wade gave her \$13,000 and a car, went to Puerto Rico to see his sister, and returned to find Sara on drugs. He wanted the \$13,000 back, was told that only \$8,000 remained, argued with Jamie

¹⁰ Sara's grades fell precipitously from over a 3.0 grade point average at the time Wade left for Iraq, to C's and D's in the next semester, and D's and F's in the following semester. E.Ex. 41 at 55-56.

(putting his hands around Jamie's neck), and finally resold the car to the dealer at a loss. *Id.* at 20. Looking back, one of Sara's comments about her father (as Dr. Whyman reported it) was: "For Dad, school was always number one." *Id.* at 21.

Much as did Dr. Seaman, Dr. Whyman reviewed the documents available about Wade's suicide and some emails between Wade and Barbara. As Dr. Seaman's report preceded Dr. Whyman's, Dr. Whyman also reviewed Dr. Seaman's report. He read a transcript of the interview Sara gave Carrier's investigator in December 2006, and the transcripts of Barbara's and Sara's depositions.¹¹ *Id.* He also reviewed a transcript of Dr. Seaman's interview of Barbara. *Id.* at 25.

A good deal of this material duplicates the information recited above. But to the extent it includes other information, it had little impact on Dr. Whyman's opinion. As Dr. Whyman stated, the data he used to draw his conclusions came from "most relevantly the histories provided by Barbara Dill, Sara Dill, and the various communications that occurred between Mr. Dill and his family." E.Ex. 44 at 31. This saddled him with the same limitations as Dr. Seaman had when relying on Barbara, Sara, and the emails and suicide-related documents.¹²

¹¹ Reviewing Barbara's deposition testimony, Dr. Whyman concluded that Barbara demonstrated poor recall at the deposition compared to what she had remembered when he and Dr. Seaman interviewed her. *Id.* at 26-27. Actually, much of what Dr. Whyman questions is consistent with what Barbara has said throughout. For example, he writes: "Asked why her husband went to Iraq, she answered (page 32) "'Our daughter had just started high school, and we had a new mortgage. And because he wanted to be able to set aside some money for a college fund.'" E.Ex. 44 at 27. She recalled a history of two bankruptcies. *Id.* She said at the deposition that she did not want Wade to go to Iraq and that they had never been apart like that before. *Id.* She testified that there was a time Wade was required to do two jobs assignments in Iraq, and he resented it. *Id.* She said that Wade had issues with supervisor Stacy Cole; that he spelled out "Goodbye" on their bed a few days before the suicide; and that Sara had drug problems at school. *Id.* at 28. There is nothing surprising about any of these statements; Barbara consistently reported the same information whenever asked. Dr. Whyman also gives considerable attention to Barbara's deposition testimony about the marijuana conviction. E.Ex. 44 at 26-27. But there is nothing of note in it: Barbara faithfully disclosed that her husband was in jail for three months. Her counsel directed her not to answer most of the other questions on this subject.

On the other hand, Barbara testified at her deposition (according to Dr. Whyman) that Wade expressed no displeasure with the manner in which she was running the household. *Id.* She said she could not recall how she used Wade's \$250,000 life insurance proceeds. *Id.* These are not credible.

To the extent that Dr. Whyman is correct that Barbara's recall seemed inadequate, this should have given him pause about how much he could rely on his interview of Barbara, irrespective of whether her deficient recall reflected problems with memory or veracity. Yet he never addresses this.

¹² Dr. Whyman's statement that he relied "most relevantly" on the histories Barbara and Sara gave him along with their communications with Wade refutes Employer/Carrier's contention that Dr. Whyman had a more complete basis for his opinion than did Dr. Seaman. Dr. Seaman received very much the same histories from Barbara and Sara and reviewed the same communications they had with Wade; the two experts relied centrally on the same data.

Consistent with this, after Dr. Whyman reviewed Mr. Anstead's deposition, he stated that it did not affect his analysis or conclusions. Dr. Whyman also made the same comment about other materials he reviewed in preparation for trial. Tr. 321-22, 340, 342, 343 (trial exhibits; depositions of Finto and Olson: Whyman states that this evidence tends to support the findings he already made). (I overrule Claimant's objections to Dr. Whyman's comment about these sources. Dr. Whyman did not read these until after writing his report, and he did not write a supplemental report to comment on them. But experts are permitted to remain in the courtroom during trial testimony and are permitted to comment on the testimony they hear, all despite not having written a report about this testimony. This is no different.)

It was based on these findings that Dr. Whyman reached his diagnoses of Probable Major Depressive Episode; Probable Dysthymia; Relationship Problem; and Probable narcissistic personality features. E.Ex. 44 at 30.

Dr. Whyman's discussion in support of these diagnoses is flawed. He exaggerates Wade's history to create a misimpression of Wade as being so deeply pathological that his suicide was essentially inevitable even had he never gone to Iraq. Dr. Whyman states that Wade "was subjected to rather substantial and extraordinary developmental vicissitudes"; that "There was a good deal of emotional psychopathology in the family"; that Barbara began to question Wade's spending habits when they "began to suggest financial ruin"; and that Wade's "behavior resulted in rather extraordinary debts," "massive debts."

