

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 April 2009

Case No. 2008-LDA-326

OWCP No. 02-141282

In the Matter of:

**J.E.,
Claimant**

vs.

**EG & G TECHNICAL SERVICE,
Employer**

and

**AIG WORLDSOURCE,
Carrier**

APPEARANCES:

**GARY B. PITTS, ESQ.
On Behalf of Claimant**

**RICHARD L. GARELICK, ESQ.
On Behalf of Employer**

**BEFORE: PATRICK M. ROSENOW
Administrative Law Judge**

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Defense Base Act (the Act),¹ brought by Claimant against Employer and Carrier.² The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 16 Oct 08 a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record which consists of the following:³

Witness Testimony of

Claimant

Claimant's Mother

Exhibits⁴

Joint Exhibit (JX): 1

Claimant's Exhibits (CX): 1-21

Employer's Exhibits (EX): 1-14

STIPULATIONS⁵

1. Claimant was injured on 18 Mar 05 in Iraq under circumstances that bring him within the jurisdiction and coverage of the Act and out of and during an employer/employee relationship.
2. Employer was timely notified.
3. Claimant filed a timely claim.

¹ 42 U.S.C. § 1651 *et. seq.* (the Defense Base Act is an extension of the Longshore and Harbor Workers' Compensation Act 33 U.S.C. § 901-950).

² For simplicity both Employer and Carrier are collectively referred to herein as Employer.

³ I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

⁴ Some exhibits appeared to be *en globo* collections of records. Counsel were cautioned that in the case of any such exhibit (CX-1) only those pages specifically cited to would be considered a part of the record upon which the decision would be based. Tr.8.

⁵ JX-1; Tr.8-11.

4. Claimant's Average Weekly Wage (AWW) was \$1,538.46.
5. An informal conference was held 26 Apr 07.
6. Claimant was paid temporary total disability weekly benefits of \$1,025.64 from 19 Mar 05 to 21 Jun 05, 9 Jul 05 to 3 Aug 05, and 10 Sep 05 to the present and continuing.
7. Claimant reached maximum medical improvement (MMI) on 1 Mar 07.

FACTUAL BACKGROUND

While working for Employer in Iraq on 18 Mar 05, Claimant was struck by mortar fire and sustained severe internal and external wounds. He was treated and underwent a number of surgeries, but eventually returned home and was nursed for a while by his mother. After a few months, he reported that he felt better and was cleared to return to work in Iraq. Shortly after his return, he complained of the rapid onset of significant neurological, digestive, and psychiatric problems that forced him to return home. He has not worked since.

ISSUES & POSITIONS OF THE PARTIES

Claimant argues that since his second return from Iraq he has never been able to return to his original job there, that Employer has not established any suitable alternative employment (SAE), and that he is therefore totally disabled. Claimant also seeks medical care for his current problems. Although it has been paying Claimant total disability, Employer seeks an order finding that nothing related to his March 2005 injury is preventing Claimant from returning to and staying on the Iraqi job for Employer. Even if he was not able to do so because of his March 2005 injuries, Employer argues in the alternative that it has established SAE. Employer also suggests that Claimant requires no medical care relating to March 2005 injury.

LAW

Although the Act should be construed liberally in favor of the claimant,⁶ the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,⁷ which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.⁸ In arriving at a decision, the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences

⁶ *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

⁷ 5 U.S.C. § 556(d).

⁸ *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).

therefrom, and is not bound to accept the opinion or theory of any particular medical examiners.⁹

Causation

Section 2(2) of the Act defines “injury” as “accidental injury or death arising out of or in the course of employment.”¹⁰ In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.¹¹ The presumption takes effect once the claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.¹²

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.¹³ These two elements establish a *prima facie* case of a compensable “injury” supporting a claim for compensation.¹⁴

A 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.¹⁵

Once the presumption applies, 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.¹⁶ “Substantial evidence” means evidence that reasonable minds might accept as adequate to support a conclusion.¹⁷ Employer must

⁹ *Duhagon v. Metropolitan Stevedore Co.*, 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).

¹⁰ 33 U.S.C. § 902(2).

¹¹ 33 U.S.C. § 902(a).

¹² *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998).

¹³ *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); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990).

¹⁴ *Id.*

¹⁵ *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 (5th Cir. 1982).

¹⁶ *See Gooden*, 135 F.3d 1066; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976); *Conoco, Inc. v. Director [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (5th Cir. 1999); *Louisiana Ins. Guar. Ass’n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (5th Cir. 1999); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (5th Cir. 1994).

¹⁷ *Avondale Industries v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1988); *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

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).¹⁸ The testimony of a physician that no relationship exists between an injury and claimant's employment is sufficient to rebut the presumption.¹⁹

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and no longer controls the outcome of the case.²⁰ 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.²¹ The presumption does not apply, however, to the issue of whether a physical harm or injury occurred²² and does not aid the claimant in establishing the nature and extent of disability.²³

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.²⁴ Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

The question of extent of disability is an economic as well as a medical concept.²⁵ To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.²⁶

If the claimant is successful in establishing a *prima facie* case of total disability, the burden of proof shifts to employer to establish suitable alternative employment.²⁷ Addressing the issue of job availability, the Fifth Circuit developed a two-part test by which an employer can meet its burden:

is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of the evidence").

¹⁸ See *Smith v. Sealand Terminal*, 14 BRBS 844 (1982).

¹⁹ See *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

²⁰ *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).

²¹ *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (4th Cir. 1997); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Greenwich Collieries*, 512 U.S. 267.

²² *Devine v. Atlantic Container Lines, G.I.F.*, 25 BRBS 15 (1990).

²³ *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

²⁴ *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

²⁵ *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

²⁶ *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).

²⁷ *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

- (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
- (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?²⁸

Employers need not find specific jobs for a claimant; instead, they may simply demonstrate "the availability of general job openings in certain fields in the surrounding community."²⁹ The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order to establish that the claimant is physically and mentally capable of performing the work and that it is realistically available.³⁰ The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record.³¹ A showing of only one job opportunity may suffice under appropriate circumstances.³² Conversely, a showing of one unskilled job may not satisfy the employer's burden. If a party contends that the actual earnings do not fairly represent the wage earning capacity, it bears the burden of persuasion on that issue.³³

In evaluating evidence, the ALJ must determine the credibility and weight to be attached to the testimony of the medical witnesses and is entitled to deference in doing so.³⁴ Generally, the opinion of a treating physician is entitled to greater weight than the opinion of a non-treating physician.³⁵ However, an ALJ is not bound by the opinion of one doctor and can rely on the independent medical evaluator's opinion and evidence from the medical records over the opinion of the treating doctor.³⁶ A claimant's

²⁸ *Id.* at 1042.

²⁹ *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).

³⁰ *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988).

³¹ *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); *see generally*, *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

³² *P & M Crane Co.*, 930 F.2d at 430.

³³ *Burch v. Superior Oil*, 15 BRBS 423 (1983); *Gage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988)

³⁴ *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961); *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993).

³⁵ *Downs v. Director, OWCP*, 152 F.3d 924, (9th Cir. 1998); *see also* *Loza v. Apfel*, 219 F.3d 378 (5th Cir. 2000)(Social Security administrative law decision).

³⁶ *Duhagan v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997).

credibility may be relevant if in developing their opinions, doctors relied on what the claimant told them.³⁷

EVIDENCE

*Claimant testified at trial and his certificates show in pertinent part that:*³⁸

He is fifty-four years old and was born and grew up around Monroe, Louisiana. He graduated from high school in 1975 and then went to truck driving school and diesel mechanic school. He completed diesel mechanic training in April 1977. He served three years in the Army from 1977 to 1980 and seventeen years in the National Guard. He had duty in Honduras, Panama, and Belize as a diesel technician, but saw no combat. He was honorably discharged from the National Guard in September 1997.

After his active duty in the Army he worked at a bag company in West Monroe as a printing press operator for fifteen years. He then worked for an electrical company as an electrician helper until 2004, when he took a job with Employer as a diesel technician. Before working for Employer in Iraq he never had any problems with his stomach, his left leg, dizziness, headaches, falling, sleeping, or chronic nightmares. He did not limp. He had never seen a psychologist or a psychiatrist before going to Iraq. He used to work twelve to sixteen hours a day. Before Iraq, he was an outgoing person. He used to fish, hunt, go to movies, and go to football games. He ran three miles every other day and won first place in the over fifty category for a Labor Day 10-kilometer run in September 2004. He ran the two miles in eighteen minutes.

He left for Iraq on 9 Jul 04. He moved around different places, including Baghdad, Mosul, Anaconda, and Kirkuk. He earned three certificates of achievement from the army for his work. He saw it as a career move and planned to stay twenty years.

