

U.S. Department of Labor

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

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



Issue Date: 23 October 2007

CASE NO.: 2007-LDA-11

OWCP NO.: 02-146451

IN THE MATTER OF:

S. T.¹

Claimant

v.

KBR GOVERNMENT OPERATIONS

Employer

and

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

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.
For The Claimant

JERRY MCKENNEY, ESQ.
JAMES L. AZZARELLO, JR., ESQ.
For The Employer/Carrier

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

¹ 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 KBR Government Operations (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 February 13, 2007, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 19 exhibits, Employer/Carrier proffered 38 exhibits which were admitted into evidence along with one Joint Exhibit.² This decision is based upon a full consideration of the entire record.³

Post-hearing briefs were received from the Claimant and the Employer/Carrier by the due date of May 18, 2007. 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's last day of exposure relevant to the alleged occupational illness was December 5, 2004.
2. That there existed an employee-employer relationship at the time of the accident/injury.
3. That Employer/Carrier filed a Notice of Controversion on June 9, 2006.

² On February 22, 2007, Employer/Carrier submitted a third amended exhibit list which proffered exhibits nos. 34 and 35. Claimant has not filed any objections to the offer and therefore EX-34 and EX-35 are hereby received into evidence.

³ 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 an informal conference before the District Director was held on August 24, 2006.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of occupational illness from the zone of special danger.
2. The nature and extent of Claimant's alleged occupational illness.
3. Claimant's entitlement to temporary total disability benefits from July 10, 2006 to present and continuing.
4. Claimant's average weekly wage.
5. Entitlement to and authorization for medical care benefits and reimbursements.
6. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at the formal hearing and was deposed by the parties on September 11, 2006. (EX-31). Claimant was 43 years of age at the time of the hearing. He is a high school graduate. He worked in the automotive field from 1981 to 1987 when he joined the U. S. Army. While in the Army he was stationed in Germany and drove trucks. After discharge from the Army, Claimant attended tractor-trailer school. He moved to North Carolina and began driving teams for Old Dominion Freight Lines. (Tr. 14-16). He was an owner-operator until January 2004 when he "let his truck go." He contacted Employer about going overseas. Claimant's plan was to work overseas for a couple of years, buy a new truck and house. He was also having child support issues after a divorce. (Tr. 16-17).

Claimant signed up to drive trucks in Kuwait and arrived in country between May 21 and 23, 2004. Within a few days he agreed to be transferred to Iraq to drive trucks rather than demobilize back to the United States. (Tr. 17-18). He was stationed at Camp Anaconda, 50 miles north of Baghdad, Iraq, until October 2004. He drove trucks "outside the wire" from May to October 2004. He went on "R & R" from October 1-14, 2004, to Germany. (EX-31, p. 6). Upon his return in October 2004, he was given an opportunity to transfer to Mosul, Iraq. (Tr. 19). He transported "anything that the military needed from water to food," seven days a week, 12 hours a day. The trucks driven by Claimant were not armored in the beginning. (Tr. 20). He had personal protective equipment consisting of Kevlar helmet and vest. (Tr. 21).

Claimant drove trucks in convoys consisting of 15 trucks, including four gun trucks. The convoys initially ran during daytime hours, but changed to nighttime hours because of the 130 degree heat and "the amount of action that we were receiving," which could be as little as rocks thrown at the trucks to small arms fire, rocket-styled grenades and IEDs (improvised explosive devices). (Tr. 22-23). He deposed that there was enemy activity on 50 to 75% of the convoys he drove. (EX-31, p. 23). He stated on one occasion his truck was hit by small arms fire during an IED explosion which "messed his windshield up" requiring him to kick out his front window to continue driving through the smoky environment. The IED hit a truck in front of the convoy driven by "Irv." (EX-31, p. 24). Claimant had a passenger with him at the time. Claimant stated he "urinated on himself" during the incident. (Tr. 24-25; EX-31, p. 25). Neither Claimant nor his passenger was injured. Claimant testified that he "had no physical damage done to me in six months there." (Tr. 26).

Claimant estimated he had his windows broken on more than three occasions during attacks. He had loads hit by small arms fire. (Tr. 26). Red tracers were used at night which could be seen, but he was not hit. (Tr. 27).

Claimant testified that before his deployment overseas with Employer, he had not seen a psychologist or psychiatrist nor taken any medications for stress. He acknowledged stressors with his divorce and a bankruptcy before his deployment. (Tr. 27). He passed the Employer's physical before being hired and deployed. He stated he was in good condition and worked out at a gym. (Tr. 28).

He stated his job duties did not change in Mosul; he drove trucks on the base. On his first mission outside the wire he was sent to recover trucks which were hit by IED attack. (Tr. 29). He identified photos he took of damaged trucks. (Tr. 29-30). He last drove out of Mosul, Iraq on November 6, 2004, when he recovered a truck with a corpse in it. Upon his return to Mosul, he informed his supervisor that he "couldn't do it anymore. I had enough." He was assigned to temporarily drive a bus on base transporting other drivers to various locations on base. (Tr. 31-32). He stated he felt ashamed that he decided not to continue driving outside the wire. Upon the return of bus drivers from "R & R," Claimant was told he had to return to driving trucks or demobilize. He chose to demobilize rather than drive trucks. He arrived back in the United States between December 5 and 8, 2004. (Tr. 33).

Claimant described an incident in which a good friend was "left behind by the military under an attack." He went by the battle scene, apparently afterwards, and saw burning debris on the opposite side of the road. He stated he took minor small arms fire or "strafing" and they "boogied" out of the area, which had "a lot to do with my psyche." (Tr. 87). He also recalled an incident when a mortar round exploded on the opposite side of his location sending shrapnel in his direction deflecting against a wall protecting his location. He stated if the wall had not been there, "I would have been if not killed, I would have been wounded without a doubt." (Tr. 87-88).