While the record shows that Wade had problems when he left for Iraq, it also shows that he was performing reasonably as a husband, father, and worker. Certainly Wade's upbringing was far from ideal, but being raised by a single parent mitigated by frequent contact with grandparents is not, as Dr. Whyman states, an "extraordinary" vicissitude; on the contrary, single parents are not unusual, and they generally raise fully functioning children, especially when there are grandparents to help. Wade's mother remarried more than once after his father left, but the record does not disclose whether there was more than one step-father while Wade was in his developmental stages. Wade's schoolhouse fights were few and happened in early school days - again not a positive event, but nothing extraordinary either. Wade (and Barbara) cut classes in school on occasion, and eventually Wade dropped out of high school: Not the paradigm of a perfect student, but there is no record that any school expelled or suspended either of them, and Wade did get a GED. Yes, in a single episode Wade grew marijuana in his garage, was arrested and convicted, and served 120 days, but it overstates the case to characterize this as a "substantial and extraordinary developmental vicissitude."

Regardless of any "vicissitudes" or ill-advised behavior, Wade joined the Marines, served about four years, received an honorable discharge, got work as a mill worker until he was injured, got a job with a dental company at \$10 per hour, improved that at the pest control company, and eventually was promoted there to a supervisor position at about \$24 per hour before taking the six-figure job in Iraq. Dr. Whyman infers that Wade was unhappy at his pre-Iraq job, E.Ex. 44 at 34, but there is no evidence of that (although there is an indication that some of Wade's subordinates complained about him). There is no evidence of discharges from employment, extended period of unemployment, or drug involvement after the marijuana conviction.

Dr. Whyman finds "a good deal of emotional psychopathology" in Wade's birth family. But having a sister with scoliosis and obesity, who needed constant pain medication and overdosed on it, says nothing reliable about psychopathology. Although Wade's brother might have had a learning disability, Dr. Whyman offered nothing to suggest that having a sibling with a learning disability is a risk factor for suicide.

Barbara might have been surprised by the extent of the Dill's debts in 2004. But for a couple who were both working full-time and earning a total of at least \$62,000 per year,¹³ owing a house with a mortgage of \$161,000 and carrying total debt of \$300,000 at that time did not amount to what Dr. Whyman described as facing "financial ruin" or having debts that were "massive." Wade's reason for going to Iraq was not to avoid catastrophe; it was to achieve a brighter future: He planned to earn extra money to pay for his daughter's education; later he also felt that the additional income could pay down some debt and might allow the Dill's to retire early.

Dr. Whyman describes the Dill's marriage as a "troubled relationship" and notes that Barbara later said that she might "have been wearing rose colored glasses." Certainly there were problems. Wade was very controlling about money and more. He decided unilaterally to go to Iraq despite Barbara's opposition. His angry outbursts could be verbally abusive; Barbara had to manage them. But Sara described her life before Wade left essentially as living well, with her parents getting along and the family wanting for nothing. Wade and Barbara had been together for about 25 years; they had been married for 15. Nothing on the record suggests any significant problems with Sara until this time. She was 14, apparently doing well in school (such that a grade as low as a "C" was a disciplinary event), and had no history of social or developmental problems reflected on the record.

Dr. Whyman asserts that Wade believed "that everything would improve if he went to Iraq and made more money." E.Ex. 44 at 34. But there is no evidence that Wade believed "*everything*" would improve; he thought that he would be able to send his daughter to college, and in time he also thought he could reduce his debt and perhaps retire early. That is what both Barbara and Sara said, and to which Sara added that, to Wade, her schooling was "number one." There is nothing to suggest that Wade went to Iraq in a desperate or fantastical effort to fix "everything."

Dr. Whyman describes Wade's emotional difficulties as progressing over time. He found that Wade addressed his deficient relationship and coping skills by needing "to be all-controlling" and that Wade could not achieve this level of control. In particular, Dr. Whyman observes that Wade could not control "his spending habits, his anger, his wife's imperfections as he saw them, and later his daughter's adolescent excesses." E.Ex. 44 at 34. "He was, over time, increasingly suspect of his wife, increasingly negative about her attempts to manage matters and eventually he learned about his daughter's activities. He basically blamed his wife for all of it." *Id.*

Dr. Whyman concludes that this describes "a life unraveling," beginning "likely" with long-term "mild Dysthymic Disorder," progressing to "an agitated depression," which "ultimately culminated in [Wade's] suicide." As Dr. Whyman wrote:

Mr. Dill had progressive emotional problems. There is no relationship between [his] job assignment in Iraq and his suicide. Mr. Dill's emotional unraveling had its germination in his developmental years, relationship problems evolving out of characterological flaws and progressive non work-related stressors There is

¹³ Wade was earning \$4,000 per month, or \$48,000 per year. Barbara worked at the doctor's office full time. Even assuming that she was paid only minimum wage, the California minimum wage in 2004 was \$6.75 per hour, which works out to about \$14,000 per year. See <http://www.dir.ca.gov/iwc/minimumwagehistory.htm>.

really no indication that [Wade] suffered from any mental disorder as a result of his work assignment in Iraq.

E.Ex. 44 at 34-35.

Dr. Whyman rejected Dr. Seaman's opinion that the separation between Wade and Barbara were a major cause of the progressive difficulties that led to the suicide. E.Ex. 44 at 35. As he wrote:

It is entirely speculative to suggest that the separation between Mr. and Mrs. Dill led to progressive difficulties for [Wade]. Mr. Dill, indeed, chose to leave home in what he perceived to be a crisis situation at a time when his daughter was entering that delicate and difficult age of early adolescence. She developed major difficulties and he then blamed his wife for them. [¶] Mr. Dill's unfortunate suicide was the culmination of all the things that had gone wrong in his life. They had no relationship to his employment overseas in Iraq.