He was exposed to body parts his first day in Iraq in July 2004. He saw blood and skin in a vehicle. That happened everyday. Vehicles were getting blown up by roadside bombs. It was just about everyday or every other day. On average every other day he'd see body parts once a day. He was under attack everyday before 18 Mar 05. Insurgents were always firing AR-15 rifles. They were shooting mortar shells as well. In Iraq, there were attacks every night when he was sleeping in his quarters. He would put his gear on and run outside to the bunker real quick.

³⁷ *Houghton v. Marcom, Inc.*, (BRB Nos. 99-0809 and 99-1315)(April 25, 2000)(Unpublished).

³⁸ Tr 23-128; CX-13-16.

They took casualties on dates other than when he was hurt. One time was at Anaconda. Baghdad was getting hit everyday by the insurgents and they were getting wounded. He was at Mosul when the mess hall got bombed. He was at the motor pool working on trucks. He heard the echo of the bomb. He knew two of the guys who died and was heartbroken. At Kirkuk, they were getting shot at every day. On two occasions, it was close to him. He heard a whisper in his ear, telling him to move. After he moved his head a bullet landed right in front of him. He had a mortar round go off a hundred feet away and could hear the shrapnel hit the tin on the roof. They ran to the bunker everyday.

He had an R & R break at home in January 2005. They had Christmas and everything was fine in his life with no problems.

On 18 Mar 05, he was in Kirkuk. As he left the mess hall after lunch, he was hit by a mortar round. It threw him five feet in the air and knocked him out. He was air evacuated to a MASH unit at Anaconda. That's the reason his is scared of helicopters now. He recalls a nurse holding his hand, having his clothes cut off, and getting doped up. After a week he was transferred to the Army Hospital at Landstuhl, Germany. He was there about a week and then sent home to Monroe. He was hospitalized for a day, and then released to go home, where he shares a house with his mother.

He did not have any follow up care and the doctors said he was ok. He started getting better, and by August 2005 thought he was in good enough shape to go back to work. He asked Employer to send him back and they returned him to Kirkuk. He was not afraid of bombing, working, or anything like that. It took four days to in-process in Bagdad. He flew from Bagdad to Kirkuk in a helicopter. He wore his protective gear but they did not draw any fire.

When he got back to Iraq there were the same attacks. Once he got to Kirkuk he reported to his supervisor, Vince Hill. Hill gave him the rest of the afternoon off. He went back to his quarters and checked to see if everything he left was still there. The next day, he went back to work and was placed on light duty. He was sweeping floors, not working on vehicles. The next day there was a Humvee with a problem nobody could figure out. He did some troubleshooting on it and found out it was a starter problem. The foreman forgot he was injured and told him to put the starter on.

While he was working on the starter, his left side had shooting pain and a burning sensation. It felt like something was on fire in his body. He called the other mechanic to come help because he didn't want the starter to fall on his head. So they pushed him out of the way. When he rose up he got light-headed, and his whole left side went numb. They called the medic and his supervisor. The Army

medic said he had nerve damage in his whole left side. He had to go see three psychiatrists over there. They wanted to know why he came back. He told them it was because that was his job and that no matter where he went he was going to work with the company the rest of his life. He wanted to stay there and work. That was his job.

He did not have second thoughts about what he was doing there after having been exposed to body parts every single day for eight months. It didn't affect him until the day he was working on that truck. That is when everything snapped. His left side shut down and everything else connected. The nightmares started and everything went downhill from there.

Ever since then he started having problems with his nerves. He can't lift anything. When he tries to do something his whole left side just starts shooting hot pain and he goes out. For a while he was in a wheelchair and then used a walker. He walks with a limp and has to use a cane to balance his body. He loses his balance while walking, gets light-headed and dizzy, sees dark and white spots, and falls down. He gets dizzy and light-headed. He now has high blood pressure and migraine headaches.

He has problems with his gastrointestinal system. When he tries to eat anything within a few minutes he has to go to the bathroom and unload everything. Then he gets an empty stomach and tries to eat again. Within a few minutes he again has to go back to the bathroom and unload everything. He gets an empty stomach and tries to eat again every day. The only thing he can eat is crackers and cheese, or maybe a soda. When he eats, he gets bloating, cramps, the runs, and morning sickness. Smelling food cooking makes him get sick.

When he eats something, within twenty minutes later he has to go to the bathroom and dump it out. Today, he ate a biscuit, sausage and Coke in the cafeteria at 7:15. It made him feel sick and he had to go to the bathroom at 8:15. It is now 10:30 and he is good, but he hasn't eaten anything else. He can eat chips, crackers, cheese, biscuits, sausage, shrimp, and boiled chicken. Sometimes when he eats those he has to get rid of them right away. But beef, lettuce, milk, ice cream, vegetables, and pork chops he has to get rid of right away.

He has gained ten to fifteen pounds since returning from Iraq. By June of 2007 he had gained thirty pounds. He has lost fifteen or twenty pounds since then. In his June 2007 deposition he testified he had gained thirty pounds since returning. The weight comes and goes. Crackers, cheese and soda, are the only thing that he can keep for a while. He thinks he gained the weight after they removed his gall bladder and appendix, but no doctor ever told him that.

When he does go to the bathroom his right side feels like it's on fire. That lasts a couple of minutes and is at a pain level of 7 of 10. He gets dehydrated and it makes his side feel like it's on fire. When the level-seven pain subsides, it goes down to one or two and then it eases off until he eats again.

His left side is totally different. It hurts at six-seven. When he takes the medicine, it is a four or five. It never gets below a four or five. He has a number ten pain in his abdominal area when he goes to the bathroom. When he goes in the bathroom it hurts so much.

When they got a wrecked vehicle there'd be human bodies and parts left in the vehicle. He had to clean all that out and fix the equipment. He has nightmares about that every night and only gets three to four hours sleep. He can see the body parts in the trucks that got blown up. When he hears a helicopter coming over he hides. He thinks they're coming to get him. A plane or loud noises like a big truck going down the highway makes him go hide. He doesn't like to go to football games, hunt, or fish anymore. He doesn't like to look at blood and some food cooking will make him sick to his stomach. He is teary-eyed and avoids things that remind him of the war. He doesn't watch Army shows or the news about Iraq. He has ringing in his ears all the time. His mother was a practical nurse and has had to come home from that work to take care of him since he got back the second time.

He did not have these problems the first time he came back from Iraq. It just all hit him at one time, when he was working on that truck. The day he was working on the truck, everything came at one time. That night, he saw in his nightmare that he was walking up a hill and there were bodies and blood everywhere. Now, when he goes to sleep he can see those body parts that were in that truck, like fingers, skin, arms, blood. That affects him.

He has not been able to find a job at home. He tried to go to work and even tried to go back to Employer. Employer won't hire him because they told him he has to be a hundred percent able to go back to work. He applied for other jobs, but they want to know what happened to him and when he explains, they say he is a high insurance risk now. He put applications in at Burger King and McDonald's but they just keep closing the door in front of him. He even put in an application for a janitor, but they said the same thing.

He lives seventeen miles from Monroe. Sometimes he needs somebody with him when he drives because he loses his direction. Monroe has roughly two hundred thousand people. That's where the jobs he applied for were.

He most recently tried to go back to work with Employer in June 2008. They said he had to be a hundred percent to do his job as a diesel technician and they did not think he was a hundred percent capable.

CX-17 is medical bills from his injuries that he paid. He was told he had Post Trauma Systems Disorder. An army doctor said his left side did that to him because he got nerve damage on his whole side.

He would like to be able to work and wishes this never happened. No one will hire him. He tried back in June, when Carrier cut him off of everything and said he could work. But Employer refused to hire him back. He does not think he could go back to work in the war zone. He would have to wear heavy protective gear and steel-toed boots. The vests weighed 100 pounds. He actually weighed it. The Army vests weighed 50 pounds. He could not wear that stuff now. He also could not run to shelter if he had to.

When he got back he eventually saw Dr. Woods, who he had known when he was at the paper company. He was having problems at home, headaches, dizziness, trouble eating, and numbness in his left leg. He got along well with Dr. Woods. He also saw Dr. Boykin, a nerve doctor and Dr. McHugh, a stomach doctor. He found them in the phone book. He also saw VA doctors and went to a doctor in Shreveport. He last was at a VA doctor on 4 Sep 08, for a nerve conduction test he had asked for. Dr. Woods didn't recommend it. Dr. Woods had told him a little more than a year ago there was nothing he could do.

His stomach and left leg hurts, and he is getting a headache. His left arm has pain. The pain is at a seven out of ten. That's his normal pain level without medication. With the medication, he is at a four or five. He was last at a ten on Monday at Dr. Woods' office. He was getting his blood pressure medicine refilled.

He gets a real bad migraine headache and starts seeing black and clear dots. He starts sweating and pain goes down his left side. It's a hot, burning sensation, like water running down on it inside of the leg, all to the left side. Then he passes out. He passed out in the doctor's office. He gets the level ten pain right away when he quits taking his medicine. He can be in bed asleep when it hits. It happens on average about once a week. The only way to get rid of it is take medicine and a hot shower. He always passes out from that level of pain. He passes out once a week.