Claimant testified he could not drive a truck upon his return to the United States, and did not know what the problem was. He contacted a carpenter for whom he had previously worked and began working as a carpenter. He worked from January to April 2005, but had problems with the carpenter who also thought Claimant "had issues . . . [and was] too explosive." He stated he was "having problems with his temper, my girlfriend, with everything." He testified that before he left Iraq he was having trouble sleeping and having nightmares. (Tr. 34-35). He described two particular nightmares that "really freak me out:" (1) he sees IED attacks and believes in his nightmare that he is de-limbed, but never dies; and (2) he began having a nightmare right after recovering the truck where he could see the fire, "I can see through the window that I'm on fire. I'm burned and I wake up instead of dying." (Tr. 35-36).

In April 2005, his girlfriend told Claimant "there's something wrong," and that he needed to seek help. He sought counseling with a psychologist, Harold Lilly in Asheboro, North Carolina. (EX-31, p. 11). Claimant stated that was the first time he heard the words "post-traumatic stress disorder" (PTSD). He did not continue to see Harold Lilly because Lilly inform Claimant that "working out in the gym" was a great way of burning anxiety. Claimant decided he could "deal with this" because he worked out. (Tr. 37). He only treated with Dr. Lilly on two occasions. (EX-31, p. 12).

Claimant was unemployed from April to September 2005 when he obtained a job with the City of Greensboro. He was subsequently fired "for disciplinary reasons." He returned to Lilly who referred him to a local mental health clinic where Claimant stated he was not comfortable. He sought assistance from his local Congressman who contacted the Veteran's Administration (VA) which first evaluated Claimant on December 8, 2005. He continues to obtain his medication from the VA and still sees a civilian doctor, Dr. Branham, but cannot afford to see him on a regular basis. Carrier has not paid for any of his medical care. (Tr. 38-39).

Claimant's main medication helps him sleep at night. He recently had anxieties from stressing about his formal hearing and his medication was increased. He was under medication at the formal hearing. (Tr. 40). He testified he has not gone back to truck driving because when he thinks of driving a truck his "stomach gets into a knot and I really get upset." (Tr. 41).

On cross-examination, Claimant acknowledged that there is no single event, except the recovery mission on November 6, 2004, that caused his post-traumatic stress disorder. (Tr. 42). He agreed the best way to describe the basis of his claim is that it is based on a "continuum of events" from the time he arrived until he stopped driving outside the wire. (Tr. 43; EX-31, p. 25).

The mission on November 6, 2004, was to recover vehicles that had been damaged or destroyed in an attack. Claimant was not involved in the attack. The attack was over and military police were present to protect the recovery effort. (Tr. 43-44). He did not see or handle any dead bodies during the recovery effort. (Tr. 44; EX-31, p. 21).

Claimant stated he "cried for help and reached out for it" when asked if he sought psychological assistance while in Iraq. He was informed by a medic that there was nobody to whom he could be referred. (Tr. 45; EX-31, p. 26).

Claimant returned to the United States in December 2004 and filed his compensation claim in February 2006. (Tr. 45). He affirmed that PTSD is one basis of his claim. But he has anxieties. He stated "I can't hold a job. I can't drive a truck. I mean, I guess post-traumatic stress disorder is what the case is about." (Tr. 46-47). Claimant acknowledged that doctors told him there were things he should and should not do to make his condition better. He was told he should work out at the gym to try to stay stress free. He was given medication to help him sleep. He regularly worked out at the gym until he had to have a hernia operation in January 2006. He was told that revisiting the events that formed the basis of his disorder does not help his situation. (Tr. 47).

Claimant acknowledged that he has received assistance from information on the "American Contractors in Iraq" website and Janna Crowder, its founder. He did not see a link to the elements of post-traumatic stress disorder on the website. (Tr. 50). He has talked to other individuals who claim to have post-traumatic stress disorder about their current problems. He has spoken to the press about "what problems I'm having in life now," not the "blood and guts" of events in Iraq. He did "briefly hit the recovery mission" in one interview. (Tr. 52).

Claimant confirmed that he recently met Dr. Hurley at a seminar in Tennessee. Dr. Hurley provides treatment to military personnel suffering from post-traumatic stress disorder. He intends to seek treatment from Dr. Hurley who is "not charging us anything for [the treatment]." (Tr. 54).

In deposition, Claimant described an assault suffered in 1991 when he was hit in the head while serving in the Army in Germany. (EX-31, pp. 16-17).

Claimant affirmed that he had financial problems before being deployed to Iraq. He had a bankruptcy and a divorce proceeding. However, he denied any financial stress before being deployed. He had only one bill which was for child support of \$680.00 per month. (Tr. 55, 57).

Claimant disputed seeing Dr. Lilly about child support problems before being deployed to Iraq. He stated he went to Iraq because there was a lot of money to be made and he would be supporting the war. (Tr. 57). He denied seeing Dr. Lilly on April 19, 2004, about problems with child support, stating that the records of Dr. Lilly were incorrect and should have reflected a visit on April 19, 2005. (Tr. 59-60; EX-33, p. 4). He also denied telling any physician that the reason he went to Iraq was to be able to pay his child support. (Tr. 61). He testified the Sandhills Center for Mental Health records which so state are incorrect. He informed his doctor at the Mental Health Center that he was fired by the City of Greensboro after his supervisor asked if he was having problems with paying his child support. (Tr. 61-62; EX-6, p. 4). However, he denied that the reasons for his discharge was as reported to the doctor. (Tr. 63-64).