Id. As Dr. Whyman testified: "There were a myriad of factors that contributed to his psychiatric condition arising from his personal life, and there were no factors that arose from his service overseas that contributed to his psychiatric condition There was no basis on which to find that his service overseas contributed in any way to his psychiatric condition or to his death. Tr. 343.

In his testimony, Dr. Whyman rejected any causal role in the Dill's separation or Wade's experiences in Iraq:

Q. Would it be fair to say then that [Wade Dill] was heading towards suicide regardless of Iraq?

A. Yes.

Q. It was just a matter of time?

A. Well, it was a matter of time given all of the other things that happened. Now take out the Iraq experience, it would have happened.

Tr. 357. Indeed, Dr. Whyman understood Wade's time in Iraq, not as a cause of anything, but as an effect, a byproduct of the "financial and emotional crisis" that existed before Wade took the job:

Q. Well, if he would have just stayed home and – things would have gone [this way] without any changes?

A. Well, you can't speculate if he would have just stayed home. He left home because there was a crisis.

Q. That was a financial crisis?

A. Well, it was a financial and emotional crisis. He – he came up with a miraculous idea to make everything better because everything was going sour. It wasn't just, "We're having a little trouble financially, but we've got a wonderful situation here." And that's why it was [such] a precipitous [leave-taking].

Id.

D. Credibility findings on expert opinions.

I accord considerably more weight to Dr. Seaman's ultimate conclusions than to those of Dr. Whyman. Both doctors agree that Wade Dill had pre-existing problems, but Dr. Whyman viewed those pre-Iraq problems as having arrived at a crisis point by December 2004 that then progressed naturally to Wade's decompensation and suicide eighteen months later owing to "myriad" non-work-related events.

This analysis fails for two reasons. First, neither the data Dr. Whyman received nor the record as a whole supports his conclusion that Wade's life had reached a crisis point by December 2004. Second, it appears that, by the myriad non-work-related events causing the suicide, Dr. Whyman is referring to the collapse of Wade and Barbara's marriage and the serious problems (which Dr. Whyman refers to as "adolescent excesses") into which Sara fell. He states that the events in Iraq had no effect, and aside from these crises with Barbara and Sara, Dr. Whyman points to nothing else.

But these crises are the very events that Dr. Seaman views as developing, at least in part, because of the physical separation that the job required. I reject Dr. Whyman's only refutation of Dr. Seaman's opinion, which is no more than a conclusory assertion that Dr. Seaman's opinion is speculative. On the contrary, I find Dr. Seaman's view rational, sensible, closely fit to the facts, and supported by the U.S. Army study.

Striving to minimize the effect of Wade Dill's time in Iraq and the concomitant changes in his family life back home, Dr. Whyman exaggerates the extent of Wade's psychological difficulties when he first left for Iraq. To be sure, aged 45 when he left for Iraq, Wade's life had included a number of challenges. His father left when Wade was three, and his mother was involved in serial marriages, but Wade also spend a lot of time with his grandparents, who lived in the country. He got into occasional fights with fellow students in early adolescence (none that led to suspensions from school), and he dropped out of high school, eventually earning a GED. Two months after he married Barbara on March 4, 1989, he was arrested after a fight with his sister's ex-boyfriend, pled to a battery, and was sentenced to time served, one year's probation, and a fine of \$150. E.Ex. 4. The following year (1990), he pled to a single count of possession of marijuana for sale (after the prosecutor agreed to dismiss all charges against Barbara), for which he was sentenced to 120 days in jail and 36 months' probation.¹⁴ E.Ex. 5, 6. A year later (December 1991), he was sentenced to an additional 45 days after he violated probation. E.Ex. 5. The full sentence (including probation) was not complete until November 1, 1995. *Id.* In August 1997, he filed for section 7 bankruptcy protection (his second bankruptcy), and his debts (of about \$43,000) were discharged in December of that year. E.Ex. 9.

¹⁴ There is no indication that Wade was involved in any elaborate drug dealing operation. He was growing some marijuana in his garage. It was of sufficient quantity to imply that it was for sale. See California Health & Safety Code section 11359. E.Ex. 5.

Having discharged those debts in 1997, by 2004, when he decided to go to Iraq, he and Barbara were \$300,000 in debt, including their mortgage of about \$161,000 on the property that Barbara's mother signed over to her. Part of the debt resulted from Wade's impulsive purchases of BMW's, including some ten car-trades in the year before he left for Iraq, as well as other impulsive buying, such as when he would walk past a store window, see a mannequin, go into the store, and buy everything on the mannequin for Barbara to wear. As I discussed in the initial decision, Wade had a quick temper, which led to an incident of road rage, frequent occasions on which he raised his voice at home, some occasions on which he damaged property in the house, and complaints from subordinates and co-workers.

Certainly both the Dill's individually and their marriage had very real problems. But nothing about Wade's decision to go to Iraq suggests that he saw it, as Dr. Whyman states, as a "miraculous" path to escape "financial ruin" and "crisis" and to address "everything" that was wrong in his life. Barbara and Wade had ongoing problems, but overall, they appeared to be doing at least as well as at any time in their lives.