Between the end of June 08 and 6 Oct 08, he passed out each and every week. The last time he was walking on a road that goes to his brother's house. It takes him about an hour or two to come to. He walks to the house and gets his medicine real quick. Most of the time, he has medicine in his truck. He takes five different

medications after he has a number ten and passes out. That makes him feel at a four or five in about twenty minutes. Four or five is his baseline, where he usually is and can put up with everything.

When he first went back to Iraq in August 2005, he was at four or five. Ever since he was injured he has had pain. Even though his pain was the same then as now, he can't go back to Iraq and do his job because he's on medication for high blood pressure. He never had high blood pressure before. He used to run three miles on Monday, Wednesday and Friday, and his blood pressure would still be the same. Now if he runs five hundred feet or gets excited watching the TV, his blood pressure shoots up. He last ran five hundred feet on Monday to see if he could do it. He does not know the last time he did it before then.

When he lifted his left leg up onto the chair as he testified, he was experiencing seven-eight level pain. Just before that, he was in five level pain.

He applied for jobs with Burger King and McDonald's and to be a janitor in June 2008. He applied because the insurance company terminated his benefits and he saw ads in the paper. Employer's doctor said he could work. He applied for a job with Employer as a diesel technician in New Boston, which is a three-hour drive. He applied online from a computer at the library. He got a call and went to New Boston to interview. His brother drove him. He was walking with a limp that day and explained what had happened in Iraq. Employer's HR rep said he liked his job experience, but not the way he walked. He said he had to be a hundred percent to do diesel technician work again. After the HR rep called somebody in Atlanta, he said Employer would call when they needed help. Employer never called him back.

He then went to apply for a job for carpenter work in Monroe, but they said he was a high insurance risk. He can't remember the name of the company. He found the job in the newspaper.

He filled out applications and interviewed at both Burger King and McDonald's. He told them about his injury. They said they didn't need him. He tried for a janitor job, but they would not hire him because of insurance issues. He had to disclose his injury to explain the gap in his employment history.

He told all the people hiring that his doctors cleared him to work, but they didn't care. When he interviewed for the jobs they could tell he was in pain. He had not taken medicine because he wanted to be alert.

*Claimant's mother testified at trial in pertinent part that:*³⁹

She was born on 30 Jul 28 and is Claimant's mother. She has worked as a licensed practical nurse for about thirty years.

Before Claimant went to Iraq, he was in A-1 physical condition. He didn't have any problems with his speech and his hearing was excellent. He had a good work ethic and was an eager beaver. He had been working since the age of fourteen.

She picked him up at the airport the first time he came home from Iraq. He was in a wheelchair. His left leg had a dressing on it. She took him to St. Francis Medical Center where they waited in the ER. The doctor came out and said that they could not admit Claimant to the hospital. They gave her his report and instructions.

She took Claimant to a friend who is an orthopedic specialist. He looked at Claimant's leg. It was red and had some discharge. Claimant's stomach had a red three-inch strip down the incision. The doctor told her how to care for Claimant at home. She nursed Claimant at home and he progressed very, very slowly at first. They got him out of the wheelchair, then on crutches for about two weeks, and then the walking cane.

She nursed him and took him to whatever doctors would see him. It took about a year. He saw Dr. Woods first. He also saw an internist, orthopedist, physical therapist, speech therapist, ears and eyes specialists, dietician, psychiatrist, and psychoanalysts. He has seen about 53 doctors altogether.

When Claimant wanted to go back overseas, she thought it was great. As far as she could tell, he was in good shape when he went back. He was not having trouble with his stomach. It just floored her when they called and told her that he was having problems.

When he came back the second time, he was in a wheelchair. He said his stomach was bothering him real bad. She took Claimant back to Dr. McHugh and he diagnosed diverticulitis, colitis, and gastritis. The VA removed three small polyps in the colon, thinking that was going to help him with his diverticulitis, or constant bowel movements. He has been on thirty to forty medications.

³⁹ Tr.128-154.

He can't eat green vegetables, peas, beans, celery, lettuce, tomatoes, green onions, or anything like that. To him, a half a banana is like a dose of castor oil. He cannot eat any fruit.

When Claimant came back he had the leg problem, the stomach problem, the digestive problem, the pain problem, the nervous problem, and the cognitive problems. It was like night and day.

She has stayed at home and nursed him since he came back. The biggest thing right now is diet and finding food that he can tolerate. At first he was nauseated and had real bad diarrhea, stomach ache, and blood pressure problems. He had the sweats real bad at first. They finally got to where he's not as nauseated as he used to be and doesn't have the vomiting that he did. He has a speech problem and his eye is bad. When he starts having real severe headaches, his eyes will turn black and then green. Then the pressure will leave. It takes him three or four days to get over that.

He is bothered by noise. He tried two or three times to sing in the church choir, sitting about three feet from the piano. He'd just have to leave the room. When he goes to church he has to sit in the back as far away from the speaker as he can.

He has nightmares. Before he went to Iraq, he would get a good night's sleep. Now, he's up during the night. She would have to start calling his name before she entered his room to get him awake, so he wouldn't want to get up and start fighting. When he does awaken he's wringing wet with sweat, so he has to get up and take a shower and change and she has to change the linens.

She observes him all the time. When they go to the grocery store, he has to lean on something at times to keep from falling on the floor. He has to sit down every so often to get off his left leg.

She had to modify the house to give him quicker access to a bathroom. It was about 23 steps from his bed to the bathroom. That was too long a distance sometimes for him to make it with out having an accident. He would have to go eight or nine times a day. It was just like having diarrhea. That continues to be a problem.

Claimant never had a problem with falling before. Now, when he falls it's his left leg. He'll take a step with the right foot and pick up his left leg like he is going to walk normally, but that leg would fold under. Then he has to catch something and usually goes down on his right leg.

He uses the cane not all the time, sometimes, most of the time. It's for when he has weaker periods. He wore one cane out and is on his second.

Claimant's medical records state in pertinent part that:⁴⁰

Claimant was injured in a mortar attack and underwent abdominal surgery on 18 Mar 05. He had his gall bladder and appendix removed. He also had surgery on his left leg. He was evacuated to Germany on 21 Mar 05. On 27 Mar 05, he was cleared to return home.

He was seen by a physician's assistant in Louisiana on 29 Mar 05. X-rays revealed residual shrapnel and his wounds were healing. Home care and follow up visits with a general surgeon and orthopedist were arranged.

On 4 Apr 05, Claimant's leg sutures were removed. Claimant stated he wanted to return to work as soon as he is able, but was told by Dr. Liles that would take at least three months.

On 20 Apr 05, Claimant was seen by Dr. McHugh to follow up his abdominal wounds. Claimant complained of pain, bloating, nausea, diarrhea, and vomiting green material. He denied fevers, chills, or sweats. Dr. McHugh felt that the diarrhea could be due to the gall bladder removal and recommended a colonoscopy for further assessment.

A 2 May 05 esophagogastroduodenoscopy disclosed gastritis and a hiatal hernia with reflux. A 5 May 05 CT scan showed some stranding dye in the right colon and colitis. A 20 May 05 colonoscopy showed diverticulitis.

On 9 Jul 05, Claimant told Dr. Liles his leg bothered him a little bit and reported primarily saphenous nerve symptoms. Claimant walked without a limp and Dr. Liles suggested Claimant was ready to return to his original job. On 13 Jul 05, Claimant said he felt great with no nausea, diarrhea or vomiting. He had minor leg pain, but was ready to return to work. He was cleared to return to work by Dr. Liles. On 4 Aug 05, Dr. Liles noted Claimant had met with a rehab counselor and was cleared to return to his original work.

On 7 Sep 05, Claimant presented to the clinic in Iraq stating he did not want to hurt someone. He explained that a week after he returned to Iraq, he informally went to an aid station three times for help with stress. He reported that after hearing an explosion, he had renewed anxiety, nausea, upset stomach and light

⁴⁰ CX-1 (as cited, see n.4), CX-2.

headedness, dizzy spells and nightmares. He was assessed as possibly suffering from PTSD and recommended for transport home.

On 15 Sep 05, Claimant initially presented to Behavioral Medicine and Addictive Disorders, Inc. and was seen by Michael Gomilla, a licensed professional counselor. Claimant reported he had been hospitalized for several months as a result of his injuries and had then returned to his job in Iraq. He noted that once back in Iraq, he could not do his job because of left side weakness, tinnitus, noise sensitivity, hypervigilance, poor concentration, and irritability. Claimant stated he was depressed and despondent that his whole life had changed. Claimant was observed to have a depressed mood and flat affect, suffering from extreme anxiety. He denied current suicidal ideations but admitted to occasions of suicidal thoughts while in Iraq. Claimant stated he had nightmares of bodies being blown up. He complained of dizziness and poor sleep patterns, along with numbness in his left arm and left leg. He frequently grimaced as if writhing in pain. He was diagnosed as suffering from post traumatic stress disorder.

