

U.S. Department of Labor

Office of Administrative Law Judges  
St. Tammany Courthouse Annex  
428 E. Boston Street, 1<sup>st</sup> Floor  
Covington, LA 70433

(985) 809-5173  
(985) 893-7351 (FAX)



Issue Date: 26 February 2008

CASE NO.: 2007-LDA-49

OWCP NO.: 02-149349

IN THE MATTER OF:

E.L.<sup>1</sup>

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL

Employer

and

INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA  
c/o American International Underwriters

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.  
For The Claimant

JOHN L. SCHOUEST, ESQ.  
BRIAN E. WHITE, ESQ.  
For The Employer/Carrier

Before: LEE J. ROMERO, JR.  
Administrative Law Judge

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<sup>1</sup> Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

## DECISION AND ORDER

This is a claim for benefits under the Defense Base Act, 42 U.S.C. § 1651, et seq., an extension of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Service Employees International (Employer) and Insurance Company of the State of Pennsylvania c/o American International Underwriters (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on May 21, 2007, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 16 exhibits, Employer/Carrier proffered 18 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.<sup>2</sup>

Post-hearing briefs were received from the Claimant and the Employer/Carrier on July 30, 2007, and July 24, 2007, respectively. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

### I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on June 6, 2006 (last day of exposure).
2. That there existed an employee-employer relationship at the time of the accident/injury.
3. That the Employer was notified of the accident/injury on August 13, 2006.

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<sup>2</sup> References to the transcript and exhibits are as follows:  
Transcript: Tr.\_\_\_\_; Claimant's Exhibits: CX-\_\_\_\_;  
Employer/Carrier's Exhibits: EX-\_\_\_\_; and Joint Exhibit: JX-\_\_\_\_.

4. That Employer/Carrier filed a Notice of Controversion on August 24, 2006.
5. That an informal conference before the District Director was held on December 4, 2006.

## **II. ISSUES**

The unresolved issues presented by the parties are:

1. Causation; fact of injury.
2. The nature and extent of Claimant's disability.
3. Whether Claimant has reached maximum medical improvement.
4. Claimant's average weekly wage.
5. Entitlement to and authorization for medical care and services.
6. Attorney's fees, penalties and interest.

## **III. STATEMENT OF THE CASE**

### **The Testimonial Evidence**

#### **Claimant**

Claimant testified at formal hearing and was deposed by the parties on March 6, 2007. (EX-9). Claimant was 40 years of age at the time of the hearing. (Tr. 14). He was born and grew up in New York and has a GED. (Tr. 13). After Claimant left high school in the 10<sup>th</sup> or 11<sup>th</sup> grade, he became a grip in the motion picture industry. He worked as a grip for 15 or 16 years and then began driving trucks. (Tr. 14).

Claimant testified: "After 9/11 happened, I was very angry because it was my city. New York is my city. Very angry, and I was looking for the opportunity to go over there, Afghanistan or Iraq. I couldn't figure out who the company was. It was Halliburton, but I'd never got KBR. And finally I found out about KBR and that's when I went over there." Claimant left for Iraq on February 15, 2005, and went to Balad, about 60 miles

north of Baghdad, where he was stationed for approximately seven months. (Tr. 15). Claimant then went to Al Asad, about 100 miles west of Baghdad, where he was stationed for the rest of his time in Iraq. (Tr. 15-16).

Claimant was a convoy truck driver; he became a convoy commander two months before leaving Iraq on June 6, 2006. As a convoy truck driver, Claimant drove mostly towards the Syrian border carrying "everything from munitions to food, toiletries, I guess, ammunition, everything. You name it, we carried it." (Tr. 16). When Claimant became a convoy commander, he stated that his job did not change and elaborated: "I was in charge. I didn't want the job. But I had the most experience. It was pushed on me, which I never got paid for being—I was never titled that, but I did it. It was in the works." (Tr. 17). Claimant testified there was a lot of turnover among drivers. (Tr. 26).

Claimant testified that there was no typical convoy size, but that the most usual configuration was seven to thirteen trucks. (Tr. 16-17). The typical convoy would have an Army escort consisting of Humvees with gunners; there would be a lead Humvee, one every five trucks, and then one at the rear of the convoy. (Tr. 18). For the first few months Claimant was in Iraq, he drove with a military shooter in his truck, but these shooters were declared unsafe because the trucks did not have any armor. (Tr. 18-19). The trucks did have ballistic blankets that wrapped around the sleeper part of the truck to the driver's side but left "exposure to everything in front of you." (Tr. 19). Claimant stated he "got fortunate" and "ended up with military issue body armor" from knowing people who would pass it down to him. He stated the armor issued when he got there weighed 60 or 70 pounds and "wasn't worth anything," but the military issue armor he acquired was a "lot lighter." (Tr. 19-20). He also wore a protective helmet. (Tr. 20).

Claimant stated the air conditioning in the trucks did not consistently function and would have to be repaired every month. (Tr. 20). Summer temperatures would be in the 120s and 130s. He testified his schedule was supposed to be 12-hour days, seven days a week, but that there "weren't any hours" and "when we were gone, we were gone. That was it. You're out. You're outside the wire, you're gone. You don't get back till you get back." (Tr. 21). He explained that "outside the wire" referred to going outside the secured perimeter area of the base. (Tr. 21). He stated he went outside the wire on convoys roughly three times a week. (Tr. 22-23).

Claimant testified convoys were attacked "all the time. I mean especially near the Syrian border we got hit a lot." (Tr. 23). The convoys would be attacked with improvised explosive devices, which could be detonated with cell phones; one convoy was also attacked with a vehicle borne explosive device—a car or truck armed with explosives and driven by a suicide bomber. (Tr. 23-24). Claimant's convoys also came under mortar fire. (Tr. 25).

Claimant stated his convoy came under attack on April 23, 2005. He described the incident: "I was new then. We'd just started going out a lot. We went up to Telefar, which is by Turkey, close to Turkey, stayed the night. We were waiting until the next night to leave. And when we left, they were waiting for us." The convoy was attacked with a daisy chain, which is "a bunch of IEDs set up, and they're timed to go off at a certain time to take out more than one vehicle." The truck in front of Claimant and the Humvee between Claimant and the truck in front of him were both blown up. Claimant stated: "I don't know. You see a light, you don't feel anything until a second or two after. Then you explode. And, I don't know, shrapnel blew my truck apart. I can't. I don't have words for it. It's an experience that you have to feel for yourself." (Tr. 27). Claimant stated that there was a lot of fire and smoke and his truck was smoldering. He was picked up by another vehicle, which drove about a mile away, where he waited a few hours before helicopters came and blew up the remains of the trucks. (Tr. 28). In his deposition testimony, Claimant stated he sustained a concussion. (EX-9, p. 38). At formal hearing, Claimant explained: "We went to Decreet. The medics wanted to keep me there. They say there's no signs in the medical records. Well, there are. There has to be. I don't know what KBR says, but I refused to stay. It was my fault. I went back with the guys, kind of a bond of brotherhood, kind of. I went back with the guys." He continued: "After that, I saw a medic and they said they were going to bring me to the military side. They never did. I went back the next day. They said, 'You're all right, you don't need to go.'" (Tr. 49).