Claimant confirmed that he raised child support payments as an issue almost every time he counseled with his doctors after returning from Iraq. (Tr. 65). He denied child support was his primary stress, stating that he couldn't hold a job and that "all I had to do is pay child support. It's not that complicated, yet I can't do it." He acknowledged that he filed for disability benefits in November 2005 and is receiving Social Security disability payments of \$1,265.00 per month and that in addition the Social Security Administration is paying his monthly child support payments effective October 5, 2005. (Tr. 67; EX-31, p. 4).

Claimant testified that he has looked for employment through newspaper ads, but has not completed a job application since July 2006 or gone on a job interview. He stated he does not think he can drive a truck, but could ride in a truck. (Tr. 70-71). He tried moving trailers and riding in trucks at his job with Times Fiber from March 2006 to July 2006, and was running into a lot of problems with it. He tried working a couple of times and had conflicts of interests with people, adding that "I don't play well with others too nicely." (Tr. 71; EX-13, pp. 27, 30, 37-38, 40). He testified that since he returned from Iraq he has had a problem he "can't quite put a handle on . . . it is affecting my life including me interacting with people and working." He considers himself physically healthy. (Tr. 73).

Claimant testified that during testing by Dr. Griffith he answered all the questions truthfully except those relating to his anger. (Tr. 74-75). He stated he did not think he was as angry as he really was. (Tr. 75). He stated he gets depressed without medication and becomes irate. He has had "bouts where [he] wanted to kill [himself]," because of his experiences in Iraq. He feels guilty because he was "one of the lucky ones that he came home with mental scars and not physical ones." (Tr. 76). He stated he considered his experience in Iraq as not normal and peculiar or strange. He stated he informed doctors that in his dreams he saw himself and other drivers being de-limbed. (Tr. 78-79).

Claimant acknowledged that he was attacked with a baseball bat while in the Army in Germany. It caused him problems for a couple of weeks. He stated that when he was in Iraq his attack "reoccurred and I started thinking about stuff like that . . . it came back in Iraq." (Tr. 79-80).

Claimant testified that he has "improved a lot" from his treatment in that he understands he is not alone and by not being suicidal. (Tr. 81-82). Claimant stated he took photographs of damaged vehicles to have something to do. During the recovery mission, the smell of burned flesh was present which "played havoc with me and they realized I was having a problem." He was told to go take pictures. (Tr. 83).

James Walden

The parties deposed James Walden on February 7, 2007. (CX-20). He testified he met Claimant in Houston, Texas during pre-employment in-processing. They worked together in Kuwait initially and later in Iraq. (CX-20, pp. 5-6). They convoyed until December 2004, when Claimant had a problem and went to their supervisor. (CX-20, p. 6). Claimant sought to work the Anaconda Express, which was an on-base trucking company, but was told he could not. (CX-20, p. 10). Claimant was told he could drive convoys or go home. (CX-20, p. 11).

He explained drivers were issued Kevlar helmets and body armor, but the trucks were not armored. Mylar film was placed on the windows to prevent shattering. (CX-20, p. 9).

He described the dangers to which they were exposed while driving in Iraq. He related mortar attacks on base and one occasion when a mortar exploded on the opposite side of a 12-foot concrete block wall where Claimant was standing. (CX-11,

p. 2; CX-20, p. 7). While in convoy, they took small arms fire every run, mortars, and lost friends and equipment due to IEDs, improvised explosive devices. (CX-20, pp. 7-8). He testified that they lost a friend, Kevin Rader, who was hit with two RPGs to the cab while hauling fuel and "they sent his charred remains home." Another friend died after an IED attack. (CX-20, p. 8). Afterwards, he noticed Claimant "started being real quite," and did not "hardly talk to anybody." (CX-20, p. 24).

He recalled one convoy where he lost his truck and grabbed his stuff and got into Claimant's truck, taking small arms fire. During the convoy, another driver, two trucks ahead of Claimant, was hit by an IED. Claimant's windshield was also blown out. (CX-11, p. 1; CX-20, p. 22).

He testified that he and Claimant were offered an opportunity to work from Mosul near the Turkey border at the end of October 2004. Claimant went out on a recovery mission "where two Turkish tanker drivers" were killed with an IED and afterwards informed Mr. Walden that he could not take it any more and had enough. (CX-20, pp. 11, 24). Claimant began driving a bus on base hauling drivers to their trucks, but was eventually told that he had to drive convoy trucks or go home. He stated Claimant sat in his room for two days "and did nothing but cry and then came home." (CX-20, p. 12).

Mr. Walden testified that he and Claimant became close friends and would work out at the gym while overseas. They have talked "maybe eight times" since their return to the United States. He stated every time they have talked "[Claimant] has been in tears." (CX-20, p. 8).

Larry Bagley

Mr. Bagley provided an unsworn statement which was received into evidence without objection. His statement related to the incident of November 6, 2004, involving the recovery mission to retrieve three vehicles. He stated that after returning to Mosul, Claimant "did not want to drive truck (sic) outside of the camp again. He then became a bus driver until he demobed." (CX-10).

The Medical Evidence

Dr. Harold Lilly

On April 19, 2005, Claimant was evaluated by Dr. Harold Lilly on a referral for complaints of bad dreams and drinking (flashbacks) and being upset about child support problems. Dr. Lilly's impression/diagnosis was depressed, stress (family) and "PTSD." (CX-1, p. 2). Claimant was unwilling to enter treatment because of lack of funds. (CX-1, p. 3).

On October 26, 2005, Claimant was again examined by Dr. Lilly with complaints of "poor sleep, depressed, anger and temper outburst." It was noted that he was having problems with PTSD that was interfering with his work and personal relationship. He was referred to a mental health clinic. (CX-1, p. 4). Dr. Lilly did not restrict Claimant from any employment or assign any work restrictions due to any psychological conditions.