As I discussed above, Wade and Barbara had been together for 25 years. They were raising their daughter together. It appears that Sara had been doing fine: she described her life as living well, and she had over a 3.0 grade point average in school. Barbara had agreed to let Wade control the finances and most decision-making, including Sara's discipline, which for better or worse appears to have limited the friction over these. Given their income, there was nothing extraordinary about their debt or financial condition for a northern California family in 2004.¹⁵ Although some \$140,000 of personal debt (beyond the mortgage) is considerable, especially when a substantial part was from Wade's impulsive spending, Wade was getting the bills paid, and Wade and Barbara both had steady work, with Wade having been promoted and earning more than he had ever earned before. The criminal convictions were long in the past, and the bankruptcy seven years earlier had receded in time as well.

Wade told his family that he was going to Iraq for financial reasons. But he did not describe it as a way to avoid "ruin." His plan was to spend five years working there and earn enough to help Sara get a college education; later he also spoke of saving money for a possible early retirement and for paying down the family debt. I find nothing extraordinary, chaotic, or crisis-filled about this. It seems entirely ordinary that a person taking a job working for a civilian contractor in the war in Iraq would do so for financial reasons (plus perhaps patriotism following 9/11). Otherwise, why would Employer pay over \$100,000 per year for the work of a pest control tech that had been paying Wade no more than \$48,000 per year in California? With the bills being paid, Wade's controlling the finances, and no signs of any deterioration in the Dill's marriage or Sara's well-being (except driving the car once underage), there is no reason on the record to

¹⁵ The property had an assessed value of \$72,296 (for a mobile home and a second structure). E.Fx. 18 at 3-4. But Employer/Carrier's arguments notwithstanding, in California, assessed value can bear little resemblance to market value. Under California's Proposition 13, a county may not increase property assessment more than about 1.1 percent per year unless there is a sale of the property. Barbara's mother could well have bought the property years or even decades earlier, and the assessed value would have fallen far behind the more rapidly increasing market values in the northern California market of that time.

conclude that Wade found himself in a deteriorating emotional and financial condition that required a "miracle" cure.

Nor did either expert specify a known risk factor to show that, as Dr. Whyman stated, Wade was heading for suicide by the time he left for Iraq and would have killed himself even had he not gone there. Wade had no history of prior suicide attempts, suicide threats, or reports to his family or friends of suicidal ideation. He had no history of mental health treatment. Although he had two criminal convictions, the latter of them occurred some 13 years earlier, when Sara was a baby, and it was marijuana-related, which would not suggest anything about being suicidal. Wade manifested a real difficulty managing his anger, but the only record of violence toward any person was the battery conviction 15 years before Wade left for Iraq. That was too remote in time to suggest that Wade had a propensity toward violence in 2006, not to mention violence that he might direct at himself.

I therefore reject Dr. Whyman's finding that Wade Dill found himself in an emotional and financial crisis and chose to work in Iraq as a would-be miracle cure for a ruinous situation. I reject Dr. Whyman's conclusion predicated on this finding that Wade's history and status made his suicide an essentially inevitable natural progression even had he not gone to Iraq.¹⁶

I find more persuasive Dr. Seaman's analysis identifying as the cause for Wade Dill's suicide the "significant and rapidly intensified" dysfunction in Wade Dill's marriage occasioned by his work-related physical separation from Barbara plus the exacerbating effects, even if relatively minor, of his experiences in Iraq. These are more consistent with the full factual record and make better sense of the events as they actually unfolded than anything Dr. Whyman offered.¹⁷

¹⁶ There is some suggestion that Dr. Whyman might have been biased. Semi-retired, he stopped practicing five to seven years before trial and limited his work to giving expert opinions. Tr. 325. He had a long-standing business relationship with Employer/Carrier's counsel and his former firm. Tr. 344. He testified that, in the past 20 years, he had worked for present defense counsel or his former firm on "many dozens of cases, and mostly - almost exclusively in the workers' compensation field." *Id.*

¹⁷ Employer/Carrier makes much of Barbara Dill's at times inaccurate rendition of the events of the last three weeks as an effort to take the spotlight off her own actions that could have contributed to the suicide. I accept that when Barbara spoke with the experts, she failed to disclose many of her own actions at this time. For example, as I have mentioned repeatedly, she did not disclose that the two men were in the Dill house when Wade returned from Iraq. There is no question that Wade found this disturbing; he stated when he discovered this that it was the end of his marriage. He changed course soon afterward and returned to the house (at least for the night), but there is no question that the event was a source of very considerable stress.

What Employer/Carrier neglects is that Barbara Dill's actions are consistent with Dr. Seaman's opinion that marital dysfunction was the primary cause of the suicide and that Employer's work requirement that they live thousands of miles apart intensified the dysfunction. Barbara's actions at the time Wade last returned from Iraq are emblematic of and support Dr. Seaman's construct: had Wade been living at home and not in Iraq, it is very doubtful that Barbara would have barred him from the door of his own home while she was hiding an apparent paramour in the bathroom.

Similarly, as the events surrounding Sara worsened, it could be said that Sara was causing stress for Wade. But the point is that Wade would have been in a far better position to address and ameliorate those events had he been living at home, something that the job precluded.