On 4 Oct 05, Claimant reported to Dr. Liles that while he was in Iraq the left side of his body suddenly went numb. Dr. Liles noted that Claimant's leg complaints were probably related to superficial saphenus neuritis. Dr. Liles saw nothing more to be done with Claimant's leg and noted Claimant was seeing a neurologist and psychologist. He believed Claimant could return to work.

Mr. Gomilla saw Claimant eleven times through 30 Nov 05 and they discussed Claimant's intrusive thoughts about the attack. On 4 Oct 05, Claimant complained of left side weakness, migraine headaches, dizziness, and fatigue. Claimant was more hopeful. On 30 Nov 05, Mr. Gomilla reported that he had diagnosed Claimant with chronic PTSD. He noted Claimant grimaced frequently in response to left side and leg pain. Claimant complained of light sensitivity and noted he could not be active for more than fifteen minutes without extreme fatigue. Mr. Gomilla opined that Claimant could not hold a job and his prognosis is poor.

On 21 Jun 07, Claimant was referred by the VA for a consult to assess a possible traumatic brain injury. On 5 Sep 07, Claimant told Dr. Nguyen that he had dizziness, was irritable, lacked sleep, and was depressed. Dr. Nguyen's impression was post concussion syndrome, PTSD, and low back and leg. On 5 Sep 07, Dr. Burkart provisionally assessed Claimant as suffering from PTSD.

On 17 Oct 07, Claimant was evaluated for cognitive function at the Shreveport VAMC. Claimant gave a history and complained of sharp pains in his chest and stomach and a bad headache. He was jovial and smiled and joked with the clinician. His mother reported Claimant was forgetful. The impression was memory disorder, executive function disorder, and cognitive deficit. Further

assessment was recommended. Claimant attended speech therapy. On 6 Nov 07, a clinical psychologist noted Claimant's cognitive abilities had suffered more than a mild erosion, given his history of two years of college. On 20 Nov 07, Claimant's mother reported that he could drive, does not get lost, and remembers important events. Claimant's diagnosis remained symptoms of PTSD, cognitive NOS secondary to medical condition, and pain disorder associated with psychological and medical condition.

On 1 Mar 07, Dr. Woods reported Claimant had reached maximum medical improvement, was permanently disabled, and could work only 1-2 hours per day.

On 2 Jun 08, Claimant was seen at the VAMC and stated he still hurts when he moves around. He reported good appetite and stable weight, but noted prandial epigastric discomfort resolving after bowel movements. He denied suicidal ideation.

On 3 Jun 08, Dr. Woods reported that Claimant had improved dramatically but was still totally disabled from any employment because of leg pain, gait and balance disturbance. He noted that Claimant suffered from irritable bowel and dumping syndrome.

On 20 Jun 08, Claimant was seen by Dr. Leblang. Claimant had a pronouncedly disturbed gait and stated he was depressed. Claimant reported being very concerned about his compensation being terminated and his pending compensation litigation. He related that he was depressed and had suicidal thoughts. He said he can't be around people and was concerned that he might do something to someone. He noted his mother had to give him a map to the grocery store and a list of what to buy. She had to go with him the first eight times he went to the VAMC. He was assessed as suffering from pain disorder associated with psychological factors and a general medical condition; depressive, cognitive, and anxiety disorders; hypertension; headache; tinnitus; and chronic low back pain; with a need to rule out a major recurrent severe depressive disorder with psychotic features and PTSD.

*A letter from Mark Shaffer states in pertinent part that:*⁴¹

He is a nurse and has known Claimant for more than twenty years. Claimant was always able bodied and of sound mind. When Claimant returned from Iraq, he suffered from dumping syndrome, radiculopathy, pain, and depression. Shrapnel causes Claimant pain from his head to his leg.

⁴¹ CX-3.

*A letter from James Powell states in pertinent part that:*⁴²

He has noticed on at least six occasions Claimant excuse himself while eating to go to a restroom.

*Various DOL forms show in pertinent part that:*⁴³

Claimant filed his claim on 4 Oct 05. He was paid weekly total temporary disability benefits of \$1,025.64 from 19 Mar 05 to the present.

*Dr. J. M. Barrash testified at deposition and his records and reports state in pertinent part that:*⁴⁴

He is board certified in neurosurgery and is in private practice. He sees some patients as an examiner and evaluator for insurance companies or claimants in workers' compensation matters. That is probably between 30 and 35 percent of his practice. Three out of four are referred to him from firms representing defendants. He saw Claimant at the request of the representative of the insurance carrier on 23 Jan 08 and wrote a report.⁴⁵

He took a history from Claimant. Claimant complained of abdominal pain, headache, left lower extremity throbbing, and tinnitus. He also examined Claimant. Claimant complained of discomfort disproportionate to the amount of stimulation applied. Claimant's response was inappropriate. It was volitional, voluntary, and not because of the stimulation that was applied. It was Claimant trying to demonstrate that it hurt more than it really did. Claimant's reflexes were symmetrical and normal. Claimant had no atrophy or weakness. Claimant's sensation was variably different in the left foot, but that could have been from the incision for exploration for the shrapnel. Claimant's bowel sounds were normal.

Claimant's gait is probably normal. He saw Claimant use a cane in his left hand and in his right hand. Claimant demonstrated a limp on the right and then on the left. The limp was voluntary and volitional. When tested, Claimant walked fine on both heels and toes without a cane. Many times walking on your heels or toes will exaggerate an abnormal gait.

Claimant had poor cooperation with all muscle testing and tried to demonstrate break-away weakness, showing no actual weakness. Claimant was dogging it and trying to show that his arm is weak by voluntary letting it go. When he tested

⁴² CX-4.

⁴³ CX-6-11.

⁴⁴ EX-1, 5-6; CX-1 (pp. 39-41).

⁴⁵ EX-1.

Claimant's biceps, he was letting it go. When he tested Claimant's other side, the one that Claimant had let go before was no longer weak. When he took the reflex hammer and tapped on Claimant's knees, arms, or wherever, Claimant complained that it hurt. That doesn't hurt and Claimant was trying to impress him. Without question, Claimant was exaggerating when examined.

He reviewed Claimant's x-rays of the spine and left leg. They did not show anything of significance. There were some mild degenerative changes and some foreign bodies in the right lower leg where Claimant had the shrapnel injury. The degenerative changes were not severe or significant and were compatible with his age. He reviewed Claimant's EMG and nerve conduction studies from 17 Oct 08. They were perfectly normal.

He thinks Claimant is fine and is exaggerating and amplifying complaints for which there is no medical basis. There is no objective evidence to support his subjective complaints. Claimant is voluntarily and consciously trying to pull the wool over his eyes by exaggerated responses, nonanatomic sensory changes, and break-away weakness. They're all voluntary and they point to a patient not being truthful. There were no real findings and the examination demonstrated normalcy. He does not use Waddell's criteria, but they're valid and a lot of people do use them. Waddell's criteria are five to eight different things, and Claimant had at least five or six of them.

He believes Claimant was at maximum medical improvement and did not need any additional treatment from a neurological perspective. He found nothing that would stop Claimant from doing any type of employment he wanted anywhere and at any level. He reviewed the Labor Market Survey Report of 21 Oct 08. Claimant is capable of performing those jobs or any job he wants to perform, without any restrictions.

He can't give an opinion on the gastroenterological problem because that's not his specialty. He is sure Claimant has some psychological problems.

Dr. J.J. Twomey testified at deposition and his records and reports state in pertinent part that:⁴⁶

He was asked to examine Claimant by Carrier. His area of specialty is occupational medicine and he is certified in internal medicine. He reviewed Claimant's records, examined Claimant on 22 Jan 08, and completed a report,⁴⁷ spending at least three hours on the case.

⁴⁶ EX-4, 7-8; CX-1 (pp. 31-38).

⁴⁷ EX-4.

He took Claimant's history. Claimant said he considered altered bowel habits his most significant difficulty. He has frequent bowel movements, up to ten a day. They are liquid and contain undigested food matter, which would be expected in rapid transit. Claimant had them very quickly after eating food, within 15 minutes. That implicates the gastrocolic reflex. If the stomach is distended with food, it stimulates motility in the bowel. When questioned if that had caused him to lose weight, Claimant said no, explaining that he had modified his diet to a preponderance of starchy foods, which helped him maintain his weight.

Usually, with diarrhea-type situations or hyperactivity of the intestine, there is a colicky type of pain. In the body, pain is usually referred to the location the organ originally had during fetal life, which in this instance would be down the middle. Pain from food poisoning and diarrhea tends to be down the middle. However, with Claimant the pain wasn't there and was not colicky, which was somewhat atypical. It was more roughly in the right upper quadrant of the abdomen, which the patient identified with the removal of his gallbladder in his first surgery after the explosion.