Sandhills Center for Mental Health

On October 27, 2005, Claimant was evaluated by a therapist at the mental health clinic based on a referral from Dr. Lilly. He reported symptoms of PTSD including nightmares, vivid memories, paranoia avoidance of situations resembling traumatic situations with intense physiological and emotional responses. He stated his present symptoms were triggered in March 2005 when he resumed truck driving for financial reasons. He experiences PTSD symptoms when he feels threaten or stressed; he views whoever is threatening him as an "insurgent" and "has to fight with himself not to defend himself against them physically." He also reported child support problems and a lack of means to pay child support. He feels trapped by his child support demands. He reported he originally went to Iraq because he could not keep up with his child support and his payments are based on the high income he could earn as a truck driver. (EX-6, p. 4). Claimant presented as "tightly controlled but agitated," his speech was loud and slightly accelerated and reported difficulty sleeping. He denied any prior mental health or substance abuse treatment except for his appointment with Dr. Lilly. (EX-6, p. 5).

On January 3, 2006, Claimant returned to the mental health clinic for evaluation of post-trauma type symptoms. He was examined by a Registered Nurse to whom he reported his symptoms of sleeplessness since returning from Iraq, frequent nightmares

and waking flashbacks. He reported that his anxiety had resolved for the most part but noted that "the only fear of an attack happens when he thinks about truck driving." (EX-6, p. 8). He was assessed with PTSD, rule out panic attacks and alcohol abuse. (EX-6, p. 10). No work limitations or restrictions were assigned to Claimant.

Records of the Department of Veteran's Administration

On December 8, 2005, Claimant was evaluated at the Salisbury VA Medical Center for follow-up and PTSD evaluation. (CX-1, pp. 6-7). On the same date, his chief complaint was recorded as SOB (shortness of breath). In his history, Claimant reported "I have PTSD and I can not sleep." No evidence of an organic problem from a cardiac or pulmonary standpoint could be found. Dr. John Cave recommended that Claimant "should start meds for PTSD." (CX-1, p. 8). Claimant was also evaluated by Dr. Jalaja Dasari, a psychiatrist. Claimant reported he drove a truck in Iraq and "was shot and ducked many times was in combat zone daily witnessed killings and flying body parts and smells of burning dead bodies." He reported "flashbacks, nightmares and recurrent intrusive thoughts and anxiety." (CX-1, p. 10). Claimant informed that he cannot drive a truck anymore. Dr. Dasari diagnosed PTSD and prescribed medications. (CX-1, p. 11).

On January 5, 2006, Claimant underwent a mental health consult at the VA Medical Center. He reported sleepless nights, awoken by nightmares or weird dreams since returning from Iraq about "what could have happened, but I never die in my dreams." He reported he was unable to drive a truck which is his primary source of income. (CX-1, pp. 12-13). Claimant was assessed as meeting the DSM-IV criteria for PTSD with mild symptoms. The clinical social worker-evaluator concluded that "it is as likely as not that he is experiencing delayed onset PTSD from civilian employment in the war zone of Iraq." It was determined that Claimant met the following DSM-IV criteria:

A) exposure to traumatic event: witnessed multiple traumatic events of friends and was shot at with bullets lodged in the vehicle; felt frightened during his first encounter with the enemy from a blast and then became complacent;

B) traumatic event re-experienced: he had recurrent and intrusive recollections of the events in that he had intense psychological distress at exposure to internal or external cues symbolizing or resembling aspect of the event;

C) persistent avoidance of stimuli associated with the trauma: at first he engaged in efforts to avoid thoughts or feelings, but "now I seek these things out;" markedly diminished interest or participation in significant activities; and feelings of detachment or estrangement from others;

D) persistent symptoms of increased arousal: difficulty falling or staying asleep; hyper vigilance; and exaggerated startle response.

(CX-1, p. 15; EX-7, pp. 39-40).

On March 8, 2006, Claimant returned for follow-up reporting he was tensed up and has rage. He reported depression and anxiousness with anger outbursts and problems dealing with work. He reported "multiple stressors" and witnessing "extensive trauma" in Iraq. (CX-1, p. 20). Claimant reported to the VA Medical Center on March 28, 2005, but was uncooperative with Dr. Justino DMello, a staff psychiatrist. (EX-7, p. 34).

On April 6, 2006, Claimant was hospitalized overnight at the VA at the recommendation of Dr. Dasari with a diagnosis and history of PTSD and hypertension. He reported he was increasingly agitated and felt depressed after a recent child support hearing. He stated he had bad memories of the Iraq war when he was a truck driver. It was determined that Claimant was not considered a danger to self or others. He was discharged on April 7, 2006, with no physical restrictions. (CX-1, p. 22; EX-7, pp. 22, 31-33).

On May 30, 2006, Claimant reported "ongoing problems related to his PTSD," sleep interrupted, nightmares of attack and injury to head in military." He reported "seeing shadows, explosions and gets very jumpy, but aware all in his mind." (EX-7, p. 23).

On July 18, 2006, Dr. Sastry Neti examined Claimant at the VA Medical Center. It was noted Claimant had "chronic PTSD related to his trauma in recent Gulf war," and presented for routine follow-up. Claimant reported he was doing "terrible with stress, insomnia, nightmares of Iraq with seeing scary shadows of insurgents and seeing self in explosions in sleep, unhappy moods" triggered by messy child support issues and problems. He felt "distracted and tied up and angry dealing with the stress of PTSD triggered by child support problems." He reported his "basic problem is PTSD with other problems compounding the original problem." Since December 2005, he stated he has been "unable to drive a truck and unable to support himself because of child support problems and paying child support." He reported that in Iraq he was "exposed to intense war related death, destruction and suffering . . . [and] had exposure to intense fighting and desert elements and had close calls." He related that the truck he was driving hit an improvised explosive device planted roadside in October 2004 but the "explosion moved in a different direction and away from him." He considered this event a close brush with death and he has been reliving that "terrible traumatic experience since that time in his sleep with nightmares of Iraq." Dr. Neti's impression was "chronic PTSD fairly severe and current child support related legal and economic problems having a triggering effect." (CX-1, p. 30; EX-7, p. 44).