As I found in the initial decision and order when holding that Claimant offered sufficient evidence to raise the section 20(a) presumption, it is undisputed that Wade Dill experienced potentially traumatic events on the job in Iraq, including his assignment to clean-up blood, brains, and other remains following a soldier's suicide; his sustaining a mortar attack in which he had to dive into a bunker; his getting covered with hazardous waste; and his knowing a colleague who was injured in the explosion of an improvised explosive device. Defense expert Dr. Whyman conceded that incidents of this kind would be stressful to anyone. I accept Dr. Seaman's view that, although these were not a primary cause of Wade's suicide, they contributed by making it more difficult for Wade to address the other stressful events occurring with his family.

I give the most weight to Dr. Seaman's finding that Wade Dill's work-related separation from his family significantly intensified the dysfunction in his marriage. The evidence shows that after Wade went to Iraq and lost significant control of his wife's and daughter's actions and of the family finances, there occurred a devastating devolution of conditions at home. Wade's communications (e-mail, telephone, and in person while on home visits) deteriorated over time from caring and loving (albeit still controlling), to angry, to threatening and enraged, to attempting to disengage (at least as to Sara), to at times hateful (as Barbara perceived it), until they included behavior that I am best able to describe as bizarre in the three weeks before his suicide. As revealed in Wade's suicide notes, from his perspective, over the 18 months he was gone, his family life collapsed as his wife failed to assume primary care of Sara, failed to control the expenses, and finally, was unfaithful. Wade's suicide followed within about three weeks his discovery of what appeared to him to be Barbara's infidelity.

This is consistent with the mechanism Dr. Seaman described, whereby the separation from Barbara caused Wade to find it increasingly difficult to know what was happening with his wife and daughter, leaving him to speculate about events at home and to develop a feeling of lost control and significance, that led to the collapse of the family. For example, based on Wade's pre-Iraq history, it is highly unlikely that, had he remained home with his wife and daughter, he would have tolerated or permitted what occurred there in his absence. He would not have allowed his 15-year-old daughter to date a man ten years her senior, not to mention a cocaine dealer: That relationship far exceeded any problem that a "C" on a report card presented, and the "C" made Wade angry. Wade had great hopes for Sara: That was part of why he went to Iraq, and he immediately sought to end her relationship with Jamie Kerr when Wade arrived home for the last time.¹⁸ Wade, who was so controlling of the family finances that he complained to Barbara about the cost of a pair of shoes or gas for the car, would not have risked \$50,000 to bail out Sara's boyfriend. Wade's direct intervention with the boyfriend might have averted Sara's involvement with cocaine; at the least, his work-related absence made Sara's drug connection easier and facilitated her cocaine use. The cocaine use led to Sara's expulsion from school. That has to have been difficult for Wade, especially given that his primary motive for going to Iraq was to finance a college education for Sara. If Wade had stayed home, it would have been far less likely that Barbara would have been spending evenings with a male "friend," sometimes in

¹⁸ Wade only abandoned his effort to separate Sara and her boyfriend when he discovered that Barbara had her male "friend" were in the house the night before and that, as he said to Sara's boyfriend, he felt that his marriage was over.

the Dill home. It is very unlikely that Wade would have come home to discover that Barbara's "friend" had been hidden in the bathroom along with Sara's cocaine-dealing boyfriend.

In addition, Dr. Seaman cites the U.S. Army study that associates 50 percent of completed suicides in the Army with failed marital or other intimate relationships, a greater correlation than with combat experience. Wade's work-related separation from Barbara and assignment to a war zone placed him in a situation notably similar to those serving in Iraq in the U.S. Army. The study thus supports Dr. Seaman's conclusions.

I held in the initial decision and order that, under the Defense Base Act, an employer's requirement that an employee work at a remote location, separated from his family, brings the events that occur in the wake of that Employer-required separation within the zone of special danger for which the employer is responsible. The Board did not disturb this holding. I see no reason to address it on remand. Employer's mandated working conditions required Wade to work thousands of miles from his wife, daughter, and home. I conclude this caused, contributed to, or accelerated Wade Dill's suicide by aggravating whatever pre-existing marital dysfunction there was and by stressing Wade further with wartime experiences in Iraq. Employer/Carrier is responsible for the death within the meaning of the Defense Base Act.¹⁹

III. Claimant's Remedy Is Not Precluded As The Result Of A Willful, Intentional Act.

In the initial decision and order, I held that Claimant's remedy is not precluded by the statutory provision that "No compensation shall be payable if the injury was occasioned solely by . . . the willful intention of the employee to injure or kill himself or another." 33 U.S.C. §903(c). I found that Employer/Carrier had rebutted the statutory presumption against the section 3(c) exclusion with substantial evidence. See 33 U.S.C. §920(d); *Del Vecchio v. Bowers*, 296 U.S.

¹⁹ This case does not involve an independent intervening causal event. The continuing marital dysfunction during Wade's last three weeks was not separate and independent of the ongoing mechanism that Dr. Seaman describes; it was, at least in part, the natural and unavoidable result of Wade's work-related absence from home. There was a single continuing injury and mechanism of injury – separation causing marital dysfunction, stress, and ultimately suicide – not two separate injuries and mechanisms of injury. For that reason, there is no independent intervening cause to consider. It is a single chain of causation. See *Maddon v. Western Asbestos Co.*, 23 BRBS 55, 61 (1989); see *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994).