Dumping syndrome is a form of rapid transit. The content of the stomach passes rapidly through the pylorus, which is a muscular ring at the exit door of the stomach, and into the duodenum, which is the first part of the small intestine. When that happens, the molecular concentration of the content of the bowel increases. The body compensates by rushing fluid out of the tissues into the duodenum, which causes a diminution of blood volume, causing a feeling of faintness and flushing, and a rapid transit of food into the duodenum. That can be associated with some diarrhea, which is not a history Claimant gave.

Claimant stated he had pain the entire length of his back and neck, ascending to the scalp around to the front and down the anterior chest. That is not typical of any clinical pain distribution that he is familiar with.

Claimant complained of ever present headaches. These headaches are not lateralized but instead are felt across the top of his scalp in the form of a steady pain. This is aggravated by loud noise. Claimant did not give a history of scotomata. Claimant said he rarely vomits with them. That is not a characteristic history for vascular headaches and the history was really not suggestive of a migraine headache. It was suggestive only of a nondescript history of headache.

Claimant initially was reluctant to be examined, but then agreed. During the examination, Claimant frequently showed expressions of pain that at times caused him to stand and lean forward against the wall and at other times to clutch his left anterior chest. He thought Claimant's expressions were excessive and

incompatible with pain behavior, which in turn correlated well with the other nonorganic features of Claimant's presentation. He can't document it, but would be suspicious that Claimant may have been exaggerating.

Claimant laughed for no apparent reason while having his face examined. He thought that was strange. Claimant wasn't laughing when he was obtaining a history or before he put his hands on Claimant's abdomen. When he went to look for shrapnel scars on Claimant's face, Claimant just burst out laughing. That was rather bizarre behavior.

The tip of Claimant's cane showed minimal wear and it would appear that he hadn't used the cane much.

When touched with a very light pressure that would not be expected to ordinarily cause pain, Claimant reacted as if he was experiencing significant pain. That is one of the features that would lead an examiner to suspect Claimant was expressing features of experiencing pain that may not be credible.

He found no problems in Claimant's neck, upper extremities, or chest. They were normal. Claimant's abdomen incision from his surgeries in Iraq had healed well and there was no incisional hernia. He could not assess Claimant for abdominal tenderness because Claimant literally expressed pain before he ever put a hand on Claimant's abdomen. Eventually, he was able to determine that Claimant was not guarding. Claimant's stomach was not distended and there was no enlarged liver or spleen or other mass. Although his complaint of frequent diarrhea would be expected to be reflected with increased bowel sounds, Claimant had none. It was a normal examination of the abdomen.

Claimant's leg had the incision and slightly less than half an inch loss of circumference, suggestive of atrophy. Claimant said he was dragging his foot, but there was no corresponding wear and tear on his shoes. He cannot say how old Claimant's shoes were. Claimant had somewhat poor posture and was a little bit stooped. The pain behavior to light touch made an assessment of tenderness unreliable. He did not feel any muscle spasm.

Waddell's tests are a series of tests that should be negative if the patient's participation is accurate. There are some papers that say one positive test should cause suspicion of the patient's participation in the test. There are about five or six tests and Claimant was positive for a lot of them. It was a significantly positive test for inadequate participation in the examination by Claimant. Claimant failed the Waddell survey for nonorganic signs, and there were included features suggesting symptom magnification.

He believes it's important not to try to trap patients. So, he explains very carefully to them how they should evaluate what he's doing. He always tells them it's in their best interest to respond accurately.

The scalp load test applies pressure on the top of the scalp. A report of pain over the lumbar spine would be inappropriate. Claimant reported that pain. A report of lumbar pain with compressing the hips is inappropriate. Claimant reported that pain. The same is true for gently rocking the pelvis.

Claimant's distribution of symptoms circumferentially at both his left upper and lower extremities and his history of pain shooting from his back and neck to the scalp and then down to the left anterior chest wall is clearly nonanatomical. They are not in the distribution of any nerve root or couple of nerve roots and they're not in the distribution of the peripheral nerves. It is possible that Claimant is making it up. It's also noteworthy that these features did not emerge until he returned the second time from Iraq.

Claimant's expressions of pain at times seem excessive. Claimant's pulse remained at baseline levels when he was expressing severe pain. It would have been expected to rise.

He did not want to express an opinion with regard to Claimant's claimed bowel condition until he was tested for the formation of a fistula, which is the opening of an abnormal channel between one part of the intestine and another. That in effect would create a short bowel syndrome. If Claimant indeed has diarrhea, it could be due to rapid transit without structural change.

Claimant's injuries were not likely to produce dumping syndrome and his presentation lacked the features of dumping syndrome other than some diarrhea. If Claimant had rapid transit, he would suspect an element of malnutrition and Claimant had not lost any weight. Claimant's upper GI and colonoscopy showed nothing more than diverticulitis, which can cause definite abdominal problems, but not a pattern of rapid transit. Claimant's CT scan done before the colonoscopy did show some stranding of the barium in the upper colon, but that was kind of negated because nothing is as accurate as direct viewing during the colonoscopy. A small bowel series done on 9 Dec 08 showed no puddle of barium as it went through the small intestine, which would be expected if there was an absorption problem. The radiologist stated that the 90 minutes that it took for the barium to pass through the small intestine to the cecum is totally normal and not compatible with a small bowel rapid transit.

Basically, Claimant's whole intestine now has been covered through direct visualization with an upper GI series, colonoscopy, and barium small bowel series.

Claimant's presentation and the diagnostic studies that were subsequently done did not support his history of severe diarrhea. It would be possible to put Claimant somewhere and monitor him for 12 hours or 24 hours and see what really happens.

He cannot address the psychiatric issues, but did not find any credible musculoskeletal basis for Claimant not to work. The FCE, which had problems, showed Claimant only capable of lifting 15 pounds. However, Claimant walked into his office carrying a big heavy tote bag, which was multiple times 15 pounds. Because of the frequent diarrhea, Claimant would have to be in a location where bathroom facilities would be readily available. In the context of musculoskeletal and gastrointestinal condition, Claimant is at maximum medical improvement.

He reviewed the jobs identified in the labor market survey that was performed by a vocational expert retained on behalf of Carrier. He found one that he felt with bowel restrictions Claimant could do at that time. Those restrictions are no longer applicable.

Claimant's behavior was somewhat bizarre. Other than his initial reluctance to be examined, he was otherwise somewhat cooperative, but the pain behavior certainly doesn't help. Claimant's overall behavior was such that there were certain aspects of the examination that he decided not to do, such as measuring ranges of motion on Claimant's back.

***Dr. Bryan Drazner testified at deposition and his records and reports state in pertinent part that:*⁴⁸**

His current medical practice is physical medicine and rehabilitation, which involves the nonsurgical care of orthopedic injuries with a significant portion of that practice being in occupational medicine. A large number of the injuries he treats are almost entirely orthopedic in nature involving cervical, thoracic, and lumbar spine; shoulder; elbow; hip; knee; wrist; and ankle and injuries, as well as soft tissue, and muscular ligamentous injuries. A significant number also falls into the class of more major multiple traumas, or catastrophic-type injuries.

His practice is almost exclusively physical medicine and rehabilitation. He is not an expert in gastrointestinal disorders, although he certainly treats gastroenterologic illness on a regular basis because patients will have complications with a medication. He is not an expert in psychiatry or psychology, although he also treats patients who have depression over the loss of wages and routinely prescribes antidepressants, anti-anxiety medications and sleeping aids.

⁴⁸ EX-2, 11; CX-1 (pp. 42-56).

He examined Claimant on 23 Jan 08 and prepared a report.⁴⁹ He explained to Claimant that he was performing an independent medical examination. He was provided about 150 to 200 pages, of records and reviewed them. He noted Claimant had reported that army medics had cut open his stomach, left leg, and the front part of his skull. Claimant quickly progressed to a regular diet, which was a very good sign that soon postoperatively. Claimant saw Dr. Liles, the orthopedist, on 4 Apr 05, a little over two weeks after his injury. Dr. Liles said Claimant was still three months away from going back to work, but had increased his walking and decreased his pain medicine.

On 2 May 05, Claimant went for a gastroenterologic evaluation with Dr. McHugh. Claimant complained of abdominal pain, diarrhea, nausea, and vomiting, though none of those had been mentioned in the medical record prior to that date. Claimant stated that he had some rectal bleeding with the diarrhea and that he was vomiting undigested material. Claimant was scheduled for an esophagogastroduodenoscopy and a CT scan of the abdomen. Claimant had normal bowel sounds and his abdomen was soft. Claimant subjectively complained of tenderness, but had no rebound and minimal guarding.