On January 24, 2007, Dr. Neti again examined Claimant in follow-up. Claimant reported feeling nervous and anxious about his hearing on February 13, 2007, which stress had triggered memories of his life in the war zone of Iraq. Claimant sought an adjustment in his medications for his anxiety. Dr. Neti's diagnosis was chronic PTSD with legal issues having an effect with flashbacks of Iraq, bad dreams of Iraq, day time anxiety and worry symptoms. (CX-18).

None of the treating or consultative physicians assigned Claimant with work restrictions or limitations or restricted him from any employment because of any psychological conditions.

Dr. H. Ezell Branham, Jr.

Dr. Branham, who is board-eligible in psychiatry, initially evaluated Claimant on June 12, 2006, based on a referral "by a friend." His chief complaint was "I can't sleep and I keep seeing things and shadows and I'm staying alone as much as I can." He described his assault while serving in the military in Germany which created a great deal of problems for him and he

was "having a lot of difficulty with dreams about that and a lot of thoughts and bad feelings about it." He reported that his thoughts and feelings had "relatively gone away until after he was in Iraq where he was driving a truck as a civilian." (CX-1, p. 26; CX-15, p. 3).

Claimant reported that his duties in Iraq required him to drive through zones which were occupied by enemy forces and where "he was shot at, involved in IED explosions, was in combat zones where people were killed and body parts were thrown around." He also related that he "had contact with dead body parts and there were odors of burning flesh and various other types of situations that were quite difficult to manage." He considered the situation "life threatening" and "quite frightening" and he left it as quickly as he could. Id.

Claimant reported having nightmares shortly after returning to the United States about his experiences in Iraq to include being shot at, being blown up with IEDs, seeing burning bodies and smells which would wake him up. He reported difficulties maintaining employment because he was tense, irritable, anxious and began to blow up easily. He has "flashbacks about the experiences he had while he was in Iraq." Id.

Claimant stated he was unable to drive a truck because he freezes at the very idea of getting behind the wheel of a truck. He has been treated at the VA Medical Center with psychotherapy and medications. He reported being hospitalized at the VA Medical Center "for a period of time." (CX-1, p. 27).

Dr. Branham opined that Claimant's mental status exam revealed he was tearful and has difficulty with his presentation, a great deal of difficulty with concentration, his memory was "extremely intact for some of the events that happened during his time in Iraq," severely impaired for some of the time he was in Iraq, judgment was impaired and he had depressive symptomatology. Claimant described very vivid and intense nightmares about experiences in Iraq which awaken him and make it hard to get back to sleep. He thinks about his experiences in Iraq "almost continuously." (CX-1, p. 28).

Dr. Branham's diagnostic impression was PTSD with isolation, concentration impairment, sleep pattern disturbance due to nightmares, flashbacks about his Iraq experiences and severe job impact. He concluded that Claimant's PTSD was

referable to his military service in Germany and also his time in Iraq. Dr. Branham prescribed medications to help Claimant sleep. Id. Dr. Branham did not assign any work restrictions or limitations to Claimant or restrict him from any employment because of any psychological conditions.

On September 6, 2006, Claimant returned to Dr. Branham with continued difficulty from nightmares of his Iraq experiences. Dr. Branham noted Claimant had an experience with a kidney stone which was frightening and debilitating to him that "brought back a great deal of his experience **during his time in Desert Storm** and also during the time in Iraq." Dr. Branham also notes in Claimant's mental status exam that his memory is impaired "for events that happened **during his military service time in Iraq.**" His diagnosis was unchanged.

On January 30, 2007, Claimant returned to Dr. Branham for follow-up reporting hernia surgery the day before. He had a lot of rumination about his experiences in Iraq and difficulties with interpersonal relationships. He was again diagnosed with PTSD and would continue on his medications. (CX-19).

Dr. John D. Griffith

Dr. Griffith, who is board-certified in psychiatry and pharmacology, was accepted as an expert in the field of psychiatry. (Tr. 89, 132). He testified at the formal hearing and rendered opinions in accordance with reasonable medical probability. (Tr. 107). He served two years in the U.S. Air Force and has worked as an intern and consultant with the VA hospital system in Nashville, Tennessee, San Diego, California and Houston, Texas, for over seven years. (Tr. 90, 131-132). He stated that during his service with the Air Force and the VA Hospitals, he has had the opportunity to treat individuals with post-traumatic stress disorder. (Tr. 90).

He has spent over 40 years dealing with psychological problems of military and military-related cases. (Tr. 91). He has been involved in over 100 PTSD cases for treatment or forensic endeavors. (Tr. 94). He has maintained academic posts for most of his career and currently teaches at the University of Texas Medical School. He has an active clinical practice and also performs forensic work. (Tr. 92). He noted that Dr. Branham, who treats Claimant, is not board-certified. (Tr. 93).

Dr. Griffith acknowledged that the diagnostic criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders Fourth Edition (DSM-IV) is not universally accepted in the world of psychiatry. He stated a lot of psychiatrists think a severe trauma causing permanent or sustained psychological difficulties but also an inability to work and to associate with family and friends is "bologna." (Tr. 94). He testified that it is not typical for a PTSD patient to discuss their situation on a regular basis and interact with people where they re-visit the condition. (Tr. 95). He opined that a patient with PTSD has two choices: they can get on with their life and put the past in the past or be sick and "say that you can't do this or you can't do that." (Tr. 96).