Even if the marital dysfunction after Wade's last return home were seen as separate and apart from the dysfunction generated while Wade was in Iraq, then the extent of the end-level dysfunction would be a natural result of the dysfunction that arose while Wade was in Iraq and thus would be compensable. See *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454, 457 (9th Cir. 1954) ("If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury"). Moreover, the marital dysfunction that Wade encountered in his last three weeks cannot be said to have resulted from his own intent or carelessness, a required showing to relieve an employer of liability based on an independent intervening cause. See *id.*; cf. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983) (worker's intentional failure to disclose history of drug addiction was an independent intervening cause of his readdiction after he was treated with narcotics for a covered injury – "causal effect attributable to the employment must not have been overpowered and nullified by influences originating entirely outside the employment"); *Wright v. Connolly-Pacific Co.*, 8 F.3d 34 (9th Cir. 1993) (unpub.) (not compensable if not a natural result of the primary injury but instead the result of an overpowering and nullifying influence). For, here, the causal effect of the physical separation of Barbara and Wade Dill as a result of the employment produced what Wade found when he returned in June 2006; it was not overpowered or nullified by any extraneous influence.

280, 285-86 (1935).²⁰ But looking to the evidence as a whole and irrespective of the presumption, I found that Wade's suicide was the result of an irresistible impulse, negating intent, and that the section 3(c) exclusion therefore did not apply. See *Maddon v. Western Asbestos Co.*, 23 BRBS 55, 61 (1989) ("Where an employee's death does not stem from a 'willful intent' to commit suicide, but is instead caused by an irresistible suicidal impulse resulting from an employment-related condition, Section 3(c) does not bar compensation");²¹ *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994).

In *Maddon*, the Board affirmed an administrative law judge's rejection of another of Dr. Whyman's opinions (also based on a psychological autopsy) and adoption instead of the claimant's expert's view that "the industrial injury causally contributed to a mental condition which prevented [decedent] from forming a rational intent to suicide." *Maddon* at 61. I considered other Board decisions as well. See *Cooper v. Cooper Assoc., Inc.*, 7 BRBS 853, 857 (1978) ("at the time he shot himself the decedent was aware of the consequences of his act but was without capacity to control what he was doing"); *Konno v. Young Bros., Ltd.*, 28 BRBS 57, 64-65 (1994) (decedent's conditions at work, combined with the pressures of a grand jury investigation, caused decedent to become depressed and led to depression, "tunnel vision," and an irrational view that suicide was the only alternative, amounting to an irresistible suicidal impulse).

Even before going to Iraq, Wade Dill had a history of impulsive behavior, such as trading cars ten times in the year before he went to Iraq or buying for Barbara all the clothes he saw on a mannequin. Even Wade's decision to apply for and accept the SEII job was impulsive (or, as Dr. Whyman described it, "precipitous").

This impulsiveness continued after Wade left for Iraq. It included another car trade while driving along the highway on a short vacation trip. This time it was especially impulsive, given that Wade was returning to Iraq in a few days and would not be at home to drive the new car, and that Sara had recently taken a set of car keys and driven without permission or a license (at age 14).

But Wade's impulsiveness intensified so markedly and abruptly during his last three weeks of life as to differ in kind. He was buffeted by rapidly shifting and opposing impulses, thoughts, and feelings. He cried when Barbara would not let him into the house when he arrived early and unexpectedly from Iraq. He went back to the house the next day to reassert his place in the family and discovered that another man had been in the house with Barbara the previous evening

²⁰ As the Board held in the present case, "Once employer produces substantial evidence sufficient to rebut the presumption, it falls from the case. Because Section 3(c) is an affirmative defense, the burden of proof then rests on employer to establish, based on the record as a whole, the applicability of Section 3(c) to the claim." Decision and Order on appeal at 10 (citations omitted). I find here, however, that even were the burden Claimant's, she met that burden with evidence of Wade Dill's impulsive and bizarre behavior, together with Dr. Seaman's opinion, which show that Wade Dill's mental condition negated intent.

²¹ Citing *Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), *aff'd in pertinent part sub nom. Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979); *see also, Voris v. Texas Employers Insurance Association*, 190 F.2d 929 (5th Cir. 1951); *Terminal Shipping Co. v. Traynor*, 243 F. Supp. 915 (D. Md. 1965).

when he arrived. He reversed his plan to rejoin the family (and literally turned around a car he was driving) to give Barbara the house keys because, as he said, his marriage was over. Yet, within hours, he was back at the house to be with Barbara, and they spent the night together in the same bed. By morning, he had abused Barbara's dog and thrown Barbara out of the house, having insisted that she return his gun.

Almost simultancously, he was telling Jamie Kerr that Kerr's relationship with Sara was over. But within a day or two, he blessed the same relationship, supported it with money and a car, and advised Jamie and Sara to make a life together, thus encouraging his teenage daughter to live with a 25-year-old convicted drug dealer.

Wade might have been planning either to disappear or to kill himself. Having set up Sara to live independently of both her parents, he gave her a memento so that she'd be able to recall that she once had a dad, and he went to see his sister. He left on the bed he had shared with Barbara the extraordinary "goodbye" message constructed of family photographs – something that would be found after he was gone since Barbara no longer was living in the house. In an irrational and bizarre act, he destroyed household appliances but made them look as though they would still work.