Later, in May of 2005, Dr. McHugh reviewed what had gone on. He said that Claimant was felt to have diverticulitis, but no other pathology. The reported diarrhea could have been due to the removal of the gall bladder. It was rather clear from Dr. McHugh's assessment that he was not particularly impressed with any of the findings, because he recommended a repeat colonoscopy in five years.

In June 2005, Dr. Liles, at the orthopedic clinic, noted that subjectively Claimant had some pain about a saphenous nerve distribution in the leg, a little bit of burning about the incision, and a little numbness medially about the ankle. He also reported Claimant had a normal gait with no limp and was capable of a full-duty work release.

At 10 to 12 weeks post injury, Claimant was completely recovered and ready for full-duty work. Claimant returned to Iraq.

Claimant's records include a 15 Sep 05 notation from Behavioral Medicine and Addictive Disorders, Incorporated. However, the assessment was not done by a licensed clinical psychologist, licensed clinical psychiatrist, or licensed medical physician. It was done by a gentleman who is just a counselor. Also, none of the clear-cut guidelines of posttraumatic stress disorder are established. Moreover, there had been no psychiatric complaints at any point until then.

⁴⁹ EX-2.

Additionally, there are credibility issues with the information provided by Claimant. For example, Claimant stated that he had been hospitalized for several months with his injuries. The Claimant was in fact hospitalized for a few days with his injuries. Claimant said he returned to employment, but couldn't do his job because of left-sided weakness. Claimant never had a complaint previously. The same absence of prior complaints was true of ringing in the ears, sensitivity to loud noises, poor concentration, and irritability. Claimant reported being depressed and despondent claiming "his whole life had changed." In fact, although he had shrapnel wounds, he had no enduring deficits.

The counselor noted no objective findings, but discussed Claimant's "intrusive thoughts" and planned to continue to allow Claimant to discuss trauma. His entries are brief, with four and five dates on a page, without any credentialing noted. A head CT scan was ordered and was completely normal.

In October 2005, Dr. Liles noted "very unusual complaints." Claimant reported "all of a sudden half of his body went numb, and he dropped the starter on his coworker." Dr. Liles observed that Claimant's leg looked well and it could not explain all the unusual, neurological complaints. Dr. Liles felt Claimant could do mechanic-like work and found no physiologic basis for Claimant's subjective complaints.

In November 2005, Claimant saw Dr. Michael Boykin with subjective complaints of left arm throbbing and weakness, dizziness, a gait disorder, and headaches. The orthopedist had observed no gait problem. Claimant's subjective reports during Dr. Boykin's examination were highly suggestive of a nonphysiologic and nonanatomic complaint that is just being voiced by the patient, without suggesting any true medical problem. Dr. Boykin recommended another CT of the brain, of the cervical spine, of the lumbar spine, and electrodiagnostic testing, all of which was completely unremarkable.

On 30 Nov 05, Claimant was reevaluated by a nurse practitioner. Claimant again had widespread and vague subjective complaints, but was essentially normal on examination. Nevertheless, the nurse practitioner ordered an MRI of the brain, an MRI of the cervical spine, and an MRI of the lumbar spine.

On 9 Jan 06, Claimant presented to the emergency room with complaints of a history of chronic neck and back pain. On 20 Jan 06, Claimant was seen at a neurology office and had a normal examination.

On 23 Mar 06, Claimant presented to Glenwood Family Practice with complaints of cervical, thoracic, and lumbar pain. They recommended a plethora of X-rays

and prescribed therapy despite Claimant's normal gait, strength, range of motion, and tone. The carrier refused to approve the tests and therapy.

In July 2006, abdominal films showed a bowel gas pattern to be normal and a tiny calcific density overlying the lower pole of the kidney. That could be a small renal calculus, which would not be an injury, but a disease of life. Diagnostic studies of the cervical spine showed some small, degenerative osteophytes. Claimant began an exhaustive and excessive course of physical therapy.

The therapy notes show no orthopedic testing, no documentation of ranges of motion, no documentation of deficit, passive modalities and self-directed exercise of riding a bicycle for 15 minutes day after day after day, and are not signed by a licensed physical therapist.

On 2 Aug 06, Claimant was seen by Dr. Woods, but there is no documentation of any objective assessments or physical examination. Nonetheless, Claimant was sent for three more weeks of physical therapy and provided a narcotic. That falls outside of every standard of care imaginable. Dr. Woods saw Claimant again on 26 Sep 06 and continued therapy with no physical examination or objective assessments. The continuation of passive modalities of therapy was egregious and fell completely outside any standards of care. No physical examinations or orthopedic testing was done by the therapist to remotely indicate an ongoing need for therapy. The treatment could not be considered reasonable, necessary, or appropriate.

On 9 Oct 06, Dr. Woods noted Claimant reported slowly improving but had many complaints, including shrapnel working its way out of his forehead and temple area. Multiple CT scans showed no shrapnel whatsoever. There is no note that Dr. Woods examined Claimant but he did opine that Claimant's gait disturbance was from a left perineal nerve injury.

On 9 Nov 06, Dr. Woods noted a negative straight-leg raising test, normal neurologic exam, and radiculopathy of pain to the left leg, which was completely contradicted by Dr. Woods' finding of a negative straight-leg raising. Claimant was sent for continued therapy for one more month. There is no therapy note reporting any testing whatsoever that showed any objective benefits after dozens and dozens of visits. The therapy was discontinued in February 2007.

In March 2007, Claimant was again seen by Dr. Woods, who ignored the orthopedic findings that Claimant was entirely capable of full-duty work and opined that Claimant was "obviously disabled and cannot do much work." Dr. Woods offered no justification for that statement.

Claimant had a functional capacity evaluation on 24 May 07. Functional capacity evaluations can be subjective and are best used when obtained by an independent testing source that doesn't stand to benefit from its own recommendations. The FCE report was one of the more disturbing studies he has ever reviewed because it ignores its own findings. It reports an appropriate increase to heart rate with activity, but the data shows the maximum heart rate achieved is between 88 and 91, which is not indicative of any significant effort whatsoever. An expected rate with full effort, depending upon age and pre-morbid condition, would range from 120 to 140. There was no significant effort whatsoever. The reason for stopping was a subjective increase in pain. The data clearly shows a self-limited, invalid effort throughout the test. Claimant wasn't trying hard. This is a classical study of self-control and non-full effort by Claimant.

On 14 Jun 07, Claimant was evaluated by Dr. Woods for shrapnel in the left index finger. X-ray studies showed absolutely no abnormalities of the index finger. Another diagnostic test was completely unremarkable with a complete discord of subjective complaints.

After reviewing Claimant's records, he performed a full examination of Claimant, starting with Claimant's history. During the time spent in the waiting room and then the lengthy record review, which was about 2 hours and 15 minutes, Claimant made no positional changes. Somebody who has significant back pain will shift to find a more comfortable position. Claimant sat in no acute distress without positional changes. Only later during direct testing did Claimant begin with inappropriate intentional guarded movements, groaning, grunting, exaggerated slow movements, and subjective pain complaints all the way from the base of the skull down to the low back.

On evaluation, Claimant had subjective pain complaints over all of the muscular areas on both sides of the spine, essentially from the bottom of the skull to the buttocks. Claimant complained of pain, but had no muscle spasm whatsoever on physical exam. Given the complaints, muscle spasm would have been expected. Claimant had completely normal ranges of motion of the cervical, thoracic, and lumbar spine, and negative orthopedic testing. There was exaggerated tenderness to palpation over both the spine and the muscles around it. The tenderness was then completely absent on distraction testing. Claimant gave suboptimal effort on direct testing, but was otherwise observed to have fully functional ranges of motion of the cervical spine. Claimant had a completely normal exam of the shoulders.

Claimant complained of tenderness diffusely from T-1 to T-12 and tenderness of the muscles on both sides, but had no muscle spasms. There was no objective finding to support the subjective pain. Claimant had no abnormal curvatures and

no costovertebral angle tenderness on lumbar distraction testing. On direct questioning, Claimant had diffused tenderness, offered a self-limited range of motion, and wouldn't cooperate with toe-and-heel walking with single leg stance. Claimant had suboptimal effort on supine straight-leg raising and would not cooperate with testing for Patrick's and Fabere's Maneuvers.

Claimant had a normal sensory exam on distraction testing, and had nothing to indicate anything going on from a sensory standpoint. Claimant had moaning and groaning to light touch about the abdomen. That was completely absent on distraction. Claimant's left leg had no calf tenderness on distraction testing, no signs of deep vein thrombosis, no palpable cord, a negative Homans sign, no lower extremity atrophy, a completely normal examination of the knee and ankle, no ligamentous laxity or instability, and normal orthopedic testing.

Claimant had no evidence of any cognitive, intellectual, or memory dysfunction. Claimant was able to answer all questions appropriately and didn't ask for questions to be repeated. He showed no hearing problems. There was no evidence whatsoever of any posttraumatic stress disorder and no suggestions of anxiety or irritability.