On September 10, 2006, Dr. Griffith, at Employer/Carrier's request, interviewed Claimant, reviewed his medical records and performed testing. (Tr. 97; EX-10). Regarding Claimant's background, Dr. Griffith testified he found it strange that Claimant could not remember his sister's last name, he had studied to be an auto mechanic but had not explored the occupation since and was in trouble because of his child support problems. (Tr. 98). He noted Claimant had been awarded Social Security benefits and was aware he could also earn up to \$600 a month, but reported he had made no attempts to do so. Claimant informed Dr. Griffith that being attacked with a baseball bat while in the military service in Germany did not trouble him, but told his psychiatrist that the incident troubled him until he went to Iraq. (Tr. 99-100). Contrary to his denial of past psychiatric problems, Dr. Griffith noted that Claimant had been seen at Behavioral Associates of Asheboro on April 19, 2004, for financial (child support) problems which were psychological in nature. (Tr. 100; EX-33, p. 4).

Dr. Griffith testified that the hallmark feature of PTSD is the traumatic event. There is no such thing as cumulative PTSD. The event "has to be the sort of event that most people would find very disconcerting like flying in 39 missions over Germany" or involvement in "sustained fighting without food or water at Iwo Jima." (Tr. 101). Claimant informed Dr. Griffith the single most traumatic event he sustained was encountering dead bodies that were burned in truck; he did not have to remove the bodies, but "the smell is what did him in." Dr. Griffith opined that such an event did not qualify because 18 year old student nurses smell burning flesh, we all smell "it" when we have root

canals and medical students have to burn warts. He was unaware of anybody who complained of the smell "that's associated with post-traumatic stress disorder." He stated "the smell, even if it is revolting, is not sufficient to rise to the level of meeting the criteria" of PTSD. (Tr. 102-103).

Dr. Griffith noted that Claimant reported not seeking any treatment for his symptoms while in Iraq. (Tr. 103-104). He opined that Claimant has not improved in his clinical situation from treatment and medications. (Tr. 104; EX-10, p. 4). Claimant reported gaining 30 pounds while in Iraq while patients with depression or under stress frequently lose weight. (Tr. 104). He also noted that before his interview Claimant was informing bystanders he was under stress which is not consistent with a PTSD patient who is ashamed and does not want others to know about their condition. Claimant also exhibited no disorder, disorientation, memory loss, delusions or hallucinations and was considered not psychotic or brain damaged. (Tr. 105).

Dr. Griffith opined that Claimant's dreams/nightmares, although concrete, are repetitive and do not "count" as a bona fide symptom of PTSD. (Tr. 106-107). Dr. Griffith's diagnoses were: Axis 1-Malingering with major depression moderate without psychosis; Axis 2-Personality disorder NOS; Axis 3-N/A; and Axis 4-Unemployment, pending child support, lawsuit. (EX-10, p. 3). He further opined that Claimant did not have post-traumatic stress disorder because a diagnosis of PTSD cannot be made when the patient is a malingeringer. (Tr. 107). He concluded Claimant was a malingeringer because he is not mentally retarded and knows what's best for him and is "better off as a result of having the illness than you are if you don't." He added that Claimant's "present circumstances sort of insulates him from the child support which has been disturbing." Dr. Griffith opined that Claimant should be well now "whether he's had treatment or not," since he was not damaged physically and we all have bad memories that we get over." He further opined that with treatment Claimant probably reached maximum medical improvement in six to 12 weeks. The MMPI testing was also abnormal in that it indicated malingering. (Tr. 108). He testified the DSM-IV requires that malingering be ruled out for a diagnosis of PTSD when a court proceeding or secondary gain is in issue. The treating clinicians for Claimant have not performed any evaluations or testing to rule out malingering. (Tr. 108-109).

Dr. Griffith testified that Claimant does not have a triggering event of enough severity to meet the criteria for PTSD. (Tr. 109). He opined that Claimant has symptoms of depression but medications have not helped him. (Tr. 110). Claimant also has a personality disorder in that he "has a lot of things that don't work," such as his unstable marriage and sexual relationship. Dr. Griffith opined that Claimant's child support stress is not a bona fide trigger for PTSD. (Tr. 111).

The MMPI-2 test results reveal that the only scale in which Claimant was normal is the masculinity-femininity scale. The "fake bad scale" shows his results "practically off the score," which suggests Claimant is malingering. (Tr. 113; EX-11, p. 2). The MMPI-2 results confirm his impression/opinion after interview that Claimant is malingering. (Tr. 114). Steven J. Rubenser, Ph.D., whose specialty is malingering, was retained by Dr. Griffith to review the results of the MMPI-2 and his evaluation. His opinion supported a finding of malingering symptom magnification. (Tr. 114-115). Dr. Griffith concluded that the MMPI-2 was not a valid report. (Tr. 115).

Dr. Griffith opined that motivation to keep social security disability benefits including child support payments is a component of secondary gain as is a desire to received workers' compensation. He opined that Claimant is not disabled and is able to work. (Tr. 116). He further opined that once Claimant's case is concluded, he may benefit from some therapy. (Tr. 117). Dr. Griffith stated it is not impossible that Claimant has some legitimate problems but it is unlikely that his condition arises as a result of his employment in Iraq. (Tr. 118-119).

On cross-examination, Dr. Griffith affirmed that his publications have not concerned PTSD. (Tr. 120). He was a pharmacology instructor and professor of psychiatry at Vanderbilt University School of Medicine during which time he was a consultant with the VA Hospital. (Tr. 122). Regarding severe trauma as a prerequisite for a diagnosis of PTSD, "almost being killed by a mortar" would depend on how close it was to Claimant. (Tr. 123). He would not acknowledge that 39 bomber missions over Germany in World War II, at which time the pilot would not be required to fly another mission, was analogous to a similar number of trips outside the wire by a driver in Iraq. (Tr. 125).