Yet, within a week, Wade was back, throwing out Jamie Kerr, demanding the money he'd given Sara and Jamie, arguing with Jamie when he found much of the money was already gone, and insisting that he was putting his family back together. He arranged to see Barbara and ask her to get back together. He was willing to go into therapy if that would bring Barbara back. He arranged a birthday party for Sara. His behavior was no longer that of a man saying goodbye and perhaps planning a suicide. He was now man who planned to be in charge and saw himself as having a future.

Then, within two or three days, when Barbara told Wade that he had to complete therapy before she would return to him, Wade shifted 180 degrees again. He begged Barbara to come back, and from the telephone calls and the suicide notes, appears to have been waiting for Barbara to agree. He wrote five suicide notes accusing Barbara of failing him and Sara, all very different in tone from what he wrote in the "Aloha" letter that he gave Barbara the day before. He then killed himself.

In the initial decision, I considered the experts' opinions in the light of these facts. Among my considerations was Dr. Whyman's limiting his diagnoses to "probable," which I took as equivalent to the DSM's term, "provisional." As the Board has instructed that Dr. Whyman's use of the word "probable" must be taken in its lay, dictionary sense, I will reevaluate with that in mind.

I consider first Dr. Seaman's opinion. Having diagnosed an Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, Dr. Seaman concluded that Wade's suicide was the irresistible result of his mental condition. ALJ Ex. 11 at 3. He wrote:

An Adjustment Disorder is [a] psychiatric condition that is associated with distress and/or mental/emotional impairment. The mental/emotional impairment

may include loss of impulse control, failure to see alternative options, distorted perceptions, excessive intense emotions, poor judgment, and impaired cognition.

* * *

Wade Dill's suicide was the result of the severe emotional distress and mental/emotional impairment of his Adjustment Disorder and was, therefore, the irresistible result of a mental disorder.

ALJ Ex. 11 at 3.

Dr. Whyman disputes this result but does so based on a misconstruction of the relevant facts. He read the suicide notes as showing a negotiation between Wade and Barbara that was part of a weeks'-long evolution of Wade's idea of killing himself. He opined that, even with the negotiation's failure, Wade still had a choice whether to take his life and decided to do so. I found this unpersuasive in the initial decision, and I find it unpersuasive now.

Wade was not involved over a period of weeks in a negotiation that failed, after which he considered his options and decided to kill himself. He and Barbara were living apart and hardly talking. Wade did not know where she was. She was not at the house, which means that the "goodbye" message Wade left on their bed was not one Barbara would see until later. This does not describe an ongoing negotiation. On the day before Wade killed himself, he begged Barbara to be with him while he was in therapy. That is better characterized as a desperate act of a man who was failing to see alternatives than as a bargaining strategy in a negotiation.

Moreover, Dr. Whyman's opinion neglects the many other crucial events that were happening during these last three weeks, while Wade exhibited powerful swings in emotion, thinking, and action. As late as the day before his suicide, he chose to leave his property to Barbara and thanked her for agreeing to take care of Sara. By the next day, he was writing suicide notes blaming Barbara for everything, accusing her of being an unfit wife and mother, and asking authorities to protect his daughter against her. A couple weeks before the suicide, Wade shifted from taking parental control of his daughter's relationship with Jamie Kerr by ending it, to blessing the relationship and supporting it, to ending their relationship as part of reconstructing his family, to acknowledging the relationship again. He gave Sara a zip drive with a picture of himself captioned, "I did exist and loved you," all in the past tense, but a week later he was putting his hands around Jamie's throat, throwing him out, and taking Sara back. Wade's bizarre dismantling of household appliances scarcely reflects deliberation. None of this is consistent with negotiation if that term is supposed to imply contemplation, deliberation, a reasoned exchange of views, intentional decision-making, or an exercise of will.²²

Having considered the evidence as a whole, I conclude that Wade succumbed to a series of shifting, diametrically opposite, powerful impulses during his last weeks. The evidence fits precisely Dr. Seaman's comment that Wade's Adjustment Disorder, aggravated by work-related events, could cause "loss of impulse control, failure to see alternative options, distorted

²² Given Dr. Whyman's assertion that Wade's suicide was essentially inevitable, it is logically questionable that it could be willful; free will and inevitability are generally inconsistent.

perceptions, excessive intense emotions, poor judgment" and did result in a suicide driven by irresistible impulse. Wade's suicide was not a willful, intended act within the meaning of section 3(c) but was the irresistible result of his mental condition as aggravated by working for Employer. Section 3(c) therefore does not preclude the claim.

IV. Funeral Expenses Must Be Limited.

As the parties stipulated that Claimant's funeral expenses were \$1,115, ALJ Ex. 10, her recovery is limited to that amount. *See* 33 U.S.C. 909(a). The previous award of \$3,000 (the statutory maximum in section 9(a)) cannot be sustained.

Conclusion and Order

For the foregoing reasons, I find that Employer/Carrier is liable under the Act for compensation for Wade Dill's death. 33 U.S.C. 909. The conditions of employment that SEII imposed and events that Wade experienced during and as a result of employment at SEII aggravated his mental condition and led to his suicide. The suicide was occasioned by an irresistible impulse and was not the result of Wade's willful intent. Accordingly,

1. Employer/Carrier will pay Claimant in funeral expenses of \$1,115, together with compound interest from July 15, 2006 until the date paid. *See* 33 U.S.C. §909(a). The previous award of \$3,000 is vacated.
2. Employer/Carrier will pay Claimant compensation beginning July 15, 2006 at the statutory maximum then in effect of \$1,073.64, together with compound interest from the date accrued until the date paid. The amount Employer/Carrier will pay must be adjusted at October 1, 2007 as provided in section 10(f) of the Act. Employer/Carrier will continue payments on this schedule through July 10, 2008. *See* 33 U.S.C. §909(b), 910(f).
3. As of July 11, 2008, Employer/Carrier will continue paying Claimant weekly compensation but at a rate reduced to \$1,012.12 plus whatever adjustments would accrue starting October 1, 2007, had she been paid at that rate at that time and adjusted as of October 1 of each succeeding year, together with compound interest from the date accrued until the date paid. *See* 33 U.S.C. §909(b); 910(f).
4. Employer/Carrier will continue paying Claimant the amounts described in the preceding paragraph (3) (with annual adjustments at October 1 of each succeeding year) until and unless Claimant remarries or dies. If Claimant remarries, Employer/Carrier will complete its compensation obligation with a single, lump sum payment equal to two years' compensation calculated at the then-applicable rate. 33 U.S.C. §909(b). All other provisions of this Order notwithstanding, Employer/Carrier's obligation to pay compensation shall terminate upon Claimant's death.
5. Employer/Carrier is entitled to a credit for all amounts paid voluntarily or pursuant to the initial order (dated January 21, 2011), including any overpayment of funeral expenses.

6. The District Director will perform all calculations necessary to carry out this Order.
7. Employer/Carrier will pay Claimant's reasonable attorney's fees incurred to Steven M. Birnbaum, Esq., Dennis F. Nalick, Esq., Scott J. Bloch, Esq., and Joshua T. Gillelan, II, Esq. 33 U.S.C. §928. Within 21 days, Employer/Carrier will meet and confer with each of the attorneys in an effort to resolve the fees amicably. For Mr. Nalick, who is deceased, Employer/Carrier will meet and confer with the representatives of his estate, if they can reasonably be identified and located. If there is a voluntary resolution as to any of these respective Claimant's attorney's fees, those who are involved will submit a stipulated fee petition for review and approval within 30 days of the date of this Order. Mr. Birnbaum filed a fee petition dated August 17, 2009. If Employer/Carrier and Mr. Birnbaum do not resolve his fees within 30 days, Employer/Carrier will file any objections or opposition to Mr. Birnbaum's fee petition within an additional 21 days; Mr. Birnbaum may file a reply within 14 days of service of the opposition. If Employer/Carrier and any of the other Claimant's counsel do not resolve the fees, those Claimant's counsel may file a fee petition within 45 days of the date of this Order; Employer/Carrier will file any objections or opposition within 30 days of service of any such petition; and any Claimant's counsel wishing to file a reply may do so (limited to new material raised in the opposition) within 14 days of service of the opposition. Any counsel filing a fee petition will accompany it with evidence of the prevailing market rates for comparable legal services in the San Francisco Bay Area, together with a memorandum of points and authorities in support of the petition and with evidence of time expended and costs incurred. If Employer/Carrier appeals this Decision and Order, any Claimant's counsel and Employer/Carrier may stipulate to postpone this process until there is a final decision. The stipulation will be in writing and filed with this Office no later than 14 days following service of Employer/Carrier's notice of appeal.
8. This Order will be served on all parties and counsel and all other persons required by regulation. In addition, the Order will be served on Claimant's former counsel, Steven M. Birnbaum, Esq., and also on the Estate of Dennis F. Nalick, Esq., at Mr. Nalick's last known address.

SO ORDERED.



Digitally signed by STEVEN BERLIN
DN: CN=STEVEN BERLIN, OU=ADMIN
LAW JUDGE, O=Office of Administrative
Law Judges, L=San Francisco, S=CA,
C=US
Location: San Francisco CA

STEVEN B. BERLIN
Administrative Law Judge

Re: Wade E Dill (dec'd)
File Number: 13-104350

CERTIFICATE OF FILING AND SERVICE

I certify that on February 12, 2013 foregoing Decision and Order, dated February 7, 2013, was filed in the Office of the District Director, 13th Compensation District, and a copy thereof was mailed on said date by certified mail to the parties and their representative at the last known address of each as follows:

Barbara Dill
9197 Chaparral Drive
Redding, CA 96001

AIG Gloval Claim
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A copy was also mailed by regular mail to the following:

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Joshua T. Gillelan, II,
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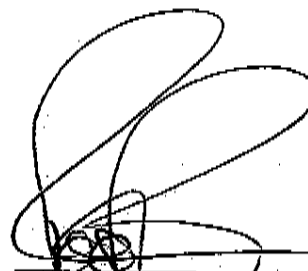
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U.S. Department of Labor, Room N-2117
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Please visit us at <http://www.dol.gov/owcp/dlhwc> for additional program information.

Re: Wade E Dill (dec'd)
File Number: 13-104350

Office of Administrative Law Judges
U.S. Department of Labor
90-7th Street, Suite 4-800
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Service Employees International, Inc.
c/o Kellog, Brown and Root Service
P.O. Box 3
Houston, TX 77001-0003



R. Todd Bruininks
Director, Districts 13/15

Mailed: February 12, 2013

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation. The date compensation is due is the date the District Director files the decision or order in his office.

RTB/rp