Claimant stated that another attack occurred in August, September, or October 2005. He was the driver for the convoy commander, "basically more or less to be a convoy commander" himself. (Tr. 29). Claimant explained that the convoy commander had the lead vehicle and was more of a target for attacks. He testified: "We got hit six out of six times going to Rawa and that's no joke. I mean it was every time we would

go, we knew. We knew to the point that we took three days of clothes because we knew we weren't getting back that day, something that's a hundred miles away, we're not getting back." Claimant stated he and the convoy commander were driving a level three armored palletized loading system; when the explosion occurred, it blew out the trailer and the air hoses. (Tr. 29-30). He stated that but for the fact that the vehicle was armored, he would have died. He elaborated: "If it was a Mercedes, if it was a cab-over, it would've been destroyed. And that's a fact. Everybody knows that. Everybody said it to us." (Tr. 31). Claimant further stated: "Of course, I can't understand how I didn't get killed that night because of the photos of that truck ... [the convoy commander] showed me photos of my truck before they blew it up. And he said, 'I don't know how you walked out of there with nothing but a little tiny scratch' on my head." (Tr. 31-32).

When asked whether he was ever around anybody in one of his convoys that was killed, Claimant responded: "No, I don't—yeah. Yeah, I knew guys, but not—they weren't—when you got over there, you stay with the guys that you were in Houston with. That's just the way it is." He continued: "D[...] I knew. I've eaten with him. I talked with him and stuff. He's dead. He got killed. There are a lot of other guys that were in that convoy that I knew. I do know a guy that got shot through his head. I know a guy that got shot through his head from that. I also was in Houston with a guy that got killed." (Tr. 32). Claimant also stated: "Army's convoys, I was never on a convoy where an American got killed. No, soldiers, yeah, a KBR guy." When asked about the soldier, Claimant testified: "There was a bridge going up to Rawa that got blown up. See, you got to understand I'm like the fifth or sixth truck back. When we stop, we stop and we keep intervals in between each other so we can get out. So what I hear is from the grapevine, people talking down the trucks. Med-Evac came in and one guy was dead. Med-Evac came in a lot." (Tr. 32-33). Claimant stated the soldier died as a result of an IED explosion and further stated Med-Evac helicopters landed next to his convoys so many times that he cannot count them. (Tr. 33).

Claimant also described an instance in which the truck that was two trucks ahead of his was blown up while on a convoy to obtain water. He testified: "It was real bad. Once I heard his voice over the radio and he was all right, because he was a friend of mine, that was a relief." (Tr. 33-34).

Claimant stated that locals would throw rocks at the trucks. (Tr. 34). He described an incident where a kid "kind of ran across my truck, threw a rock and tried to more or less, as he was running in front of my truck, throw a rock at the same time. And I didn't brake. I wasn't going to brake. I didn't care about braking. I'm getting the heck out of there." Claimant thought he might have hit the young man, but was told by other drivers that he had not. He stated he hoped he had not hit the young man, but explained "never stop, no matter what. That's just your natural human instinct telling you that." (Tr. 35).

When asked whether he began developing any problems relating to stress while he was overseas, Claimant responded: "Yeah, I was asking for time off. I kind of, kind of had it. I think I kind of burned out. I think I was done. I know I was done." (Tr. 35-36). He elaborated that "it's like playing the lottery, you know. It's a bad lottery, you know. You stay there long enough, you're going to get it, you're going to buy it, you're going to buy the farm. So my time was coming I mean." (Tr. 36). He stated that when a military convoy behind his convoy was hit, "that was my breaking point. I really couldn't anymore, I can't, I mean, I'm done." (Tr. 36).

Claimant was terminated from employment on June 2, 2006, for violating General Order No. 1, the Code of Conduct, for allegedly consuming alcohol and refusing to provide a breath sample for analysis. (EX-2, p. 9). Regarding his termination, Claimant testified: "We were no angels. I mean I had a drink here and there over there, it's true." However, he testified he was not drinking the night before he was terminated, when two other employees were involved in a fight. (Tr. 37).

Upon his return from Iraq on June 6, 2006, after termination, Claimant stated he was "just shaking a lot and didn't really want to go anywhere. I wanted to stay in my yard." He elaborated: "I was out of Iraq, but Iraq was not out of me. That's all I've got to say about that. I don't know what else to tell you. I mean, just not eating, sweating, drinking heavy. I started drinking a lot, I think. Yeah, I drank a lot for a good month." (Tr. 38).

Claimant presented to his family doctor, Dr. Simms, for a rash on his chest; his doctor recommended that he make an appointment with a psychiatrist. Claimant stated that after he began seeing a psychiatrist, Dr. Bhargava, he "kind of started

feeling better." He was prescribed medicine. (Tr. 39, 42). Claimant sees Dr. Bhargava every two to four weeks. (Tr. 42-43). He stated: "Now I'm calm a little bit. I mean, I get anxiety attacks in the afternoons and the morning before my wife leaves, you know, I'm like waiting for her to come home, I can feel attacks coming on, you know, and I start--can't concentrate, can't think. Can't really do anything, but talk to myself and walk around a lot. And she gets home and everything kind of gets better when she's home." (Tr. 39-40). Claimant also expressed that he has experienced problems with sleep upon his return from Iraq; he was prescribed medication but is unable to take it due to a respiratory condition. (Tr. 41-42).

Claimant testified that upon his return from Iraq, he has become "a hermit." Since the death of one friend in February 2007, he only socializes with one other friend. He further stated: "I stay in my house all the time. I prefer it there. It makes my wife nuts, but I stay in the house or go in my yard." (Tr. 43).

Claimant stated he did not feel that he could work at the present. (Tr. 43). He testified: "I don't have the strength. And I don't think I could take any crap from anybody right now. I don't know. I don't know how to describe it. I don't think I could stock shelves. I definitely can't drive. That's for sure." Regarding driving, Claimant elaborated: "I can't drive. I can't. When I sit in the passenger seat, I freak out at the littlest of things." When asked whether Claimant had driven since his return from Iraq, Claimant testified that he had driven to his friend's house as well as to Wal-Mart. He stated that he has driven "maybe once or twice" since February 2007. (Tr. 44). During his deposition, Claimant was asked whether there were any activities he used to be able to do that he cannot do now; Claimant responded: "Drive." He elaborated: "I get road rage real easy. That's a fact." (EX-9, p. 78).

Claimant described his typical day: "It's embarrassing to tell you, but I watch sitcoms, go in the backyard with my dogs. That's about it. I do keep the kitchen clean and I do cook once in a while." Upon his return from Iraq, Claimant testified he gets "nervous easy," has tremors, and recurring nightmares. (Tr. 46-47). He also gets headaches "all the time." (Tr. 45). He testified he did not have problems with tremors or shakiness, sleeping, or chronic nightmares before going to Iraq. (Tr. 47).

He also had never been recommended by a doctor or professional to seek psychiatric or psychological attention before going to Iraq. (Tr. 48). Claimant stated he did not complain about stress while in Iraq, but did complain about headaches. (Tr. 49).

On cross-examination, Claimant was examined regarding the three IED attacks. Claimant stated he was not physically injured in the first April 2005 attack or the second September 2005 attack. (Tr. 69). He acknowledged he was never on a convoy where a KBR employee was killed. (Tr. 69-70). Regarding his termination, Claimant acknowledged that, while it was against the rules, he did consume alcohol while in Iraq. However, he denied drinking or being involved in a fight the night before his termination. (Tr. 70).

Claimant testified he considered applying for work but was told by Dr. Bhargava that he could not work. When asked whether Claimant thought he could work, Claimant responded: "No, I don't. I don't think I can get along with people. I get very irritated very quickly. And I just kind of get snappy and get irritated. And I don't think I can take any crap from anybody right now." (Tr. 74).

Claimant testified he had not seen the surveillance video conducted in the matter. (Tr. 75). Regarding his ability to drive, he stated: "No, I drove. When I first got home from Iraq, we had this white Taurus which we still have. And I took that to my friend, Paul's house because he was a cop ... So I drove about a mile to his house and a mile back. For some reason, after I got out of the hospital, I haven't drove since. I don't know what it is." Claimant stated that before he went into the hospital in October 2006, he drove "very little. If I didn't have to drive, I wasn't driving. I would be driven." Claimant testified that the white Taurus was not the only car he drove; he also drove a red truck, but not "that much." (Tr. 76). Claimant stated that when he first went to Dr. Bhargava, he would drive himself to the appointments, but she recommended that he not do that anymore. When asked whether Claimant drove after his hospital stay in October 2006, he stated: "Possibly. I doubt it. Maybe once. I really don't like it. If you have surveillance, maybe I did. You know, it's kind of hard to put things in perspective." Upon further examination, Claimant testified: "Today, I can honestly say I can drive." (Tr. 77).

Claimant was examined regarding a social psychological profile he completed on February 7, 2007. In the profile, Claimant responded he was basically satisfied with his life. (Tr. 83). He also responded that he had not dropped many of his activities or interests; he did not feel his life was empty; he did not often get bored; he was in good spirits most of the time; he felt happy most of the time; he did not prefer to stay home rather than going out and doing new things; he did not feel he had more problems with memory than most; he did not feel pretty worthless the way that he was; he did not feel his situation was hopeless; he did not feel full of energy; and he did not think that most people were better off than he was. Claimant also responded that he thought it was wonderful to be alive, and indicated he often felt helpless. (Tr. 84). Claimant testified he did not recall filling out the profile. (Tr. 85). When asked whether he often felt helpless, Claimant responded: "Define helpless, I mean. I feel depressed. I feel I had suicidal thoughts. I mean, I feel blah, emptiness, tired." (Tr. 87).

#### **Claimant's Wife**

Claimant's wife testified at formal hearing and was deposed by the parties on March 6, 2007. (EX-10). Claimant and his wife have been married since March 11, 2006, and have known each other since June 2002. Claimant's wife described Claimant before he went to Iraq as "hard working, good attitude, leader, likes to be the, you know, the leader of the family, somebody you could lean on or depend on, good sense of humor." (Tr. 88). She stated Claimant was social before going to Iraq.

While Claimant was in Iraq, he spoke with his wife over the phone about once a week. Claimant's wife testified he was not allowed to talk about the attacks over the phone, but she could tell when they occurred because Claimant "wanted comfort" and was "more emotional." (Tr. 90). While on R & R, Claimant described the April 2005 attack; regarding the effect of the attack on Claimant, his wife stated: "I mean, you have a near death experience, and I think he was pretty new at the time there, so he still had a gungho attitude. But there were times when he was, you know, would talk about how emotional it made him." (Tr. 91-92). When Claimant returned home on R & R in March 2006, Claimant was "much more emotional than he had been.

In fact, he wrote to his parents ahead of time and asked them to meet him at home when he came home. And he cried when he got off the plane. So he was just more emotional." Claimant's wife stated she could tell that Claimant had reservations about going back to Iraq. (Tr. 92).

When Claimant returned from Iraq upon his termination in June 2006, Claimant's wife described Claimant's emotional state accordingly: "Like not in control of his emotions, like anger, or he would cry a lot or sob a lot. But he was unable to explain necessarily what was bothering him at the time. He was—a lot of rage, you know. Sometimes I was afraid, not that he would ever hurt me. But it was just frightening to watch. He didn't make a lot of sense sometimes, you know. He would seem irrational or not in touch with reality sometimes." (Tr. 92-93). She testified Claimant's anxiety manifested itself in an abnormal amount of pacing. (Tr. 94-95). Claimant's wife also stated that when Claimant "first got home, he wouldn't sleep through the night. He would be disturbed. Like one time, I thought he was going to hit me in his sleep. He would knock himself out of bed or just wake up, couldn't sleep, go downstairs, try to watch something on TV, like at two or three in the morning, you know." (Tr. 95).

She testified that if Claimant experiences any kind of stress during the day, "he'll curl up on the couch and go to sleep." Regarding Claimant returning to work, she testified that he "talks about going back to work, which I think, you know, I think it's good. But he doesn't talk about—like, you know, he says he wants to go back to truck driving. And I've been in the car with him when I drive or when he tries to drive, and it's insane. I mean, he can't." Claimant's wife stated that driving and riding in vehicles "creates a very stressful situation" for Claimant. (Tr. 96). She elaborated: "Like he way overreacts to something that's very minor. If I was approaching a stop sign and I stopped, and I assumed it was a four-way stop, and started to proceed, but then realized it was not a four-way stop and there was an approaching car, and so I stopped again, but it was harder. And [Claimant] got sick to his stomach, I mean, nauseous. He wanted to just get out of the vehicle. He wanted to just go out. And you can't just get out in the middle of nowhere. So, you know, those kind of things. He overreacts to certain things, incidents that happen in the car." (Tr. 96-97).

On cross-examination, Claimant's wife testified that she was the sole source of income for her family. (Tr. 104).

### **The Medical Evidence**

#### **Dr. Sharlaw Bhargava**

Dr. Bhargava was deposed by the parties on March 19, 2007. She is board-certified in adult, adolescent, and child psychiatry. (EX-16, p. 5). Dr. Bhargava attended medical school in India, completed her residency at the University of Illinois at Chicago, and completed her fellowship at the Baylor College of Medicine. (EX-16, pp. 8-9). She is in her second year of private practice. Claimant first presented to Dr. Bhargava on June 26, 2006, upon referral from Dr. Simms, Claimant's family physician. (EX-16, p. 11, 17). Dr. Bhargava characterized her relationship with Claimant as his treating physician. She agreed that a treating physician has a duty to help a patient to get better and generally has to accept as true what the patient tells the physician, but added that a treating physician also makes their own observations and assessments. (EX-16, p. 13). Dr. Bhargava testified that approximately 30 to 40 percent of her practice is comprised of adult patients and the remainder of her practiced is with children and adolescents; she is currently treating five or six patients for PTSD, two of whom were in Iraq. (EX-16, pp. 14-15).

Claimant presented to Dr. Bhargava with multiple panic attacks. (EX-16, p. 18). He complained of nightmares, flashbacks, an inability to sleep, cold sweats, and an inability to adjust to family life upon his return from Iraq. Dr. Bhargava stated that Claimant "mentioned that he was exposed to the war where he had a lot of friends killed in ambush. And he was extremely traumatized by that, and he felt that he just remembered these friends all the time, and he has been avoiding anything that would remind him of the war or anything that would remind him of whatever happened there. So he would not want to watch T.V., he would not want to go out, he would not want to talk to anyone, just would want to withdraw himself to his room and not even talk to his family. And he was extremely irritable, mood was very labile by going from really being-feeling normal and then really feeling depressed. ... He was also very paranoid. He said he felt he heard his name being called. He was afraid somebody was going to attack him. He felt a lot of anger towards everybody." (EX-16, p. 19).

When further examined regarding Claimant's friends, Dr. Bhargava testified: "He has mentioned a couple of times about these friends. And actually, he has some friends who are back from Iraq, and he's mentioned that that's the only people he would interact with because he feels that they understand what he's going through. He did not specifically mention their names, not that I recollect, but he did talk about them a few times. Every time he comes in, he mentions something about that, but he doesn't—he avoids talking in detail about it, like he would stop after one sentence or something and not want to talk about it. But he does mention that quite often actually." (EX-16, p. 20).

Regarding Claimant's current diagnosis, Dr. Bhargava stated Claimant still suffers from PTSD. (EX-16, p. 20). She explained that her clinical diagnosis of PTSD is based upon the criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), for which she opined Claimant displayed "all" or "most" of the requisite symptoms. (EX-16, p. 21). With respect to the first criteria, Dr. Bhargava was examined as to what trauma she thought Claimant had been exposed, to which she responded: "Well, that's what I think I said before, that his friends being killed in ambush. And apparently, he had witnessed some of the friends." When asked whether Claimant had told Dr. Bhargava that he had witnessed friends dying, she responded: "He's told me that he has—he's not seen everybody killed. I think he's seen one or two people being killed. And then the other people, he heard that they were killed." (EX-16, p. 23). Dr. Bhargava could not recollect any other traumatic events to which she would attribute as a possible cause. (EX-16, p. 24).

As to increased arousal, Dr. Bhargava testified Claimant has "hypervigilance" and is "just paranoid about where he is," is never sitting still, and is constantly on the "lookout" for something to happen. (EX-16, p. 24). When asked whether Dr. Bhargava had performed a differential diagnosis in order to rule out conditions other than PTSD, she testified she had. Dr. Bhargava stated she explored major depressive disorder and generalized anxiety disorder and that Claimant "has symptoms of all that stuff, but it doesn't matter—it does not make sense in context with the trauma that he has because they would very well qualify in that category." (EX-16, p. 26). She did not

attribute Claimant's current condition to his alleged head injury and stated he had no cognitive or neurological problems. (EX-16, p. 26). She testified she did not find any symptoms indicating any type of personality disorder. (EX-16, pp. 34-35).

Dr. Bhargava confirmed she was familiar with the concept of malingering. (EX-16, p. 32). When asked what her judgment was as to the possibility that Claimant was malingering, she testified: "You know, in this case, I mean, this patient has been coming to me for several months. He has looked very distressed. I met his wife. I talked to her. He's not been able to transition back into his family smoothly at all. He has continually mentioned about feeling depressed, having mood swings, not able to sleep well, having paranoia, having nightmares. So I feel that this is what I'm going to base my judgment on, that what the patient is reporting, and he visibly looks very anxious. He visibly looks that he's always on the edge and gets startled easily. So that's what I see in him." (EX-16, pp. 32-33). Dr. Bhargava elaborated: "And again, I don't have anything to substantiate that except based on what he tells me and what I've observed. And his family did actually come in, his wife had come in. She was very tearful. She was also very much corroborating to what he had explained. So I based my judgment based on that." (EX-16, p. 33).

Dr. Bhargava stated Claimant is currently taking Zoloft for depression, Trazodone for sleeping, as well as medication for panic attacks. She also recommended that Claimant present to a therapist, but did not know whether Claimant had done so or not. (EX-16, p. 36). Dr. Bhargava opined Claimant has yet to reach maximum medical improvement because Claimant needs "more intensive counseling, more medications probably. And it will take the time, too." (EX-16, p. 38). Dr. Bhargava stated Claimant "is not there where I think he's significantly or optimally improved." (EX-16, p. 39). She opined that it would be at least a year before Claimant would be able to return to work. (EX-16, p. 40).

#### **Dr. Mark S. Moeller**

Dr. Moeller testified at formal hearing. Dr. Moeller is a board-certified psychiatrist and has been in private practice for roughly fifteen years. He is an assistant clinical professor at Baylor College of Medicine. (Tr. 108, 144; EX-14, p. 4). Dr. Moeller is a medical expert for Administrative Law Judges, Office of Hearings and Appeals, Social Security

Administration and has performed over 300 psychiatric evaluations for the Veterans Administration, the majority of which were for Vietnam veterans claiming depression or post-traumatic stress disorder. (Tr. 109-111; EX-14, p. 5). Over the span of his career, Dr. Moeller estimated he has either evaluated or treated over 400 individuals either alleging or claiming to have post-traumatic stress disorder. (Tr. 113).

Claimant presented to Dr. Moeller on April 30, 2007, for evaluation at the request of Employer/Carrier. (Tr. 115). Dr. Moeller reviewed the medical records of both Drs. Bhargava and Simms. When Claimant presented to Dr. Moeller, he was on time, groomed appropriately, cooperative, "very verbal," articulate, and forthcoming with his complaints, symptoms, and history. (Tr. 117).

Dr. Moeller testified, based on Claimant's evaluation, medical records, and testimony at formal hearing, that Claimant met the first element for a diagnosis of post-traumatic stress disorder: exposure to a very severe or life threatening traumatic event. (Tr. 118). He also opined Claimant met the second criteria of PTSD: the re-experiencing of the traumatic experience, based upon Claimant's complaints and testimony regarding recurring nightmares related to the traumatic events. (Tr. 119-120). As to the third criteria: persistent avoidance of stimuli associated with the trauma, Dr. Moeller testified Claimant "probably" met the criteria according to Claimant's subjective experience, but Dr. Moeller noted Claimant "doesn't seem to have any difficulty discussing the traumas. He obviously discussed them with his friends and family. He discussed them with his care givers." (Tr. 120). Dr. Moeller opined Claimant "likely" met the fourth criteria of a persistent increase in arousal state. (Tr. 121). Further, he stated Claimant met the criteria that the symptoms last greater than one month. (Tr. 121-122).

However, regarding the final criteria, that the disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning, Dr. Moeller opined the criteria had not been met. He elaborated: "Well it's confusing, because what I find as I put everything together and as I spoke with him, it's very difficult to ascertain his impairments because he made statements that were patently untrue in terms of his impairments and distress." Dr. Moeller continued: "Well in reviewing the surveillance, it's clear that he's able to drive, and he's running errands and he displays a fairly appropriate affect. He's in some social

situations with his stepson and someone who's helping him with the black Camaro. And yet, he tells me that he's unable to tolerate being around people, stays in the house all the time and he can't drive." (Tr. 122). Consequently, he opined "it also throws into question all the other criteria, the reason being that all these criteria are subjective." (Tr. 122).

Dr. Moeller stated he reviewed the surveillance conducted on Claimant. He testified Claimant told him that he could not drive, yet the surveillance showed Claimant driving. (Tr. 123). Dr. Moeller testified that Claimant "told me, as he testified today, that he was unable to tolerate, told me that he could not take shit from anybody, that he was irritable, could not sleep, could not tolerate any sort of stress, could not drive, could not interact with the public. And so the magnitude of his dysfunction was very, very great I mean basically that he portrayed himself as homebound and completely incapacitated." (Tr. 123-124). Dr. Moeller compared this portrayal to the surveillance video: "I saw a man who was going about his business, doing errands, driving around, talking with his friend, and has a very appropriate affect and what appears to be a very appropriate mood and way of interacting with others." He continued: "In my evaluation, which again throws a little objectivity into it, his mood and his affect were completely within normal limits. He was able to joke appropriately. He was able to smile appropriately. And I did not see a consistency between his subjective complaints and what I was seeing as more objective data." (Tr. 124). Dr. Moeller stated affect is a critically important factor to consider in a PTSD diagnosis. (Tr. 124-125). He agreed that Claimant's affect at formal hearing was very responsive, active, and under control, as it had been when Claimant presented to Dr. Moeller for evaluation, and that such an affect was not characteristic of an individual suffering from PTSD. Dr. Moeller stated that one who has been through severe trauma and is still in a heightened state of PTSD is blunted and detached, does not move normally, and may be prone to disengagement from conversations. (Tr. 125).

Dr. Moeller opined it was likely that the diagnosis of malingering applied to Claimant. (Tr. 129). He stated that PTSD is both treatable and curable and that if it were assumed Claimant had PTSD, based on his evaluation and what he witnessed at formal hearing, the impairments would be "very mild." (Tr. 130-131). Further, Dr. Moeller explained that work is part of the treatment plan for PTSD "if at all possible," and that, assuming Claimant has PTSD, he did not see what the difficulty

would be in Claimant's returning to work. (Tr. 132-134). He opined Claimant was capable of returning to work as of the April 30, 2007 evaluation, but did not know if Claimant was capable of returning to work as of June 2006. (Tr. 134-135). He also stated the two medications Claimant was currently taking, Zoloft and Abilify, would not prevent Claimant from returning to work. (Tr. 135). Dr. Moeller stated that pacing and irritability were "almost predictable" side effects of Abilify. He expected that, in a year, Claimant would probably not be under the care of a psychiatrist or psychologist. (Tr. 136).

On cross-examination, Dr. Moeller acknowledged his examination of Claimant only lasted about an hour-and-a-half. (Tr. 136). During the evaluation, Dr. Moeller observed Claimant had a "fine, fast tremor," but when he asked Claimant about it, Claimant was "kind of dismissive about it." Dr. Moeller noted that being dismissive and cutting off conversation was not the same as a blunted affect. (Tr. 137-138). He acknowledged that Claimant's medication was supposed to reduce blunting. (Tr. 138). Dr. Moeller noted that it was "possible" that Claimant was suffering from depression, but did not know "that it's predominant." He also stated that the event described by Claimant and his wife when his wife was driving and rolled a stop sign "sounded like a pretty clear cut panic attack, a sort of near miss motor vehicle accident that he was involved in" and could have come from the traumas Claimant experienced in Iraq. (Tr. 139).

Regarding the surveillance conducted on Claimant, Dr. Moeller testified: "What doesn't show up is any problems with socialization. It appears that he's able to drive. There's no episodes of road rage. There's no episodes of meld [sic] down. He took some kind of air tank in, and I think he got it refilled out. And my assumption off of that video is that all of that went without any problems. So certainly the video doesn't attest to any kind of symptomatology. It attests to the absence of symptomatology." He recognized that the surveillance only showed "several minutes, probably 15 minutes" of driving through traffic running errands. (Tr. 141-142). Upon further examination regarding Dr. Moeller's assessment of malingering, Dr. Moeller stated it was possible, not probable, that Claimant was intentionally producing or exaggerating his symptoms. (Tr. 144). He noted that there is no objective evidence of the traumatic experiences described by Claimant, such as military records, videos, or witnesses. (Tr. 145).

When asked what caused the change in Claimant such that he worked for 16 years prior to going to Iraq, but upon his return from Iraq no longer desired to work, Dr. Moeller testified: "I don't know. But I could speculate that he didn't like his job, that it was frightening and hot and dirty. And when he was fired from it and had to return home, I would speculate again, that he had to save face because he was at a job that was paying him a great deal of money and everyone knew he was out of the country and doing this job. And he came back, and I think that's sort of what he was left with now." He continued that it was saving face to have PTSD compared to being fired for fighting and drinking. (Tr. 146).

In his evaluation, dated May 9, 2007, Dr. Moeller noted Claimant reported witnessing people killed in Iraq. (EX-14, p. 1). He also reported sustaining a concussion when an explosion went off near his vehicle. After a near-accident while riding in a car, Claimant stated he felt nauseated and upset. Dr. Moeller also noted that in Claimant's deposition and at the time of evaluation, Claimant stated he could not drive anymore and depends upon his spouse and step-daughter for rides. The report indicates Claimant made the following statements: "I stopped driving a couple of weeks after I got home;" "I felt out of control;" "Once I made it two blocks and had to pull over." Dr. Moeller also noted Claimant reported he only went out for appointments with various doctors. Dr. Moeller noted Claimant did have a mild bilateral hand tremor. (EX-14, p. 2).

Dr. Moeller reviewed the video surveillance conducted on Claimant. (EX-14, p. 2). He opined Claimant's "presentation is inconsistent with that of a person suffering from a severe mood, anxiety, or psychotic disorder. Statements made, both in sworn deposition and in my evaluation about being unable to drive, were untrue." Dr. Moeller recognized it was likely that Claimant may have been exposed to significant traumas while driving a truck in a combat zone and that Dr. Bhargava had diagnosed Claimant with PTSD. However, he also opined Dr. Bhargava, as Claimant's treating psychiatrist, believed Claimant's stories of his traumatic experience and took Claimant's symptoms at face value. Dr. Moeller concluded Claimant's "exaggeration of his deficits and outright symptom fabrication make a diagnosis of PTSD untenable." (EX-14, p. 2).

## **The Wellness Center**

On February 5, 2007, Claimant completed a social/psychological profile at The Wellness Center, Denton, Texas, where he was being treated for respiratory failure. (EX-11, p. 87). The profile asked a series of fifteen "yes or no" questions. Claimant responded that he was basically satisfied with life; had not dropped many of his activities and interests; did not feel his life was empty; did not often get bored; was in good spirits most of the time; was not afraid something bad was going to happen to him; felt happy most of the time; did not prefer to stay at home rather than going out and doing new things; did not feel he had more problems with memory than most; thought it was wonderful to be alive now; did not feel pretty worthless the way he was; did not feel his situation was hopeless; and did not think that most people were better off than he was. However, Claimant did respond that he often felt helpless and did not feel full of energy. (EX-11; p. 91).

## **The Vocational Evidence**

### **William L. Quintanilla**

Mr. Quintanilla is a vocational rehabilitation counselor; he testified at formal hearing. Mr. Quintanilla performed a vocational assessment evaluation in order to determine the type of work Claimant would be able to seek and maintain. He reviewed the records of both Drs. Bhargava and Moeller in determining Claimant's physical and mental capabilities. (Tr. 151). On cross-examination, Mr. Quintanilla testified he did not interview Claimant in performing his vocational assessment evaluation. (Tr. 155).

In his vocational rehabilitation assessment, dated May 17, 2007, Mr. Quintanilla reviewed Claimant's physical and medical status, his social, military, and educational background, and employment history. Mr. Quintanilla concluded that if Claimant was released to medium-level work, based on Dr. Moeller's opinion, Claimant could return to work as a heavy truck driver with Employer with no loss of future wage-earning capacity. If Claimant chose not to return to his previous job, he could work as a local truck driver; according to the Texas Workforce Commission, jobs of this nature offer mean wages of \$12.78 per hour in the Dallas/Fort-Worth/Arlington, Texas area. Mr. Quintanilla also identified the following unskilled, entry-level positions as appropriate for Claimant: gate guard, counter

clerk, security guard, production assembler, parking lot attendant, order filler, deliverer/courier, cashier, order clerk, assembler, security clerk, and surveillance system monitor. (EX-15, p. 5).

A labor market survey was conducted within the Dallas/Fort-Worth/Arlington, Texas area to document the availability of positions that appear to be within Claimant's residual functional capacity. The following positions were identified:

1. Dispatcher. Arlington Roadside & Locksmith, Arlington, Texas. Wage: \$7.00/hour. Responsibilities include coordinating customer service calls and dispatching service vehicles. (EX-15, p. 5).
2. Dispatcher. Metro Cable Services, Inc., Arlington, Texas. Wage: \$7.00-10.00/hour. Responsibilities include dispatching cable technicians on various assignments, data entry of all project information, and closing of tickets. No experience necessary. (EX-15, p. 5).
3. Parts Delivery Driver. Lonestar Forklift, Garland, Texas. Wage: \$8.00/hour. Responsibilities include delivering parts. (EX-15, p. 5).
4. Alarm Dispatcher. Cops Monitoring, Grapevine, Texas. Wage: \$8.25/hour. Responsibilities include monitoring residential and commercial alarm systems. (EX-15, pp. 5-6).
5. Telemarketer. At Courier, Richardson, Texas. Wage: \$9.00/hour. Responsibilities include placing telemarketing calls. (EX-15, p. 6).
6. Non-Commission Security Guard. Force One Security, Dallas, Texas. Wage: \$9.00-15.00/hour. (EX-15, p. 6).
7. Delivery Driver. Zimmer, Wilson, Phillips, Richardson, Texas. Wage: \$10.00-12.00/hour. Responsibilities include the pick-up and delivery of orthopedic implants and instruments to hospitals. (EX-15, p. 6).
8. Small Package Delivery Driver. Direct Consulting Solutions, Inc. Wage: \$10.60/hour. Driver will assist in warehouse as needed and with loading of trucks and trailers. (EX-15, pp. 6-7).

9. Non-Commissioned Security Guard. Old Red Courthouse, Inc., Dallas, Texas. Wage: \$11.54/hour. Guard will conduct rounds to ensure that museum visitors have a safe and pleasant experience, check exhibits and displays to ensure that they are in proper working order, monitor building through use of security camera system, and assist with set-up and breakdown for events. (EX-15, p. 7).

### **The Surveillance Evidence**

Four video surveillance discs were offered by Employer/Carrier. The first surveillance video was made on September 4, 2006, the last on December 17, 2006. (EX-18). Only portions of eleven days are reflected in the four videos.

On September 4, 2006, Claimant's residence was filmed from approximately 8:00 a.m. to 6:00 p.m., with no apparent activity. On September 5, 2006, surveillance was conducted of Claimant's residence from 9:00 a.m. to 7:00 p.m. The only activity filmed is Claimant retrieving an empty recycling bin from his front yard at approximately 5:00 p.m. (EX-18, Disc 3).

Surveillance was conducted between 10:00 a.m. and 6:00 p.m. on September 6, 2006. Between 10:20 and 10:39 a.m., Claimant is filmed cleaning out a black car parked on the street outside his residence. He is also filmed filling a tire with air on a blue truck with a red tank. The blue truck is parked in Claimant's driveway next to a red truck; he later places the red tank in the bed of the red truck. During this period, Claimant interacts with a younger male, apparently his stepson, who is mowing the yard. At 10:39 a.m., Claimant leaves his residence driving the red truck. At 10:45 a.m., Claimant is filmed leaving an automotive garage carrying the red tank, apparently having had the tank filled. Between 10:48 and 10:50 a.m., Claimant is filmed at a gas station. (EX-18, Disc 3).

At 10:57 a.m., the red truck is filmed back in the driveway of Claimant's residence. Between 10:57 and 11:36 a.m., Claimant is filmed interacting with the younger male and another male beside the blue truck parked in Claimant's driveway. The men perform maintenance on the blue truck. Between 11:52 a.m. and 12:20 p.m., the same three men are filmed working on the black car parked on the street and then loading it onto a trailer. During this period, Claimant is filmed directing the other man as he drives the car onto the trailer. At 12:03 p.m., Claimant

is filmed getting into the black car and repositioning it on the trailer. The men then secure the car to the trailer. (EX-18, Disc 3).

At 12:28 p.m., the third male is filmed driving the black car away on the trailer and Claimant is filmed driving the red truck away from his residence. He subsequently goes on a series of errands. At 12:37 a.m., Claimant's truck is filmed parked outside a bank. Two minutes later, he is filmed getting into the truck. At 12:52 p.m., Claimant is filmed getting into his truck after apparently leaving what appears to be a "Pack 'N' Mail" store. At 12:58 p.m., Claimant is filmed standing outside what appears to be the same bank. At 1:08 p.m., he is filmed driving away from the bank. At 1:14 p.m., Claimant's truck is again filmed outside what appears to be the "Pack 'N' Mail" store. At 1:15 p.m., Claimant is filmed getting into the truck and driving away. At 1:28 p.m., Claimant's red truck is parked in the driveway; Claimant appears to remain in his residence for the remainder of the surveillance period, ending at 6:00 p.m. (EX-18, Disc 3).

Surveillance was also conducted on Claimant's residence between October 18, 2006 and October 20, 2006. Claimant's residence was filmed between 7:55 a.m. and 6:00 p.m. on October 18, 2006. Between 2:04 p.m. and 3:30 p.m., Claimant is filmed performing yard work with a younger male, apparently his stepson. On October 19, 2006, surveillance was conducted between 9:00 a.m. and 7:00 p.m. with no apparent activity. Claimant's residence was also filmed between 8:00 a.m. and 5:00 p.m. on October 20, 2006. The only activity captured was Claimant retrieving the mail in his pajamas at 2:50 p.m. (EX-18, Disc 2).

Another round of surveillance was conducted between November 14 and 16, 2006. On November 14, surveillance was conducted between 8:55 a.m. and 5:00 p.m. At 9:26 a.m., Claimant is filmed getting out of the driver's side of the red truck at his residence along with a passenger, who appears to be his wife. The two talk for a moment and then go into the home. At 9:33 a.m., Claimant walks his wife back out to the truck, she drives away, and he goes back into his home. Claimant is filmed taking out the trash at 9:46 a.m. At 11:46 a.m., a white car is filmed in motion, but the driver is unidentifiable. At 11:52 a.m., the same white car is parked on the street outside Claimant's home. Claimant is filmed next to the car, apparently having just exited the car, and is filmed going into his home. Claimant leaves his home at 12:51 p.m. and stands in the

driveway. He is picked up by a driver in a silver car several minutes later. At 1:25 p.m., the silver car is filmed outside what appears to be a dentist's office. At 2:23 p.m., the silver car is filmed outside a gas station. At 2:34 p.m., the silver car pulls up to Claimant's residence. Claimant exits from the rear passenger side, checks the mail, and goes inside. He apparently remained in his residence until 5:00 p.m., when surveillance was ended.

On November 15, 2006, surveillance was conducted between 8:00 a.m. and 6:00 p.m. with no apparent activity. Surveillance was also conducted on November 16, 2006, between 8:53 a.m. and 5:00 p.m. At approximately 9:00 a.m., Claimant is filmed sitting in a green/blue car for several minutes and then getting out of the car and walking to the side of his residence. At 10:19 a.m., the same car is filmed driving to Claimant's mailbox. Claimant is shown collecting the mail, walking towards his residence, then walking back to the car and entering the driver's seat. At 10:29 a.m., the same car is filmed at another location which appears to be in Claimant's neighborhood. No other activity was filmed until surveillance was ended at 5:00 p.m. (EX-18, Disc 1).

Surveillance was conducted on Claimant's residence between 8:00 a.m. and 4:00 p.m. on December 16, 2006. The only activity captured was at 9:32 a.m., when Claimant took out the garbage in his pajamas. Surveillance was also conducted between 8:00 a.m. and 5:00 p.m. on December 17, 2006, with no apparent activity. (EX-18, Disc 4).

### **The Contentions of the Parties**

Claimant contends his psychological condition has worsened due to his work in the zone of special danger. He avers that the legal question is not whether he has the specific diagnosis of PTSD but, rather, whether his psychological condition has worsened since his work in Iraq and whether the deterioration is work-related. Within this question, Claimant argues, is whether he has (1) PTSD, and/or (2) depression, and/or (3) panic attacks, and/or (4) psychologically caused tremors from his violent combat exposures in Iraq. Due to his psychological condition, Claimant contends he is entitled to temporary total benefits from June 26, 2006 to the present and continuing based upon an average weekly wage of \$1,574.40.

Employer/Carrier contend Claimant has failed to establish that he suffers from PTSD. However, if it is determined that

Claimant suffers from PTSD as a result of his work environment in Iraq, Employer/Carrier argue that any such injury was temporary in nature and resolved at the very latest on April 21, 2007, as opined by Dr. Moeller. Employer/Carrier also aver they have established suitable alternative employment and Claimant's average weekly wage at the time of the injury was \$1,574.40.

#### IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to

considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

#### **A. The Compensable Injury**

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9<sup>th</sup> Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

#### **1. Post-Traumatic Stress Disorder**

The DSM-IV describes the essential feature of PTSD as the "development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person." (Diagnostic Criteria for 309.81, PTSD, p. 424).

Characteristic symptoms resulting from extreme trauma include persistent re-experiencing of the traumatic event, persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness, and persistent symptoms of increased arousal. Traumatic events that are experienced directly include, but are not limited to, military combat, violent personal assault, being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents, or being diagnosed with a life-threatening illness.

Witnessed events include, but are not limited to, observing the serious injury or unnatural death of another person due to violent assault, accident, war, or disaster or unexpectedly witnessing a dead body or body parts. Traumatic events can be re-experienced in various ways, commonly the person has recurrent and intrusive recollections of the event or recurrent distressing dreams during which the event is replayed. Stimuli associated with the trauma are persistently avoided. Id.

A differential diagnosis requires that malingering be ruled out in those situations in which financial remunerations, benefits eligibility and forensic determinations play a role. Id., at 427.

## **2. Witness Credibility**

Claimant's credibility in this matter is wanting. I find his testimony and various medical histories are internally inconsistent and create a vacillating description of events and his impairments. Claimant is inconsistent in describing at least some of the traumatic events he witnessed while in Iraq. None of the events are corroborated by independent evidence. When Dr. Bhargava was examined as to what trauma she thought Claimant had been exposed, she responded: "Well, that's what I think I said before, that his friends being killed in ambush. And apparently, he had witnessed some of the friends." When asked whether Claimant had told Dr. Bhargava that he had witnessed friends dying, she responded: "He's told me that he has—he's not seen everybody killed. I think he's seen one or two people being killed. And then the other people, he heard that they were killed."

In his evaluation, Dr. Moeller noted Claimant reported witnessing people killed in Iraq. However, at formal hearing, Claimant acknowledged he was never on a convoy where another KBR employee was killed, he only knew of other employees who were killed. In fact, according to his testimony at formal hearing, the closest Claimant came to witnessing anyone die during a convoy was the following event: "There was a bridge going up to Rawa that got blown up. See, you got to understand I'm like the fifth or sixth truck back. When we stop, we stop and we keep intervals in between each other so we can get out. So what I hear is from the grapevine, people talking down the trucks. Med-Evac came in and one guy was dead. Med-Evac came in a lot." Contradictorily, in his exit interview with Employer from Iraq, he made no claims of being stressed, anxious, having nightmares, being depressed, or having any other problems arguably associated with PTSD. (EX-2, p. 2). Therefore, what Claimant reported to Drs. Bhargava and Moeller regarding witnessing deaths in Iraq is inconsistent with his testimony and formed an inaccurate factual basis upon which medical opinions were based.

Further, I find Claimant's testimony regarding his level of impairment to be exaggerated and contradicted by surveillance evidence. Claimant stated he did not feel that he could work at the present. He testified that one of the reasons he felt he could not work was because he **"definitely can't drive. That's for sure."** Also, during his deposition, Claimant was asked whether there were any activities he used to be able to do that he cannot do now; Claimant responded: "Drive." He elaborated: "I get road rage real easy. That's a fact." At formal hearing, Claimant elaborated: **"I can't drive. I can't.** When I sit in the passenger seat, I freak out at the slightest of things." The surveillance videos belie Claimant's testimony.

When asked whether Claimant had driven since his return from Iraq, Claimant testified that he had driven to his friend's house as well as to Wal-Mart. He stated that he has driven "maybe once or twice" since February 2007. On cross-examination, he stated: "No, I drove. When I first got home from Iraq, we had this white Taurus which we still have. And I took that to my friend, Paul's house because he was a cop ... So I drove about a mile to his house and a mile back. For some reason, after I got out of the hospital, I haven't drove since. I don't know what it is." Claimant stated that before he went into the hospital in October 2006, he drove "very little. If I didn't have to drive, I wasn't driving. I would be driven." Claimant testified that the white Taurus was not the only car he drove; he also drove a red truck, but not "that much." Claimant

stated that when he first went to Dr. Bhargava, he would drive himself to the appointments, but she recommended that he not do that anymore. When asked whether Claimant drove after his hospital stay in October 2006, he stated: "Possibly. I doubt it. Maybe once. I really don't like it. If you have surveillance, maybe I did. You know, it's kind of hard to put things in perspective." Upon further examination, Claimant testified: **"Today, I can honestly say I can drive."**

Further doubts regarding Claimant's ability to drive and interact with other individuals are raised by the video surveillance taken in the matter. I find Dr. Moeller's testimony regarding the surveillance to be well-reasoned. Dr. Moeller testified: "Well in reviewing the surveillance, it's clear that he's able to drive, and he's running errands and he displays a fairly appropriate affect. He's in some social situations with his stepson and someone who's helping him with the black Camaro. And yet, he tells me that he's unable to tolerate being around people, stays in the house all the time and he can't drive." Dr. Moeller further stated that Claimant "told me, as he testified today, that he was unable to tolerate, told me that he could not take shit from anybody, that he was irritable, could not sleep, could not tolerate any sort of stress, could not drive, could not interact with the public. And so the magnitude of his dysfunction was very, very great I mean basically that he portrayed himself as homebound and completely incapacitated."

Dr. Moeller compared this portrayal to the surveillance video: "I saw a man who was going about his business, doing errands, driving around, talking with his friend, and has a very appropriate affect and what appears to be a very appropriate mood and way of interacting with others." He continued: "In my evaluation, which again throws a little objectivity into it, his mood and his affect were completely within normal limits. He was able to joke appropriately. He was able to smile appropriately. And I did not see a consistency between his subjective complaints and what I was seeing as more objective data." On cross-examination, Dr. Moeller further testified regarding the surveillance video: "What doesn't show up is any problems with socialization. It appears that he's able to drive. There's no episodes of road rage. There's no episodes of meld [sic] down. He took some kind of air tank in, and I think he got it refilled out. And my assumption off of that video is that all of that went without any problems. So

certainly the video doesn't attest to any kind of symptomatology. It attests to the absence of symptomatology." He recognized that the surveillance only showed "several minutes, probably 15 minutes" of driving through traffic running errands.

While it is noted that a majority of the days on which surveillance was conducted failed to show any significant activity on the part of Claimant, it is also noted that several of the days, especially the activities of November 6, 2006, as noted by Dr. Moeller, are inconsistent, at least in part, with Claimant's testimony regarding his self-isolation and impairments. Also, the social/psychological profile completed at the Wellness Center, which Claimant testified he did not recall completing, raises further questions regarding Claimant's true psychological state. For instance, in the profile and in stark contrast to his testimony, Claimant indicated he was basically satisfied with life, had NOT dropped many of his activities and interests, and did NOT prefer to stay at home rather than going out and doing things. While it is noted that Claimant also responded that he often felt helpless and did not feel full of energy, at least a number of the responses in the profile are difficult to reconcile with Claimant's testimony regarding his impairments. Accordingly, although Claimant was undoubtedly exposed to traumas while driving a truck in Iraq, I am generally not impressed with his efforts to embellish his exposure to alleged trauma in Iraq and the severity of the alleged impairments sustained as a result. In sum, I find Claimant is not a credible witness.

### **3. Claimant's Prima Facie Case**

In the present matter, Claimant testified about various attacks upon his truck and other trucks in his convoy during convoy operations. He described a convoy attack occurring on April 23, 2005, in which the truck in front of him as well as a Humvee were blown up by IEDs. He stated he sustained a concussion as a result of the attack. Claimant also recalled another attack that occurred in August, September, or October 2005, when he was driving with the convoy commander; the explosion blew out the trailer and the air hoses of the vehicle in which they were driving. He stated that but for the fact that the vehicle was armored, he would have died. Claimant also described an attack in which the truck that was two trucks ahead of him in the convoy, driven by a friend, was blown up.

Claimant also testified he knew other employees, including some friends, who died while in Iraq and also witnessed a Med-Evac helicopter taking away a dead soldier after an attack. Accordingly, I find Claimant was exposed to sufficient trauma to support a presumptive **prima facie** case.

Claimant described various symptoms as a result of his exposure to trauma in Iraq, including trouble sleeping, nightmares, panic attacks, and depression, and tremors. Upon referral from his family physician, Dr. Simms, Claimant sought treatment from Dr. Bhargava. Dr. Bhargava diagnosed Claimant with severe chronic Post-Traumatic Stress Disorder; she prescribed medications to help manage anxiety and mood and stated these symptoms were "severely impairing" Claimant's functioning. (CX-1, p. 8). She opined Claimant was "unable to function in a work environment, and, in my opinion, he will not be able to work for an extended period of time." (CX-1, p. 11, 12). Dr. Bhargava did not perform any objective diagnostic testing to rule out malingering, although she did render an opinion on a subjective basis that Claimant was not malingering.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982).

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on or before June 6, 2006, his last day of exposure to his working conditions, and that his working conditions and activities on that date and before in Iraq could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

#### **4. Employer's Rebuttal Evidence**

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical/psychological harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT) (5<sup>th</sup> Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

"Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5<sup>th</sup> Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5<sup>th</sup> Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

I find that Employer/Carrier have rebutted Claimant's **prima facie** case. Dr. Moeller opined Claimant's "exaggeration of his deficits and outright symptom fabrication make a diagnosis of PTSD untenable." Specifically, Dr. Moeller testified that the final criteria of the DSM-IV, that the disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning, had not been met due to inconsistencies between Claimant's subjective complaints and the objective surveillance evidence obtained. Accordingly, since I have found Claimant's **prima facie** case rebutted, I must consider and weigh all of the evidence of record.

### 5. Weighing All the Evidence

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

The value of Dr. Bhargava's opinions as Claimant's treating physician is diminished by her reliance upon Claimant's subjective complaints which have been discounted above. She diagnosed Claimant with severe chronic PTSD and opined Claimant's symptoms were "severely impairing" his functioning. She testified Claimant has yet to reach maximum medical improvement because Claimant needs "more intensive counseling, more medications probably. And it will take the time, too." Dr. Bhargava stated Claimant "is not there where I think he's significantly or optimally improved." She further opined that it would be at least a year before Claimant would be able to return to work.

However, the DSM-IV requires that malingering be ruled out for a diagnosis of PTSD when a legal proceeding or secondary gain is an issue. Dr. Bhargava did not perform any objective diagnostic testing to rule out malingering, although she did render an opinion on a subjective basis that Claimant was not malingering. Her opinion is based upon her clinical judgment of treating Claimant over a period of several months and his distressed appearance. Dr. Bhargava elaborated: "And again, I don't have anything to substantiate that except based on what he

tells me and what I've observed. And his family did actually come in, his wife had come in. She was very tearful. She was also very much corroborating to what he had explained. So I based my judgment based on that."

Accordingly, I find Dr. Bhargava ruled out malingering based solely upon her judgment of Claimant's subjective complaints, which, as discussed supra, are highly questionable, and Claimant's wife's corroborating statements, which, due to the role of financial remuneration, are also of little value.

I place greater probative weight upon the opinion of Dr. Moeller. Dr. Moeller is highly credentialed, has been in private practice for fifteen years, and is an assistant clinical professor at Baylor College of Medicine. Over the span of his career, Dr. Moeller estimates he has either evaluated or treated over 400 individuals either alleging or claiming to have PTSD. Dr. Bhargava has only been in private practice for two years and the majority of her patients are children and adolescents rather than adults. While Dr. Bhargava is currently treating five or six patients for PTSD, two of whom were in Iraq, she has not evaluated and/or treated the number of individuals claiming PTSD that Dr. Moeller has. Dr. Moeller opined Claimant's "exaggeration of his deficits and outright symptom fabrication make a diagnosis of PTSD untenable." He testified that the final criteria of the DSM-IV, that the disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning, had not been met. Given Claimant's questionable credibility, I place greater weight upon the opinion of Dr. Moeller because his reasoned medical opinion is not based solely upon Claimant's subjective complaints, as is Dr. Bhargava's, but is also based upon objective surveillance evidence that reveals inconsistencies between Claimant's subjective complaints and his actual level of impairment.

While it is recognized that Claimant is not limited to a specific diagnosis of PTSD in establishing a compensable injury, there is no doctor of record to opine that any other condition, including depression, panic attacks, and psychologically caused tremors, prevents Claimant from returning to work. The credible medical evidence supports Dr. Moeller's conclusion and opinion that Claimant does not suffer from PTSD. At best, the record evidence is evenly balanced regarding causation of Claimant's alleged psychological condition.

The proponent of a rule or position has the burden of proof, by preponderance of the evidence, in cases resolved under the Administrative Procedures Act. See Greenwich Collieries, supra. Because I conclude that Claimant has not established by a preponderance of the record evidence that he suffered from PTSD or another psychological condition as a result of his employment with Employer in Iraq, Claimant has not met his burden of proof under the Act.

Since Claimant failed to establish that he suffered from a compensable injury, findings regarding the remaining issues, including nature and extent of disability, average weekly wage, entitlement to medical benefits and care, attorney's fees and interest are moot and unnecessary.

#### V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon considering the totality of the record, I find no merit to Claimant's claim and it is hereby **DENIED**.

**ORDERED** this 26th day of February, 2008, at Covington, Louisiana.

**A**

LEE J. ROMERO, JR.  
Administrative Law Judge