Dr. Griffith confirmed that the exposure has to be severe and IED explosions next to Claimant's truck requiring him to kick out his windshield to drive apparently is not severe enough. (Tr. 126). Regarding Claimant's loss of a friend in Iraq, Dr. Griffith stated the "survivor's guilt is highly over the limit," referring to Air Force personnel in World War II dividing up a casualty's clothing. (Tr. 127). He doubted that Claimant's depression had anything to do with his employment in Iraq because he is depressed not doing anything, not working, not pulling his weight and living a monotonous experience. (Tr. 128). Of the eight cases on which Dr. Griffith has been associated, he has found six claimants to be malingering. (Tr. 129).

Dr. Griffith confirmed his conclusion that cumulative events cannot constitute PTSD is also set forth in the DSM-4. (Tr. 132-133). However, one mission where 50% of the mission's aircraft was lost may be enough to qualify for PTSD. (Tr. 134). An event can also induce psychological trauma, and not physical trauma, as a qualifying criteria. (Tr. 135).

In an addendum prepared on March 15, 2007, Dr. Griffith opined that Claimant's presentation does not meet the criteria for PTSD because (a) the specific event that he described as the "turning point" (the vehicle recovery operation) did not threaten him with injury or death; (b) the cumulative events which Claimant described as stressors cannot be grouped together to substantiate a PTSD diagnosis as defined in DSM-IV; and the MMPI-2 indicated strongly that Claimant is exaggerating his symptoms and/or was malingering. (EX-38, pp. 3-4).

The Contentions of the Parties

Claimant contends that he sustained an occupational illness, PTSD, from the zone of special danger while performing duties as a truck driver in Iraq. He asserts he experienced nine extreme traumatic stressors, each of which was sufficient in itself to give rise to PTSD. He relies upon the diagnoses of Dr. Lilly, the VA Medical Center and Dr. Branham. He argues his average weekly wage should be calculated using his actual earnings for the 28.714 weeks of employment for Employer in Iraq, yielding a weekly wage of \$1,860.88. Lastly, he contends he is entitled to temporary partial disability benefits between December 6, 2004 and July 11, 2006, while employed at various alternative jobs, and temporary total disability benefits from July 12, 2006 to present.

Employer/Carrier argue that Claimant has not presented sufficient evidence to establish a **prima facie** case of disability under the Act or that his disability, if any, is unrelated to any condition of employment with Employer. They assert that Claimant did not suffer any physical harm or injuries while employed by Employer and that during the only "traumatic event" described to Dr. Griffith, the recovery mission on November 6, 2004, Claimant was not involved in the attack which caused the damage, did not handle any dead bodies and the area in which the recovery occurred was secured by military police. Employer/Carrier aver that Claimant cannot meet the DSM-IV criteria for PTSD. They argue that the only objective evidence of record, the MMPI-2, suggests Claimant is not suffering from PTSD, but is malingering and exaggerating. Employer/Carrier argue that Claimant has obtained alternative employment from which his wages should be used to determine his entitlement to partial disability benefits. Lastly, they argue Claimant's average weekly wage should be computed based on his earnings before and during his employment with Employer under Section 10(c) of the Act yielding a weekly wage of \$1,270.29.

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).

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 or psychological 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 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for

compensation. Id. It is claimant's burden to establish each element of his **prima facie** case by affirmative proof. Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990).

1. Post-Traumatic Stress Disorder (PTSD)

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 questionable. His hearing and deposition testimony does not embellish the reports of exposure to Iraq actions and experiences provided to treating and consulting physicians which formed, in part, the basis of

their diagnoses. Thus, his presentations are inconsistent and contradictory. He informed VA physicians and clinicians that he was shot at many times in the combat zone and "daily witnessed killings and flying body parts and smells of burning dead bodies." Rather than the Iraq experiences which he described in testimony, he reported "nightmares or weird dreams" of "**what could have happened**, but I never die in my dreams." He claimed to have witnessed "multiple traumatic events of friends" and rather than avoiding stimuli associated with his alleged trauma, he "now seeks these things out." He also reported exposure to "intense war related death, destruction and suffering" and exposure to intense fighting and desert elements and "had close calls," such as **when the truck he was driving hit an IED** and he had been reliving the terrible traumatic experience.

Contrary to his history provided to Dr. Griffith, Claimant reported to Dr. Branham that his assault while in the Army in Germany created a great deal of problems for him and he was having a lot of difficulty with dreams about the assault, but those thoughts and feelings had relatively gone away until he was in Iraq. He informed Dr. Branham that he was involved in IED explosions and in combat zones where people were killed and "body parts were thrown around." He also reported having contact with dead body parts and odors of burning flesh. He apparently informed Dr. Branham that a kidney stone episode brought back experiences during the time he served in Desert Storm and in Iraq during his military service.

Claimant denied seeking evaluation or counseling from Dr. Lilly before going to Iraq about his child support issues which permeate his counseling history. His testimony contradicts the records of Dr. Lilly which indicate he was examined on April 19, 2004, for "financial problems-child support." Dr. Lilly's records of April 19, 2005, indicate his complaints centered on "bad dreams" and drinking (flashbacks). I am not impressed with Claimant's testimony or explanation regarding his pre-Iraq counseling.

I find Claimant's testimony and various medical histories are inconsistent and create a vacillating description of events of varying degrees of severity which erode his alleged exposure to traumatic events. Although he was undoubtedly exposed to traumas while driving a truck in Iraq, I find his embellishment and outright fabrication of events to enhance his exposure belies his credibility and the basis of his claim. I am generally not impressed with his efforts to exaggerate his exposure to alleged trauma in Iraq.