A 17 Oct 08 EMG report shows Claimant did not give full effort, but the studies were normal. There was no electrodiagnostic testing data to substantiate Claimant's complaints.

The Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, gives diagnostic criteria for posttraumatic stress disorder. There must be persistent re-experience with flashbacks and nightmares. These were not well established or documented and not complained of at all to the physicians over the first several months. There must be persistence of avoidance of stimuli associated with the trauma, such as an inability to talk about things even related to the experience. Claimant talked about it without any agitation or irritability. Another symptom is persistent symptoms of increased arousal, such as difficulty falling or staying asleep or anger. Claimant never made a complaint to any of the physicians early on.

Claimant is engaged in clear-cut malingering and disability posturing after his return to Iraq. He has been supported iatrogenically by his more recent providers as he was overprescribed physical therapy without documented objective improvement.

Claimant's injuries to the abdomen, while initially unfortunate, were self-limited and had entirely resolved within a very short period of time. Separately sustained wounds to the left lower extremity, with the exception of some superficial

numbness, had resolved very rapidly. No psychiatric injury was sustained. Only later did the disability posturing and the symptom magnification begin. All objective testing has been negative.

Claimant could have a modest, superficial saphenous neuritis, that couldn't be truly assessed given the lack of cooperation with the exam.

Claimant sustained no psychiatric injury. He is clearly entirely capable of a full-duty release without restrictions. There's obviously enormous disability posturing. There are secondary gain and motivational issues at play. Claimant was at maximum medical improvement 10 weeks or so after the injury as stated by Dr. Liles. Claimant was able to return to work without any physical restrictions whatsoever.

He reviewed a Labor Market Survey Report from Wright Rehabilitation Services. All of the jobs would be within Claimant's physical abilities. There would be no medical restrictions preventing him from doing any of them. Claimant would also be physically capable of going back to Iraq to work as a diesel mechanic.

Dr. Liles said that it's possible that the leg wound could irritate a nerve that runs in that area. However, the leg looked well and can't explain all the neurologic-like complaints. The saphenous nerve could explain some decreased sensation along with distribution of that nerve in the medial aspect of the leg, but certainly couldn't explain the non-dermatomal complaints or his widespread complaints of numbness. The EMG/NCV showed no evidence of any nerve irritation whatsoever.

If a piece of shrapnel had been left in one of the three compartments of the knee joint or down in the ankle joint or the tibiotalar joint or the subtalar joint, it could be consequential and could explain pain on certain movements about those joints. However, that would have been something in the acute inflammatory phase immediately post-op. Small, metallic fragments would not have moved to their current location from the location on 18 Jul 06.

There was no significant left lower extremity atrophy. One is considered impaired with changes of greater than 1 centimeter.

*Dr. John Griffith testified at deposition and his records and reports state in pertinent part that:*⁵⁰

He is board certified in psychiatry. He examined Claimant on 24 Jan 08 at the request of the insurance carrier. He prepared a written report regarding that examination.⁵¹ In conjunction with the evaluation of Claimant he reviewed Claimant, records and took Claimant's history. He noticed that two of Claimant's brothers are also disabled and that Claimant was a diesel mechanic, which is a good way to earn a living.

To summarize the interview, Claimant seemed to be claiming to be ill. Claimant seemed to have a need to appear to be ill and claimed symptoms that were absolutely bizarre at times and silly at other times. Putting everything together, he felt that Claimant was inventing an illness. Once a patient starts inventing a certain number of symptoms, it's impossible to come to any other definitive diagnosis.

An example of Claimant's bizarre and silly presentation of symptoms was lunch. He typically will have his staff order a sandwich for him and the patient. They sit at the table and eat the sandwich. Claimant had a couple of bites, and then began to make very loud noises, as if about to vomit, "agghh, agghh, agghh." He put a waste paper basket under Claimant, but after about eight "agghhs," Claimant straightened up and finished his sandwich quite well without any further incident.

Claimant also had walked in with a Six-Million-Dollar-Man walk. It is the most painful way in the world to walk. It is as if the patient is in the bottom of a swimming pool, making slow, fluid motions. It is like he is walking on an egg, but very dramatic. He sees it in kids that are making fun of the Six-Million-Dollar Man.

He noticed that in Claimant's history, he would keep having these symptoms, when he'd get a shot of some narcotic, he would be well for a while. This went on for some time, even after Claimant came back to the states.

Claimant had symptoms that he sees sometimes with people who are not very sophisticated. Claimant is not very sophisticated, but he is smart. There is no such thing as a dumb diesel mechanic. Claimant reports that he has headaches in the top of his head. The only people that have headaches in the top of their heads are his patients. Patients of neurologists or neurosurgeons don't have them. It's just his patients who have headaches on top of their head.

⁵⁰ EX-3, 9-10; CX-1 (pp. 25-30).

⁵¹ EX-3.

Claimant doesn't seem to be able to work, but doesn't seem to be too worried about it either. Every man knows deep down inside that he was made to work. If people don't work, they soon begin to get depressed and down in the dumps. Claimant is depressed and down in the dumps, but it's mainly because he's inactive. He's not doing anything. He's living with his eighty year old mother, who is waiting on him, cooking his meals for him, and watching TV with him. He thought that was pretty strange as well.

He administered Claimant the MMPI, but had it scored by Pearsons. When he looked at the results, the first thing he saw was that it gave an invalid profile because the F was greater than 89. That means Claimant was not truthful and there was no point in scoring the test. Of course, they did score it later on, and if his test was valid, Claimant would be endorsing every psychological illness except for manic depressive psychosis.

As a result, he can't make a diagnosis on the basis of those test results. However, they are certainly consistent with and reinforce the impression that Claimant is inventing his symptoms. In a nutshell, the MMPI results suggest malingering or symptom magnification.

A lot of men go to Iraq to make money, find that people want to shoot them, decide that is not for them, and say they want to go back home. If that is an illness, then Claimant has that illness. He is sure Claimant decided he wanted to go back and then had second thoughts. Claimant is inventing these symptoms in an effort not to have to go back to work in Iraq. Claimant is capable of working in any capacity.

He reviewed the 21 Oct 08 Labor Market Survey.⁵² There is nothing from a psychiatric realm that prevents him from working at any of those jobs. Claimant does not need any kind of psychiatric treatment. The main thing is for him to get this thing settled so he can start leading a normal life. Once this claim is decided, Claimant would not manifest these invented symptoms anymore. He is not mentally retarded and would figure it out.

Claimant might benefit from an antidepressant. He leads such a sedentary life now that he might have to get some exercise. Despite his so-called dumping syndrome, he's gaining weight. So, Claimant needs to trim down some.

He has read the reports but is not giving an opinion on Claimant's physical injuries.

⁵² EX-14.

He does not think Claimant has psychiatric problems related to his work in Iraq. However, since Claimant is inventing symptoms, he has no way of knowing which ones might be real. Claimant makes suicide threats, but doesn't call 911 or talk to a best friend, his pastor, or a psychiatrist. What Claimant does is write a letter to his claims examiner, and try to upset his psychiatrist by making a death threat. If Claimant is depressed, a trial of an antidepressant should turn him around in anywhere from three days to six weeks.

He has seen people have nervous breakdowns, and start having bizarre symptoms and behavior from stress after stressful events.

*A Wright Rehabilitation Services Labor Market Survey states in pertinent part that:*⁵³

The rehabilitation counselor was asked to identify full time jobs for Claimant that provided a weekly income of \$1,700. She reviewed Claimant's medical records and work limitations, interviewed him on 16 Aug 08, and issued a report on 21 Oct 08. Claimant reported that after a half day of work upon his return to Iraq, he suddenly developed numbness and loss of use in his left arm and leg. The condition improved rapidly with medication, but he has had three more episodes after returning home, the last being in the fall of 2006. The records from Claimant's May 2007 functional capability evaluation indicated Claimant could work in a job that was sedentary above the waist and sedentary light below the waist.

Claimant reported severe headaches alleviated by Darvocet; tinnitus; stomach burning and dumping syndrome; constant shoulder pain; left arm limited to shoulder height; inability to turn his head left due to cervical pain; unclear speech; lower back pain; loss of left leg support; walking limited to 150 feet with a cane; standing limited to five to ten minutes; speech deficit; and pain, numbness, and tingling radiating into his left leg.

⁵³ EX-14.

She identified a number of occupations suitable for Claimant. They included jobs requiring light, medium, and heavy strength. She also identified the following specific Monroe jobs:

<u>Employer</u>	<u>Job</u>	<u>Salary</u>
Doggett Machinery	Diesel Mechanic	\$11.93-\$21.58
Ryder	Diesel Mechanic	\$11.93-\$21.58
Manpower	Maintenance Technician (Electrical)	\$15.00
Trans Wood	Tractor Trailer Mechanic	\$11.93-\$21.58
Firestone	Auto Mechanic	\$11-\$25
Konecranes	Maintenance Technician	\$11.93-\$21.58
The News-Star	Press Operator	\$12.14-\$17.37
Midas (Ruston)	Service Manager/Technician	\$24-29,000/yr
(Through LA Workforce)	Small Engine Mechanic	\$9.00-\$15.19

Claimant's job log states in pertinent part that:⁵⁴

He did what the Carrier asked of him. He contacted the following possible employers:

<u>Employer</u>	<u>Result</u>
Buffi Gaspard CSP	Did not return his calls
Doggett	Did not return his call
CBC Con.	
Haliburton	
Louisiana Works	They said no one is hiring
Ryder	
Trans Wood	Did not return his call
Konecranes	Company is in Ohio
News Star	Did not return his call
International Paper (Bastrop)	Closing or laying off
Bancroft Bag	Will not rehire Claimant
Louisiana Plastic	Will not rehire Claimant
Swan Electrical	Will not rehire Claimant
Hobby Lobby	Did not return his call

⁵⁴ CX-21.

ANALYSIS

The parties agree that Claimant was seriously injured in the course and scope of his employment with Employer on 18 Mar 05 and for a period of time was totally disabled. They also agree that by August 2005, he felt that he had sufficiently recovered and was medically cleared to return to his original job in Iraq. There follows a stark contrast in the positions of the parties relating directly to Claimant's credibility. Claimant maintains that since his return to Iraq and subsequent virtual collapse of his left side, he has been unable to return to Iraq and his original job. Employer, on the other hand, submits that Claimant is faking and engaging in symptom magnification and could return to the same work. Accordingly, causation is not the initial issue. The first issue that must be addressed is whether Claimant suffers from an injury or condition that prevents him from returning to Iraq as a mechanic. Claimant has no presumption to benefit him and bears the burden of proof on that question.

At the outset, I note that I did not find Claimant's testimony to be compellingly credible. His appearance and demeanor did not create an impression of reliability. On the other hand, Claimant's mother, while having an obvious and understandable bias in the case, appeared to be doing her best to tell the truth as she believes it to be. However, her testimony was based in part on Claimant's subjective complaints and reports.

The expert medical evidence offered by Employer was the most probative and persuasive in the record. The four expert doctors who examined Claimant on behalf of Employer issued highly consistent and mutually corroborative opinions as to Claimant's status and ability to work. They found no significant objective findings to support Claimant's subjective complaints, believed he was exaggerating and feigning symptoms, and could return to work.

Employer's neurosurgeon noticed Claimant's complaints of discomfort were disproportionate to the amount of stimulation applied and opined that Claimant was trying to show more pain than he really had. He saw Claimant use a cane in both hands and limp on both sides. The limp was voluntary and volitional. Claimant tried to demonstrate weakness by giving way. He noted that Claimant had five or six positive Waddell's signs and had no question that Claimant was exaggerating and consciously trying to pull the wool over his eyes. He found nothing that would stop Claimant from doing any type of employment he wanted anywhere and at any level, including the jobs in the Labor Market Survey Report. He was sure Claimant has some psychological problems.

Employer's occupational and internal medicine expert noted that while Claimant said altered bowel habits are his most significant difficulty, his pain was atypical. He noted Claimant reported various types of atypical pain distribution, complained of

significant pain upon light or no touch at all, and exhibited bizarre behavior. He was suspicious that Claimant may have been exaggerating. He concurred with the neurologist that Claimant had multiple positive Waddell's signs for symptom magnification, even though he believes it's important not to try to trap patients and warns them. He observed that Claimant's whole intestine had been examined through direct visualization and nothing supported Claimant's reported history. He also related that although the FCE said Claimant could only lift 15 pounds, he saw Claimant walk into his office carrying a big tote bag weighing much more. He concluded Claimant would have to be in a location where bathroom facilities would be readily available, but was at maximum medical improvement in the context of his musculoskeletal and gastrointestinal condition.

Employer's expert in physical medicine and rehabilitation appeared to have conducted the most thorough and detailed review of Claimant's medical records. I found his deposition testimony to be the most credible, probative, and persuasive evidence in the case. He noted internal inconsistencies in and effectively impeached the Functional Capacity Evaluation report and the assessments of Claimant's treating health care providers, most notably Dr. Woods and Mr. Gomilla. He reported that Claimant had been prescribed medication, physical therapy and extensive diagnostic tests without an adequate medical basis and opined that much of those actions were clearly outside the medical standard of care. He identified instances of providers accepting and acting upon Claimant's subjective reports without any objective corroboration.⁵⁵ Like the other experts who examined Claimant, he observed suboptimal efforts and wholly disproportionate complaints of pain. He noted that in his first several months, Claimant made no mention of the persistent flashbacks and nightmares associated with PTSD. He testified that Claimant has no psychiatric injury, is unlimited in his ability to return to work, and is engaged in clear cut malingering and disability posturing.

Employer's psychiatric expert likewise concluded that Claimant was trying to appear ill and inventing an illness. He noted that the MMPI results indicated Claimant was not truthful in his responses, indicating malingering and rendering the tested unusable for diagnosis. He noted that according to the responses on the test, Claimant demonstrated every psychological illness except manic depressive psychosis. He stated he is certain that upon Claimant's return to Iraq, he decided he didn't want to be there, and began inventing symptoms as a means to escape. He does not think Claimant has psychiatric problems from working in Iraq and found nothing from a psychological standpoint that would prevent Claimant from working in any of the jobs identified in the Labor Market Survey. He conceded that since Claimant is inventing symptoms, he can't say which are real and allowed that Claimant might benefit from an antidepressant.

⁵⁵ E.g., Complaints of shrapnel coming out of Claimant's head.

The weight of the evidence is clear that, save some possible minor residual nerve damage from the incision in the left leg, there is no organic explanation for Claimant's complaints. Exhaustive testing revealed no explanation for or corroboration of Claimant's reported symptoms. He sufficiently recovered physically to return to his job in Iraq and reported no new physical trauma leading to his collapse while repairing the Humvee starter. Although Claimant's intestinal complaints seem to be corroborated by his mother and friends, he does not report the type of pain that would be expected by the experts. Moreover, while he testified he had gained 30 pounds by June 2007, he noted his weight comes and goes and added that he had lost 15 or 20 pounds since then. However, he also reported at his 2 Jun 08 appointment that his weight was stable.

Claimant carried the initial burden of establishing by a preponderance of the evidence that he is unable to return to the mechanic job in Iraq. Claimant's testimony, his mother's testimony, and the medical records he offered were evidence that tended to establish that fact. However that evidence was substantially impeached by the expert medical evidence offered by Employer. Although Employer's experts were not treating physicians, they were highly credentialed practitioners who appeared to evaluate the entirety of Claimant's complaints and the likelihood of his subjective complaints. Even Dr. Liles, who treated Claimant's orthopedic injuries, opined that Claimant could return to work. I did not find Mr. Gomilla's findings or opinions to be as persuasive as the fully developed rationale of the more extensively trained and credentialed Dr. Griffith. The same is true of the brief notes of the various VA doctors who saw and treated Claimant.

Given the very probative evidence offered by Employer's medical experts, the comparatively less persuasive medical evidence relied upon by Claimant and the questionable credibility of Claimant's testimony and subjective complaints, the evidence is in equipoise as to whether Claimant is manufacturing symptoms and truly able to return to his job in Iraq. Since that is the case, he has not carried his burden and established a *prima facie* case for disability.

Although the evidence does not support a finding Claimant cannot return to his original job, it does support a finding that Claimant requires continuing follow-up care for his psychological and intestinal condition and that such conditions could be a consequence of his 18 Mar 05 injury.

ORDER AND DECISION

1. Claimant was injured in Iraq on 18 Mar 05 while working for Employer.
2. Claimant was temporarily totally disabled as of that date.
3. Claimant's average weekly wage (AWW) at the time of his injury was \$1,538.46.
4. Claimant remained temporarily totally disabled through 3 Aug 05, when he reached maximum medical improvement and returned to his original job.
5. Employer shall pay Claimant temporary total disability benefits from 19 Mar 05 through 3 Aug 05 based on an AWW of \$1,538.46.
6. Claimant's claim for disability compensation for the period subsequent to 9 Sep 05 is denied.
7. Employer shall pay all reasonable, appropriate and necessary medical expenses in accordance with Section 7 arising from Claimant's 18 Mar 05 injury, including continuing psychological and gastroenterological treatment.
8. Employer shall receive credit for all compensation heretofore paid, as and when paid.
9. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.⁵⁶
10. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.
11. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.⁵⁷

⁵⁶ Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984).

⁵⁷ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for

A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

ORDERED this 8th day of April, 2009, at Covington, Louisiana.

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PATRICK M. ROSENOW
Administrative Law Judge

Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director.