I was impressed with the testimony of Dr. Griffith who was accepted as an expert in the field of psychiatry and is highly credentialed and has held numerous academia positions, including his present position with the University of Texas Medical School. He has been involved in over 100 PTSD cases for treatment and forensic endeavors. Dr. Griffith rendered medical opinions within reasonable medical probability based on his interview of Claimant, a review of medical records provided and independent diagnostic testing. Unlike Claimant's treating and consulting physicians and clinicians, who did not mention or consider the issue of malingering in their records and reports, Dr. Griffith attempted to rule out malingering which is necessary to a diagnosis of PTSD in benefit entitlement or secondary gain situations. Thus, I find his opinions more probative, reasoned and explicated than Drs. Lilly, Branham and the VA clinicians and physicians.

3. Claimant's Prima Facie Case

In the present matter, Claimant testified about various attacks upon his truck during convoy operations. He recalled one occasion when his truck was hit with small arms fire during an IED explosion requiring him to kick out his front window. He acknowledged that he suffered no physical injury during his six months in Iraq. He also recalled the death of a friend left behind by the military, and a mortar explosion opposite his location from which he was protected from death or injury by a concrete wall. His last exposure was a recovery mission where he recovered a truck which contained a corpse. Although Claimant's testimony and history presentations are inconsistent, I find that he was exposed to sufficient trauma to support a presumptive **prima facie** case.

Claimant described his symptoms as trouble sleeping and having nightmares of IED attacks and recovering a truck where he sees fire through his window and he is burned. He initially sought treatment with Dr. Lilly who diagnosed PTSD which was interfering with his work and personal relationships. He reported his diagnosis of PTSD to the mental health clinic to which he was referred by Dr. Lilly and that his anxiety had resolved by January 2006, but for fear of an attack when he thinks about truck driving. Based on Claimant's subjective

presentation, Drs. Dasari and Neti of the VA and Dr. Branham diagnosed Claimant with PTSD. None of the foregoing physicians performed any objective diagnostic testing to rule out malingering nor did they render an opinion on a subjective basis that Claimant was not malingering.

However, I find Claimant's subjective complaints of symptoms can be sufficient to establish the element of physical or psychological 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, I find 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 December 5, 2004, 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 or psychological harm or pain and the working conditions which could have caused 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) (5th 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 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th 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. Griffith testified that the alleged cumulative events urged by Claimant as a basis of his PTSD condition do not conform to the criteria of the DSM-IV. He maintained that Claimant does not have a triggering event of sufficient severity to meet the criteria of PTSD. He opined that based on objective testing of the MMPI-2, Claimant cannot be diagnosed with PTSD because he is engaged in symptom magnification and malingering. The DSM-IV requires that malingering be ruled out for a diagnosis of PTSD when a legal proceeding or secondary gain is an issue. He further opined that Claimant is not disabled and is able to work and, although Claimant may have "some legitimate problems," it is unlikely his condition arises from his employment in Iraq. 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.

Based on the record as a whole, I find and conclude Claimant did not establish that he suffered a harm or injury as a result of his employment with Employer in Iraq. During the psychiatric evaluation conducted by Dr. Griffith, he obtained a personal history from Claimant as well as a description of the events which Claimant claimed formed the basis of his PTSD condition. He noted that Claimant relied upon the single most traumatic event of encountering dead bodies burned in a truck being recovered in November 2004 and the smell of burning flesh. He opined that such an event did not qualify as a traumatic event or meet the criteria for PTSD. Claimant informed Dr. Griffith that he was never struck by enemy fire, his truck was never blown up by IEDs and acknowledged that his reports to Dr. Branham regarding "contact with dead bodies that were thrown around" were not true.

Dr. Griffith performed MMPI testing on Claimant which he considered abnormal. He retained Dr. Steve Rubenzer, Ph.D., who he considered to be a specialist in malingering, to examine the results of the MMPI-2. Dr. Rubenzer opined that Claimant's profile contained indications of considerable dramatization, exaggeration, or faking, with significant findings on several validity indices, including a very high score on the Fake Bad Scale of 32. He reported that the Fake Bad Scale is "the best-validated response style scale in a compensation context, and scores of 30 or more are extremely rare among patients not in litigation." He further opined that the profile suggested probable exaggeration of psychiatric symptoms, but should not be relied upon in isolation. He noted that Claimant's portrayal "cannot be taken at face value." Dr. Rubenzer opined that in a compensation context, malingering must always be suspected.

In conjunction with his interview and review of Claimant's medical records, Dr. Griffith concluded that Claimant was malingering since his psychological test results of dramatization, exaggeration and faking were consistent with his clinical interview. As previously noted, none of Claimant's

treating physicians or clinicians performed any objective testing of Claimant nor did they comment about the potential of malingering as a prerequisite to a diagnosis of PTSD. They did not rule out malingering as required by the DSM-IV. Dr. Griffith's medical opinion is based upon both subjective and objective criteria and is therefore more reasoned and probative. Moreover, although Dr. Branham acknowledged that Claimant reported "severe impact on his ability to maintain employment," none of his treating or consulting physicians assigned any work limitations or restrictions or opined that Claimant could not perform employment because of his psychological condition. Dr. Griffith concluded that Claimant was not disabled from a psychiatric perspective and was able to work.

Thus, the record as a whole supports Dr. Griffith's conclusion and opinion that Claimant was malingering and does not suffer from PTSD or any other work-related psychological condition. Therefore, I find and conclude, based on the record as a whole, Claimant did not establish by a preponderance of the evidence, as is his burden, that he suffers from PTSD or any other psychological condition as a result of his employment with Employer in Iraq. See Greenwich Collieries, supra.

Since Claimant failed to establish that he suffered from a compensable injury, findings regarding nature and extent, 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 the entire record, I find no merit to Claimant's claim and it is hereby dismissed.

ORDERED this 23rd day of October, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge