

U.S. Department of Labor

Office of Administrative Law Judges  
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Issue Date: 28 November 2008

CASE NO.: 2008-LDA-2

OWCP NO.: 02-153726

IN THE MATTER OF:

K. S.<sup>1</sup>

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.

Employer

and

INSURANCE COMPANY OF THE STATE  
OF PENNSYLVANIA

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.  
For The Claimant

JOHN SCHOUEST, ESQ.  
LIMOR BEN-MAIER, ESQ.  
For The Employer/Carrier

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

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

## DECISION AND ORDER

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

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on April 22, 2008, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 13 exhibits, Employer/Carrier proffered 21 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.<sup>2</sup>

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

### I. STIPULATIONS

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

1. That the date of Claimant's alleged accident/injury was January 30, 2005 and his last day of exposure was February 12, 2005.
2. That there existed an employee-employer relationship at the time of the alleged accident/injury.
3. That Employer/Carrier filed a Notice of Controversion on June 19, 2007.

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

4. That an informal conference before the District Director was held on August 24, 2007.
5. That Claimant received temporary total disability benefits from February 6, 2005 to present at a compensation rate of \$737.82.
6. That partial medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

## **II. ISSUES**

The unresolved issues presented by the parties are:

1. Causation; fact of injury/illness from the zone of special danger.
2. The nature and extent of Claimant's disability.
3. Claimant's average weekly wage.
4. Entitlement to and authorization for medical care and services.
5. Attorney's fees, penalties and interest.

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

### **The Testimonial Evidence**

#### **Claimant**

Claimant testified at formal hearing and was deposed by the parties on April 16, 2008. (EX-18). He also made a recorded statement to Employer/Carrier upon returning to the United States after his alleged injury.<sup>3</sup> (EX-9). Claimant is 37 years old. He was born in Houston, Texas, and grew up in Louisiana. Claimant graduated high school and subsequently worked in construction and as a cook. (Tr. 18). Claimant was hired by Employer and left the United States for Kuwait in April 2004. (Tr. 18-19). Claimant testified he was then transferred to Iraq and, for much of his deployment, was stationed at Tallil, an

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<sup>3</sup> The exact date the statement was made is not indicated in the record.

airbase north of Baghdad. (Tr. 19). He stated he was hired as a warehouse supervisor, but was also "doing escorting, convoying with the military, manifests, tracking trucks ... [and] going in and out of the base getting trucks, bringing them back into the base." (Tr. 19-20).

Claimant testified that prior to his deployment he had never presented to a psychiatrist or a psychologist, nor had he ever been given medication for sleep problems, depression, or mood disorders. He stated he passed Employer's pre-employment physical, which included a psychological component. (Tr. 20). Claimant also testified he did not have any problems with his left knee, left ankle, or his lower back prior to going to Iraq. (Tr. 21).

Claimant testified that on January 30, 2005, he was working in the staging yard at Camp Bashir along with PWC, a contractor that recovered vehicles. (Tr. 21, 37; EX-18, p. 10). He stated that as he and four other individuals were attempting to go off the base to search for a truck, a mortar-damaged food truck was being brought into the base. (Tr. 22; EX-18, p. 10). As the group approached the damaged truck, a mortar struck it, causing the deaths of the four men assisting Claimant. (EX-18, p. 10). Claimant described the mortar attack: "There was a lot of stuff going on at that time. They hollered 'Code Black.' The horn went off, a lot of bombs was going off, and then the next thing I know we got hit." (Tr. 23).

Claimant stated that when the mortar hit the truck, he went "flying backwards." He landed upside down and his leg was "twisted all the way around." Claimant testified he lost consciousness. He was told by a female medic that he had a "slight concussion." Claimant testified he had a piece of shrapnel in his arm, which was taken out. (Tr. 23). He further testified his leg was set back in place and was "black, blue, [and] purple." After the shrapnel was removed and his leg set back in place, he was taken to his tent. (Tr. 24).

Claimant testified he was told not to discuss the explosion. He explained: "I signed a document with the military ... that I would not discuss this matter, because it was under friendly fire is what they told me. [Employer] wanted me to sign a whole bunch of papers before I even left Iraq and I wouldn't do it." (Tr. 24-25). He stated he was told by Employer his "medical would be taken care of if I signed these papers, and I wouldn't sign them." (Tr. 25). In his deposition, Claimant testified that after the alleged January

30, 2005 mortar explosion he was placed in his room "for a week, not to talk to nobody, not to say anything. I had two guys at my door at all times watching me making sure I didn't say nothing to nobody. My food was brought to my room. Had human resource constantly coming up to my room and wanting me to do this and that. And then [Employer] was trying to get me to sign more papers saying that ... we can get you out of here quicker if we get these papers signed. And it didn't happen. I wouldn't sign. It took a month to get me out, almost a month before they flew me out." (EX-18, p. 12).

Claimant stated he is still having "a lot" of pain in his left knee as of formal hearing. (Tr. 26). He also stated the injury to his left knee and ankles affects the way he walks in that he cannot keep his balance, his leg "buckles up," and he cannot sit or stand for a long time. (Tr. 25-26). He also has pain in his low back. (Tr. 27).

Claimant stated that approximately five months after his return from Iraq, he began having "a lot of problems with flashbacks" and "reliving what happened, the explosion, and seeing what I seen over there." He elaborated: "I woke up in the middle of the night screaming, hollering. At one time, it was around Fourth of July, I threw my wife down on the ground, ... I thought it was insurgents. It was firecrackers going off ... explosions, and I thought we was getting hit. I thought I was actually back in Iraq at the time." (Tr. 29). Claimant testified he shakes and jerks and can only sleep for about four hours during the night. He sleeps mostly during the daytime because he is "on a lot of medicine." (Tr. 30).

Claimant described recurring images of events he claims he witnessed in Iraq. He testified that he witnessed Blackwater employees shooting Iraqi insurgents while on a convoy from Tallil to Cedar. Claimant also described another instance in which he was escorting trucks with the military. He stated: "There was a whole bunch of kids out in the middle of the road. The military don't stop. The kids didn't move. We ran over them." (Tr. 30). Claimant stated the event was "kind of devastating, because we didn't know if they had bombs on them or not." (Tr. 30-31). In his deposition, Claimant testified that he "watched people get shot over there. I seen people in a vehicle got burnt crisp, seen a lot of dead people on the ground. In Kuwait-I seen Kuwait being attacked while we was there in one motel. I seen another motel got blowed up before I even went to Iraq. And I seen car bombs go off while we're going down the road, seen bodies sitting in vehicles covered in

blankets. Drove off in vans. That's how they carried the bodies. I seen a lot of stuff, lot of bad stuff. Ran over kids—military had kids in the middle of the street on a convoy. In a convoy with the military, you don't stop, you never stop. And they ran over people. And we ran over them, too, because we was in the convoy..." (EX-18, p. 18).

Claimant testified he was hospitalized for a month in January or February 2007 because he was having "real bad flashbacks" and was self-medicating with vodka. (Tr. 31-32). He stated he attended Alcoholics Anonymous meetings and stopped drinking approximately eight months prior to formal hearing. (Tr. 33).

On cross-examination, Claimant elaborated on the events he alleges occurred on January 30, 2005. Claimant testified that on the morning of January 30, 2005, he left the Cedar I base and traveled approximately 30 miles to a "staging area" or checkpoint. (Tr. 37). He stated he was working as an "escort convoy," escorting trucks into the Cedar I base along with individuals employed by Tamimi. (Tr. 42, 45). After spending some time at the "staging yard," Claimant migrated back within four miles of Cedar I. (Tr. 40). Claimant testified that between 5:00 and 6:00 in the evening, the base was being hit by mortars. He stated an alarm went off and helicopters were flying, including one Blackhawk. (Tr. 46).

Claimant stated the attack went on for approximately ninety minutes. He testified he and other workers continued to work during the attack, even though he had been trained to go to a secure location during a 'Code Black.' Claimant stated he put on a MVC suit and a gas mask when he heard the alarm. (Tr. 47-48). He estimated he was thrown forty or fifty feet as a result of the mortar explosion and was knocked unconscious "for a brief period of time." Claimant stated his "whole leg was turned all the way around," and his "foot was facing the back." (Tr. 50).

Claimant testified after the alleged injury occurred he was "confined to quarters, not to say anything, not to talk to anybody. KBR security was there, told me not, uh, not to talk to anybody. They brought me my food. I stayed there for three weeks in my room." (Tr. 50-51). Claimant testified he was transported to a "top-secret base" the day after the alleged incident, where he remained for approximately two days, until February 2, 2005, and was then convoyed to a medic camp at Talil. (Tr. 51-52). He remained at the medic camp for another

two days, until February 4, 2005, and was then sent to Cedar II, where he remained for three weeks until he returned to the United States. (Tr. 52-53). Claimant testified he never worked after his alleged January 30, 2005 injury. (Tr. 53).

Claimant was examined regarding a January 18, 2007 LS-203 in which he stated he "Stepped of [sic] reefer truck into a hole, twisted leg and ankle, back." Claimant testified he never stepped out of a trailer, never stepped into a hole, and never twisted his ankle. (Tr. 57, 63). He testified he claimed he stepped into a hole "because the only documents I brought back from Iraq was the same thing that y'all have, that I stepped in a hole. I have no proof saying I got blowed up." (Tr. 57). Claimant admitted that prior to the alleged January 31, 2005 injury, he ran out of medication for his gout and presented to the medic to obtain more medication. (Tr. 61). However, Claimant testified the overseas records describing a flare-up of gout and treatment for stepping into a hole are fabricated. (Tr. 61-65). He stated that he "never stepped in no hole." (Tr. 63).

In Claimant's recorded statement, he stated he was injured at 6:00 in the evening on January 30, 2005, when he stepped out of a refrigerated container while doing inventory. (EX-9, pp. 5-6). Claimant indicated the deck of the trailer was three-and-a-half feet off the ground, it was raining, and he stepped off the trailer into a puddle, twisting his left knee and ankle. (EX-9, pp. 6-7). Claimant stated he reported the incident to his supervisor, Kevin. (EX-9, pp. 7-8). He indicated he was able to walk after his injury. (EX-9, p. 7). Claimant stated he was treated by an Army doctor who was concerned about a possible blood clot. (EX-9, pp. 8-9). He indicated he was sent to Kuwait to have Doppler testing in order to rule out the possible blood clot. (EX-9, pp. 9-11).

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

Claimant's wife testified at formal hearing and was deposed by the parties on April 16, 2008. (EX-19). She has been married to Claimant for five years. Claimant's wife testified Claimant did not have the scar on his right arm prior to going to Iraq, nor had he been treated by a psychologist or psychiatrist or taken medication for psychological problems. (Tr. 82). She also testified Claimant did not have any problem with his back or left leg before going to Iraq. (Tr. 82-83).

Claimant's wife testified Claimant has had difficulties adjusting upon his return to the United States from Iraq. She elaborated: "He keeps telling me he wants to go back, that he doesn't feel right. One night he woke up in the middle of the night and he was choking me, and I woke up and he thought I was an insurgent, and he was choking me and ... he stopped and he started crying ... And so he started sleeping in the other bedroom, and I started sleeping with the door locked at night until he ... started with a psychiatrist--well actually he started first with a psychologist, and then she referred him over to Dr. Cardona, and then Dr. Cardona ... put him in a--Intracare because he was thinking of killing himself." (Tr. 83). Claimant's wife testified Claimant was hospitalized for approximately one month. She stated Claimant was physically fit before going to Iraq, but gained weight upon his return. (Tr. 84). She also testified Claimant was "a lot of fun" before going to Iraq but is now "like taking care of another child." She also stated Claimant suffers from hallucinations and delusions from which he did not suffer before going to Iraq. (Tr. 84-85).

Claimant's wife testified Claimant's drinking was "pretty bad" upon his return from Iraq and he has been "almost basically flipping out a lot" since his psychiatric medication was stopped. (Tr. 86-87). She testified Claimant falls "a lot" as a result of his alleged left knee condition. She also testified Claimant's back hurts "a lot." (Tr. 87).

On cross-examination, Claimant's wife testified a medic called to inform her that Claimant would be returning from Iraq and that Claimant had a torn ACL. (Tr. 88-89). She stated Claimant's left leg was "purplish blue looking" and "wasn't pretty at all." (Tr. 89-90).

**Mr. Kevin Savoy**

Employer/Carrier submitted a signed statement from Mr. Savoy, dated August 28, 2008. Mr. Savoy testified that he was Employer's direct supervisor working in the food service warehouse at Camp Cedar during January and February 2005. He stated Claimant worked under his supervision in the food service warehouse at Camp Cedar during 2005. (EX-21, p. 1).

Attached to Mr. Savoy's statement were two time sheets, signed by Claimant and Mr. Savoy, for work performed by Claimant at Camp Cedar. Mr. Savoy explained the first time sheet reflects Claimant worked a total of 92 hours between Sunday,

January 23, 2005 and Saturday, January 29, 2005. (EX-21, pp. 1, 3). The second time sheet indicates Claimant worked 13 hours on Sunday, January 30, 2005, 13 hours on Monday, January 31, 2005, and completed forty hours of sick time between Tuesday, February 1, 2005 and Saturday, February 5, 2005. (EX-21, pp. 1, 4). Under "Comments" for January 30 and January 31, 2005, "ration food" was noted. (EX-21, p. 4).

Mr. Savoy explained the term "within the wire" is used to designate the area of Camp Cedar contained within the secure perimeter of the campsite. He stated he was "personally familiar" with Claimant's job duties and responsibilities and that "[a]t no time was [Claimant] required to work anywhere other than 'within the wire' of Camp Cedar. [Claimant] was not permitted to leave Camp Cedar to escort trucks from various checkpoints outside Camp Cedar. This was not part of his job duties." (EX-21, p. 1).

Mr. Savoy stated he was not aware of Claimant sustaining any injuries as a result of a mortar attack or other type of explosion occurring while he worked in Iraq. He elaborated: "We utilized the services of a sub-contractor named Tamimi to assist [Claimant] and others under my supervision in the food service warehouse on Camp Cedar during 2005. Since these subcontractors would be working alongside my employees at Camp Cedar, I would be aware of any significant injuries or deaths to any of these subcontractors. I am not aware, and there are no reports, of any of these Tamimi employees sustaining any deaths or injuries as a result of a mortar attack or other type of explosion." (EX-21, p. 1). Mr. Savoy further stated: "An incident involving the destruction of a truck entering or near Camp Cedar resulting in multiple deaths and injuries would be an event that would become common knowledge to those of us working at Camp Cedar. I am not aware of any such event occurring and none have been reported to me." (EX-21, p. 2).

Mr. Savoy testified that he personally accompanied and drove Claimant from Camp Cedar, where he had been staying on sick time, to a truck convoy which was heading to Kuwait on or about February 10, 2005, apparently to have testing to rule out deep vein thrombosis. (EX-21, p. 2).

## **The Medical Evidence**

### **Employer's Health Records**

Employer's Health Record indicates that on February 1, 2005, Claimant presented at the clinic at the camp with complaints that his "gout is flaring up." Claimant reported having a history of gout and that his last flare-up occurred approximately one year earlier. He reported that he ran out of his gout medicine nine days earlier and the pain had started the previous day in his left ankle. Claimant reported that his left ankle felt "hot and swollen," and that he "...can't hardly walk on it." He rated his pain as an '8' out of '10' and stated the pain was constant. It was noted that Claimant ambulated to the clinic unassisted. (EX-12, p. 13).

Upon physical examination, Claimant was awake, alert, and oriented and was in no apparent distress. He ambulated with a limp favoring his left side. On inspection, Claimant's left ankle and left foot were "unremarkable." No discoloration or deformity was noted. "Very mild" edema was noted around the left lateral malleolus. Range of motion of Claimant's left ankle was "very limited" by pain in all articulations. (EX-12, p. 13).

The medic's assessment as of February 1, 2005, was an "exacerbation of gout." Claimant was placed on medication and one day of bed rest. Claimant was instructed to rest and keep his leg elevated as much as possible. The medic reconfirmed Claimant's understanding of diet restrictions and instructed Claimant to return the following day for follow-up. (EX-12, p. 13).

Claimant presented for follow-up on February 2, 2005, and reported no change in his pain or range of motion. On inspection, Claimant's left foot, ankle, and calf appeared unchanged. Bed rest was extended by two days. (EX-12, p. 14).

On February 3, 2005, Claimant returned for follow-up with complaints of new onset of left knee pain. Claimant's range of motion was "somewhat limited." He had a substantial increase in pain on manipulation of his left knee joint. Otherwise, there were no changes in Claimant's condition. (EX-12, p. 14).

Claimant again presented to the clinic for follow-up on February 4, 2005. He complained of an increase in pain in his left knee. On examination, new discoloration was noted on the top of Claimant's left foot. Claimant was taken to "TMC Cedar." The medic noted: "En route to TMC pt stated 'I got to thinking, I stepped off in a hole coming out of one of the reffers [sic] the other day.'" On questioning pt revealed that the incident took place on 1-30-05. Pt states that he 'twisted my ankle and knee and I heard and felt a pop.' Pt also stated 'At first I thought it was my gout acting up, but now I think it might be from when I got hurt the other day.'" (EX-12, p. 15). Claimant was referred to the 86<sup>th</sup> CSH at Tallil Air Base to rule out possible deep vein thrombosis, where he was diagnosed with musculoskeletal injury and possible strained or partially torn ACL. An x-ray was negative for fracture. No deep vein thrombosis was found on ultrasound. Claimant was given crutches and two more days of bed rest. He was released to return to work on February 7, 2005, with no lifting, bending, climbing, or use of his left lower extremity. (EX-12, pp. 15-20).

Claimant presented to the clinic for follow-up on February 5 and February 6, 2005, with no changes in his condition. On February 7, 2005, Claimant again presented to the clinic for follow-up with no change in his condition. Because Claimant was unable to perform his usual job duties of climbing in and out of refrigerated trailers, an orthopedic consultation was scheduled. (EX-12, p. 21). Upon Claimant's orthopedic consultation, it was recommended that Claimant needed to go to Kuwait for a "Duplex" study to rule out possible deep vein thrombosis and was placed on Lovenox. (EX-12, pp. 22-23). Claimant was instructed that he would have to inject himself with Lovenox during his travel to Kuwait. (EX-12, p. 24). He was transferred from Camp Cedar in Iraq to Camp Arifjan in Kuwait. Claimant was unable to inject himself with Lovenox because he was riding in a truck; a medic later injected him with the medication. (EX-12, p. 25). The Duplex study was negative for deep vein thrombosis. (EX-12, p. 26). On or about February 12, 2005, Claimant returned to the United States from Kuwait in order to seek further treatment related to his left leg.

**Dr. Mark E. Franklin**

Claimant presented to Dr. Franklin, an orthopedic surgeon, upon his return to the United States on February 15, 2005, in a knee immobilizer and crutches. He reported injuring himself in Iraq when he stepped out of a truck and into a hole and twisted his ankle and knee. Upon physical examination, Claimant was

"hypersensitive" over the entire left lower extremity. (EX-12, p. 28). An x-ray of Claimant's knee was negative for acute fractures or bony abnormalities and no significant arthropathy. X-rays of Claimant's ankle showed no acute fractures, arthropathy, or bony abnormalities. Dr. Franklin noted that Claimant "shows no objective bony or clear cut ligamentous injury in the knee. He may have what amounts to an ankle sprain but given the hypersensitivity I am a little concerned about a possibility of complex regional pain syndrome." Dr. Franklin removed Claimant from the knee immobilizer. (EX-12, p. 29).

### **Jacinto MRI and Diagnostic Center**

An MRI of Claimant's left knee was obtained on February 17, 2005. The radiologist, Dr. London, interpreted the MRI as revealing a "Probable free edge tear of the posterior horn of the lateral meniscus." Dr. London elaborated: "Only seen on the sagittal T2-weighted images is irregularity of the free edge of the posterior horn of the lateral meniscus, consistent with a tear. Clinical correlation would be helpful." He further noted the anterior horn of the lateral meniscus and the anterior and posterior horns of the medial meniscus were within normal limits in signal and configuration and the anterior and posterior cruciate and medial and lateral collateral ligamentous complexes appeared intact. (EX-12, p. 30).

### **Dr. Kenneth R. First**

Claimant presented to Dr. First for evaluation on March 14, 2005.<sup>4</sup> Claimant reported injuring his left ankle and left knee in Iraq stepping into a hole. Examination of Claimant's ankle revealed no significant swelling but some tenderness. Dr. First's impression was a high ankle sprain. He recommended a further MRI because he did "not feel confident in the MRI done at Jacinto MRI and Diagnostic Center." (EX-12, p. 33).

### **Dr. David M. Lintner**

Claimant presented to Dr. Lintner, an orthopedic surgeon, for initial evaluation on April 11, 2005, and reported injuring himself in Iraq when he stepped off a truck and into a hole and twisted his knee. (EX-12, p. 38). Dr. Lintner's impression was a left lateral meniscus tear; he recommended a partial lateral meniscectomy. (EX-12, p. 39). On April 21, 2005, Dr. Lintner performed a partial lateral meniscectomy with removal of plicae.

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<sup>4</sup>. Dr. First's qualifications are not set forth in the record

He found a small free-end radial tear, posterior horn, lateral meniscus. (EX-12, p. 42). Claimant presented to Dr. Lintner for follow-up on April 26, May 4, May 24, and June 14, 2005. (EX-12, pp. 44-51). As of June 26, 2005, Claimant continued to complain of knee pain and swelling. (EX-12, p. 51). As Dr. Lintner treated only knee and shoulder problems, he referred Claimant to Dr. Varner to address Claimant's complaints of pain in his left ankle and to Dr. Doctor for evaluation of complex regional pain syndrome. (EX-12, pp. 51-53). As of June 16, 2006, Dr. Lintner noted that "no further intervention is needed" for Claimant's left knee other than continuing with a home strengthening program. (EX-12, p. 95).

**Dr. Keith E. Varner**

Claimant presented to Dr. Varner, an orthopedic surgeon, for evaluation of his left ankle on June 30, 2005, upon the referral of Dr. Lintner. Claimant reported injuring himself when he stepped down off a truck about two or three feet onto the ground and rolled his ankle and twisted his left knee. Claimant had full range of motion of his left ankle and there was no evidence of fracture. Dr. Varner's impression was left ankle sprain and possible subtalar joint injury. (EX-12, pp. 54-55). On July 8, 2005, Claimant underwent a left ankle MRI revealing no evidence of fracture, displacement, or tear, but suggestive of strain. (EX-12, pp. 56-57). On May 24, 2006, Dr. Varner noted: "From a foot and ankle perspective, I am not sure I have anything else to offer [Claimant]. I have attempted to identify the source of his complaints. He has had multiple injections and aspiration of a cyst and he has seen Dr. John Marymount for a second opinion, all without exact cause of his underlying complaints ... Based on my examination, his ankle is certainly stable, although it is very painful. I do not have any restrictions, although pain may be a limiting factor." (EX-12, p. 90).

**Dr. John V. Marymount**

Claimant presented to Dr. Marymount on October 24, 2005, upon the referral of Dr. Varner for a second opinion regarding left anterior lateral ankle pain.<sup>5</sup> Dr. Marymount diagnosed Claimant with an ankle cyst, which was aspirated on January 9, 2006. (EX-12, pp. 72-73, 79).

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<sup>5</sup> Dr. Marymount's qualifications are not set forth in the record.

### **Dr. Uday Doctor**

Claimant presented to Dr. Doctor, a pain specialist, on July 8, 2005, upon the referral of Dr. Lintner, with complaints of left knee and ankle pain. Dr. Doctor's impression was possible left chronic regional pain syndrome. He recommended a lumbar sympathetic block to rule out a chronic regional pain syndrome, which was performed on August 3, 2005. (EX-12, pp. 58, 60-61). Claimant presented to Dr. Doctor for follow-up on August 17, 2005. Dr. Doctor noted that the lumbar sympathetic block was negative, "probably" ruling out complex regional pain syndrome. (EX-12, pp. 62-63). However, on February 10, 2006, after performing lumbar sympathetic blocks on October 4 and October 25, 2005, Dr. Doctor diagnosed Claimant with complex regional pain syndrome Type 1. (EX-12, pp. 81-82). Dr. Doctor ordered an EMG, which yielded no evidence of a mononeuropathy or acute radiculopathy, but did not rule out a "more chronic process." (EX-12, pp. 83-84).

As of May 5, 2006, Claimant presented with complaints of low back pain for the first time, which Dr. Doctor opined could be associated with Claimant's antalgic gait caused by his left knee and ankle pain. (EX-12, p. 88). An MRI obtained on October 16, 2006, revealed "mild" disc bulge at L5-S1 level and "minimal" disc bulges at the L4-5, L3-4, and L2-3 levels. The radiologist issued the following impression: "Congenitally narrow spinal canal with minimal degenerative change. Conus appears within normal limits." (EX-12, p. 105).

Claimant presented to Dr. Doctor for follow-up on November 6, 2006, with continued complaints of left knee, low back, and ankle pain. Further, Dr. Doctor noted Claimant did not sleep well due to nightmares about Iraq and "continues to have intrusive emotions and memories, and flashbacks plus many more symptoms." Dr. Doctor issued the following impression: "Probable PTSD. Final diagnosis pending." He referred Claimant to Dr. Mary Kennington for evaluation and treatment. (EX-12, pp. 106-108).

### **Dr. Mary Kennington, Ph.D.**

Claimant was referred to Dr. Kennington by Dr. Doctor for psychological evaluation related to chronic pain and reported mood disturbance. Dr. Kennington issued a "Psychological Evaluation Summary" in which she reported Claimant "stated that he was injured in Iraq on 1/1/2005 when he 'fell off a truck and

stepped in to a hole.' At the time, he injured his knee, twisted his ankle and 'ripped a disc' in his spine..." Claimant reported losing a child eight days after its birth and described the experience as very traumatic for both him and his ex-wife. (EX-12, p. 109). She noted that Claimant "suffered a number of traumas. Most significantly, he witnessed a number of people that he saw killed in Iraq. [Claimant] stated that he 'saw' these dead victims, as he relived these experiences, from time to time. He is also still grieving over the loss of the infant baby that died. [Claimant] also lost his older brother as a result of a motor vehicle accident, years ago." (EX-12, p. 110).

Dr. Kennington administered the MMPI-2 to Claimant; the responses resulted in a "valid profile. As such, his findings are presented as a reasonable estimate of his current psychological functioning, based on the assessment procedures implemented." She indicated Claimant was a "consistent historian." (CX-12, p. 110). Dr. Kennington noted Claimant "revealed many symptoms of Post-Traumatic Stress Disorder. The greatest of these symptoms, as reported previously, is the reliving of past traumas in Iraq; 'I see dead people.' (The patient's girl friend also reported that he had an extreme panic reaction to fireworks, appearing to relive the war sounds of Iraq.) [Claimant] stated that he would hear noises and be reminded of the war. He also reported that he felt paranoid that something was going to happen. He also discussed the deaths of four individuals that he knew (very personally) who were killed while he was there. He stated he was unable to rid himself of thoughts of both the war, and his injury." Claimant reported that he "had only suffered one head injury—at the time of his injury. He stated that he lost consciousness for about 45 minutes at that time and was taken to the medics with a concussion." (CX-12, p. 111). Claimant denied ever experiencing hallucinations or delusions other than "the occasional flashback-type experiences regarding the dead in Iraq." (CX-12, p. 112).

A MMPI-2 scale indicated that unusual thinking patterns were elevated. Dr. Kennington opined the results were not consistent with a thought disorder. She diagnosed Claimant with major depressive disorder, recurrent; PTSD; generalized anxiety disorder; and panic disorder, without agoraphobia. Dr. Kennington recommended Claimant be seen for a medication

evaluation and attend psychotherapy on a weekly basis due to the severity of his symptoms and stated she would not treat Claimant but refer him to a mental health provider due to the severity of his problems. (EX-12, pp. 112, 114).

On December 7, 2007, Dr. Kennington issued correspondence to Claimant in which she stated the following: "I received your request for a follow-up letter regarding differential diagnoses, based on the results from your evaluation. Upon reviewing your results, I do not find evidence to substantiate any further diagnosis, including that of Malingering." No further explanation was provided. (CX-1, p. 266).

### **Dr. Emilio Rene Cardona**

Dr. Cardona was deposed by the parties on August 7, 2008. (CX-15). He is a board-certified psychiatrist who has been in private practice since 1978. (CX-15, p. 4). Dr. Cardona has been an assistant professor in psychiatry at the Baylor College of Medicine since 1980. (CX-15, p. 6). Claimant was referred to Dr. Cardona by Dr. Doctor. (CX-15, pp. 7-8).

Dr. Cardona evaluated Claimant on January 4, 2007, and issued a report of his findings. (EX-12, pp. 115-118). He noted Claimant's psychiatric history was negative prior to his alleged January 30, 2005 injury. He noted in his report that "[Claimant] was employed by Halliburton working in a warehouse in Iraq. He was there for 2 years. He was in the warehouse when a mortar came in and he flew out 50' slamming into the bed of an 18 wheeler. His left leg was twisted when he landed. He required pain killers while waiting to be transported back to the states; it took 10 days. To have the necessary surgery approved took 2 months. His left leg has nerve damage; it took a year for him to be able to walk. He worked in the 'hot zone.' The mortar that hit them was friendly fire; 4 people died. He saw a lot of dead people. He has flashbacks and visions of dead people when sleeping. He relives some of the horrors of the war. The flashbacks began 2 weeks following his return to the states. He has problems sleeping." (EX-12, p. 115). Dr. Cardona performed a mental status examination and diagnosed Claimant with post-traumatic stress disorder, insomnia, hallucinations, depression, and anxiety. (EX-12, pp. 116-117). He opined: "As a result of this injury, [Claimant] is experiencing a significant amount of pain, depression and

anxiety, which are likely to interfere with medical treatment and a return to work." He found Claimant's psychiatric symptoms were "Severe (full impairment/unemployable at this time)." Dr. Cardona recommended individual psychotherapy and office visits, relaxation strategies, and medication. (EX-12, p. 117).

On January 12, 2007, Dr. Cardona dictated correspondence to Carrier stating Claimant had become "seriously suicidal" over the past 24 hours and required hospitalization. (EX-12, p. 119). Dr. Cardona admitted Claimant to Intracare Hospital on an emergency basis after Claimant became suicidal. Dr. Cardona noted: "The day prior to admission [Claimant] had been drinking quite heavily and ended up that night taking an unknown number of pills prescribed to him, plus the alcohol." Claimant had "began to drink quite heavily on a binge drinking type basis to control his anxieties and his hallucinations." (EX-12, p. 126). Dr. Cardona stated Claimant "has had severe difficulties during his hospital stays, especially at night. I was able to witness one of those events in which he would get highly agitated and in a very somewhat paranoid, defensive way, reporting visual and auditory hallucinations." Dr. Cardona noted Claimant's physical pain was "very apparent." Claimant developed severe edema of both legs and shortness of breath and was transferred to Memorial Hermann Hospital with the diagnosis of possible embolism. (EX-12, p. 127). Dr. Cardona's final diagnoses were post-traumatic stress disorder, alcohol abuse, chronic pain, sympathetic syndrome, and obesity. Claimant had a global assessment of functioning score of 35 upon admission to Intracare and a score of 50 upon discharge; he also had an estimated score of 90 prior to the alleged injury. (EX-12, p. 128).

Dr. Cardona testified it was very common for people with PTSD to self-medicate with alcohol in his experience. (CX-15, p. 12). He stated his diagnosis of PTSD was based upon the DSM-IV criteria and opined Claimant was "sort of a classic case." (CX-15, p. 15).

On cross-examination, Dr. Cardona testified the best means of objectively testing whether a patient suffered from PTSD or not was to perform comprehensive psychological testing. (CX-15, p. 22). Dr. Cardona stated he did not request a battery of psychological tests for Claimant because Carrier had "denied everything else." (CX-15, p. 24).

Dr. Cardona testified a diagnosis of PTSD "requires definitely a traumatic event or witnessing traumatic scenes," and stated that "Just Iraq is a traumatic event." (CX-15, p. 35). He stated the MMPI-2 was the "psychologist's way of doing things..." but that he did not rely at all upon psychologists. (CX-15, pp. 26-27). He stated that there is no blood test for determining whether someone had PTSD. (CX-15, p. 43). Dr. Cardona testified that a below average cortisol level would not be an objective indication of PTSD and elaborated "... all of that is research. There may be something that will come up later, not right now." (CX-15, pp. 44-45). When asked whether it was his opinion that Claimant was malingering or operating out of secondary gain motivation, Dr. Cardona responded: "Well, when I saw him, he was a very sick man." (CX-15, pp. 45-46). Dr. Cardona testified he examined Claimant twice—once in his office and once in the hospital. (CX-15, p. 48). He stated his diagnosis of PTSD was based upon his observations and characterized Claimant's behavior as objective evidence of his diagnosis of PTSD. (CX-15, pp. 49-50).

**Ms. Rosalie Hyde, LCSW, LMFT**

Claimant was referred to Ms. Hyde, a licensed clinical social worker and licensed marriage and family therapist and co-founder of the Houston/Galveston Trauma Institute, for "assessment and recommendation to Workmen's Compensation at no fee as a member of Physicians for Human Rights." (EX-12, pp. 138, 169). Claimant presented to Ms. Hyde for three individual, one-hour interview sessions, the first one being on March 20, 2007; she administered the Beck Anxiety Scale and the Beck Depression Scale as well as the Post-Traumatic Stress Symptom Scale. (EX-12, pp. 138, 169).

Claimant described being injured in a mortar attack in which four co-workers were killed. He also reported a number of other traumatic events that he witnessed "as a truck driver in the transport convoys." (EX-12, pp. 138, 170). Ms. Hyde noted that after Claimant's alleged injury, he "stayed in Kuwait a number of weeks, and was not allowed to leave for the US until he signed a paper stating that he had fallen in a hole. He states that he regrets signing but felt he could do nothing else since he was dependent on the authorities to get him medical care, and he was in a great deal of pain and needed surgery." (EX-12, p. 170). Ms. Hyde found Claimant to be "credible and markedly altered by his experience in Iraq." (EX-12, p. 171). She opined Claimant suffered from PTSD and noted that "PTSD is by definition, a set of symptoms that does not develop

immediately." (EX-12, pp. 171-172). Ms. Hyde referred Claimant to Dr. Norman Decker for medication evaluation. (EX-12, pp. 137, 171).

### **Dr. Norman Decker**

Claimant presented to Dr. Decker for two one-hour psychiatric interviews on April 5 and April 12, 2005, upon the referral of Ms. Hyde.<sup>6</sup> Claimant described a number of traumatic events that he witnessed in Iraq. (CX-1, p. 227). Dr. Decker noted: "Somewhere during his second tour of duty a mortar fell very close to him in the compound in which he was stationed. He states he was blown fifty feet across the room and knocked unconscious for an indeterminate number of hours." Claimant stated that the explosion was from "friendly fire," but that Employer made him sign that his injury was from "stepping in a hole" before they would send him back to the United States. (CX-1, p. 228).

Claimant complained of flashbacks of his traumatic experiences in Iraq. (CX-1, p. 228). He reported visual, auditory, and tactile hallucinations and delusional beliefs that he was back in Iraq, which Dr. Decker noted were "all characteristic of a severe post traumatic disorder." (CX-1, p. 229). Dr. Decker concluded: "It is not my impression that [Claimant] is suffering from a factitious disorder (pretense). Instead, his story and symptomatology are characteristic of a severe Post Traumatic Stress Disorder. The confusing point is that he didn't report it when he came home. It is important to note, in this regard, that Post Traumatic Stress Disorder frequently has a delayed onset, days, weeks, months, or even years after the traumatic events. The delayed onset makes the disease no less real." (CX-1, p. 230).

### **Dr. J. Martin Barrash**

Dr. Barrash is a board-certified neurosurgeon who has practiced in Houston, Texas since 1972. (Tr. 95, 113). He testified at formal hearing. Dr. Barrash acknowledged he is not a knee specialist. (Tr. 95). At the request of Employer/Carrier, Dr. Barrash examined Claimant, reviewed his medical history, and issued a report of his findings on April

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<sup>6</sup> Dr. Decker is a Clinical Professor of Psychiatry at Baylor College of Medicine and the University of Texas Health Science Center in Houston and is past president of the Houston/Galveston Trauma institute. (EX-12, p. 131).

15, 2008. (EX-16). In his report, Dr. Barrash noted: "This began 1/30/05 when he stepped into a hole covered by water, twisted his left side and his leg was dislocated. The leg was behind him and had to be popped back into place at the area of the incident. He then went to KB&R Clinic for a gout flare up. The same day he states that the water incident happened, he was blown up and thrown 40 feet when a mortar went off and hit a truck that he was 20 feet behind. He states that he never stepped into the hole when he was near a freezer but that his problem was really caused by the mortar." (EX-16, p. 1).

Dr. Barrash opined Claimant "may have had a strain" of his left ankle. When asked whether he knew how Claimant would have strained his ankle, Dr. Barrash testified: "Well there are conflicting stories, information. The information I have from the medical records is different than that which [Claimant] told me so I have to go by the medical records. I have no way of confirming or contesting that which he tells me." (Tr. 97). Dr. Barrash opined such a sprain would have generally healed by several months after the incident and he would not have expected any residual disability to have arisen as a result of such strain. (Tr. 98).

As to Claimant's left knee, Dr. Barrash opined that if Claimant "suffered an injury it would be a strain because the imaging study was perfectly normal, and it was a good quality study, on a good machine, read by a competent radiologist." (Tr. 100). Dr. Barrash acknowledged Dr. Lintner opined Claimant had a partial tear of his meniscus in his left knee, but agreed with the radiologist who interpreted the MRI as showing no tear. (Tr. 100-101). He stated sometimes physicians perform surgeries for exploratory purposes. (Tr. 101). Dr. Barrash testified a partial tear of the meniscus can cause pain or can be asymptomatic. (Tr. 102). He opined Claimant should have been fully recovered approximately four weeks after his left knee procedure and would not have any permanent limitations with respect to his left knee. (Tr. 104).

Dr. Barrash testified he had had the opportunity to review the medical records and films relating to Claimant's lower back and opined Claimant had no lower back injury. He stated both an imaging study of Claimant's low back and his examination were normal. (Tr. 104).

Dr. Barrash opined there were inconsistencies between Claimant's complaints and his examination. (Tr. 104). He noted that "when [Claimant] bent forward, he could only flex a very limited amount. When he was sitting in the chair on my examining table he could raise his legs up seventy-eighty degrees. There's no difference if you stand and bend over or if you sit and raise your legs up, it's the same maneuver. And I give him ten, ten degrees difference, you know, fifty degrees and sixty degrees sitting, but not ten or twenty degrees standing and eighty degrees sitting, that's inconsistent." Dr. Barrash continued: "Also, when I merely touched his back, mere cutaneous stimulation, not enough to cause discomfort, he complained of pain, the same kind of pain he complained of in other areas, and that's inconsistent. Mere stimulation doesn't cause that pain." He explained that symptom magnification can explain someone presenting inconsistent symptoms or reactions. (Tr. 105). Dr. Barrash observed that Claimant walked to the witness box holding his cane in his right hand, but left the witness box holding his cane in his left hand. He stated that people who injure a leg do not switch their cane from one hand to another. (Tr. 106).

In his April 15, 2008 report, Dr. Barrash opined Claimant "obviously does have a minor complex regional pain syndrome which is responding partially to the sympathetic blocks." (EX-16, p. 3). Dr. Barrash testified that Claimant's complex regional pain syndrome was "maybe a two" out of ten in terms of severity. (Tr. 108). When asked whether he had made a determination as to whether Claimant's condition would cause any sort of work disability, Dr. Barrash replied that it was "certainly a possibility." Upon further examination as to whether he had formed an opinion as to whether Claimant's condition was disabling, he replied: "It's very difficult to do that because he also has so many inconsistencies in the examination. What I really find and what he really complains of are not equal. The complaints are far outweighing the actual neurological findings." Dr. Barrash testified he could not verify Claimant's subjective complaints and opined that if Claimant did have complex regional pain syndrome, the cause of the syndrome "would be the surgery that he had on his knee because he did not complain of it before that." (Tr. 109).

On cross-examination, Dr. Barrash testified Dr. Lintner, who performed Claimant's left knee surgery, has a "very good reputation" and agreed he would expect Claimant to rely on Dr. Lintner's recommendation regarding surgery. (Tr. 110). When asked whether it would be reasonable to opine that a twist of

Claimant's knee in Iraq would have aggravated or accelerated a pre-existing partial tear of Claimant's meniscus, Dr. Barrash responded: "Perhaps. The only thing against that is that [Claimant] had a negative MRI scan, which is a very sensitive examination." (Tr. 110-111). Dr. Barrash also opined gout could cause ankle and knee pain but would not cause a tear in a meniscus. (Tr. 113).

**Dr. John Dorland Griffith**

Dr. Griffith testified at formal hearing. He is a board-certified psychiatrist with over fifty years of experience in the field of psychiatry. (Tr. 118; EX-17, pp. 6-12). Dr. Griffith has held positions in psychiatry at the U.S. Air Force Hospital at Keesler Air Force Base, Vanderbilt University School of Medicine, University of Oklahoma School of Medicine, University of California San Diego, Baylor College of Medicine, and the University of Texas Medical School at Houston. (EX-17, pp. 7-8).

Dr. Griffith met with Claimant, reviewed his medical records, administered an MMPI-2 test, and issued his findings in a May 15, 2008 report. (Tr. 118; EX-17). Dr. Griffith testified Claimant reported suffering post-traumatic stress disorder caused by an injury from an explosion in Iraq. (Tr. 118). He testified Claimant's MMPI-2 test results indicated Claimant was malingering and opined Claimant is malingering and does not suffer from PTSD. (Tr. 120). Dr. Griffith opined Claimant did not have any psychiatric disability related to his work in Iraq. (Tr. 123).

In his May 15, 2008 report, Dr. Griffith opined "Without a history of trauma, the diagnosis of PTSD cannot be made. Furthermore, the nature of his story of trauma suggests that he is seeking support and the added contradiction is that he claims injuries that are at odds with one another. For example, he is seen for 'gout' but this becomes a twisted knee or ankle caused by a workplace misstep, only to be claimed again as being caused by a blast injury." He further stated cumulative trauma over time cannot substantiate as a cause of PTSD. His diagnoses were: Axis-I. Malingering (Pseudo-PTSD); Axis II. Deferred; Axis III. Leg pain of unknown cause; Axis IV. Lawsuit; pending child support, sick wife, poor job prospects; Axis V. No psychiatric disability. (EX-17, p. 4).

Cross-examination of Dr. Griffith was deferred for post-hearing deposition conducted on July 16, 2008, in view of the lateness that Claimant's Counsel received Dr. Griffith's report. (CX-14; EX-22). On cross-examination, Dr. Griffith testified there is no test for malingering but that the MMPI-2 can assist in concluding malingering. (EX-22, pp. 7-8). He acknowledged the word "malingering" does not appear anywhere in Claimant's MMPI-2 test result printout. Dr. Griffith stated he is not an expert in the administration, scoring, and interpretation of the MMPI-2. (EX-22, p. 5). He testified there are several scales contained in the MMPI-2 that address malingering. (EX-22, p. 8). He stated he did not know what many of the letters of the scales on the MMPI-2 mean nor the significance of several scales listed in MMPI-2. (EX-22, pp. 8-9).

Dr. Griffith concluded Claimant was malingering based upon his interview with Claimant and Claimant's MMPI-2 results, particularly the fake bad scale, but acknowledged he was not an expert on interpreting the fake bad scale. (EX-22, p. 9). He testified he was not aware that the 'PK' scale is called the Post-Traumatic Stress Disorder-Keen Scale, that scores in excess of 64 are considered indicative of PTSD, and that Claimant scored a 70. (EX-22, p. 12). Dr. Griffith administered no other tests other than the MMPI-2 to determine whether Claimant suffered from PTSD. (EX-22, p. 16).

Dr. Griffith was questioned regarding cortisol levels. He stated that if a person is under stress, their cortisol levels should be higher. When asked whether he was aware of research indicating that individuals with prolonged PTSD actually have lower than normal cortisol levels, he responded: "It could also mean they don't have PTSD." (EX-22, p. 19). Dr. Griffith testified cortisol levels are a "finding that is not going to add or take away from the diagnosis" of PTSD. (EX-22, p. 20). Dr. Griffith stated there was sufficient basis through reviewing Claimant's medical records and interviewing Claimant to determine he was a malingerer without relying upon Claimant's MMPI-2 results. (EX-22, p. 48). When asked whether he doubted whether PTSD is a valid condition, he responded: "I have some doubts about it, especially some forms of it." (EX-22, p. 51).

## **The Documentary Evidence**

### **Employer's First Report of Injury or Occupational Illness**

"Employer's First Report of Injury or Occupational Illness," dated February 7, 2005, describes Claimant's accident accordingly: "Employee was stepping out of a refrigerated container onto the ground from knee height and stepped into a hole 'twisting' his ankle and knee." The nature of the injury was listed as a possible ACL strain. (EX-1).

### **Employee's Claims for Compensation**

In Claimant's original "Claim for Compensation," dated January 18, 2007, he described his accident accordingly: "Stepped of [sic] reefer truck into a hole. Twisted leg and ankle, back[.] Was raining. Hole was covered with water." Claimant listed injuries to his ankle, knee, hip, and back. (EX-4).

In a subsequent "Claim for Compensation," dated January 25, 2007, Claimant stated he was injured by "war zone exposures to combat," and described the nature of his injury as "stress symptoms (PTSD), including hospitalization on 1/20/2007 [and] injury to body generally." (EX-5).

## **The Vocational Evidence**

### **Mr. William L. Quintanilla**

A "Preliminary Vocational Rehabilitation Assessment" was issued by Mr. Quintanilla, a vocational rehabilitation specialist, on April 21, 2008. Upon reviewing Claimant's medical history, social and educational background, and employment history, Mr. Quintanilla noted Claimant "continues to seek medical and mental treatment, and has not been given permanent physical or mental restrictions by his treating physician." Accordingly, Mr. Quintanilla indicated he would submit an addendum report and a labor market survey with his final conclusions when additional medical records became available for review. (EX-15, p. 1). No further vocational evidence was submitted.

## **The Contentions of the Parties**

Claimant contends he sustained both physical and psychological injuries while in the course and scope of his employment with Employer in Iraq and is entitled to temporary total disability benefits from January 31, 2005 to present and continuing. Specifically, Claimant avers he sustained injuries to his left ankle, knee, and low back on January 30, 2005, as a result of a friendly fire mortar explosion. Claimant also contends he witnessed numerous other traumatic events in Iraq and currently suffers from work-related psychological injuries, including post-traumatic stress disorder. Claimant further asserts his overseas medical records have been fabricated and he was forced to cover up the mortar incident and claim that he injured himself as a result of stepping in a hole.

Employer/Carrier contend the January 30, 2005 mortar incident Claimant alleges did not occur and, therefore, Claimant is not entitled to any related compensation or medical benefits. They note Claimant has provided several different versions of how he sustained his alleged injuries and now admits he never injured himself stepping off a truck into a hole.

## **IV. DISCUSSION**

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

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale

Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980) ("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

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

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

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

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm

or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9<sup>th</sup> Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

#### **1. Post-Traumatic Stress Disorder (PTSD)**

The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Washington, D.C., American Psychiatric Association, 1994 (DSM-IV) describes the essential feature of PTSD as the "development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person." (Diagnostic Criteria for 309.81, PTSD, p. 424).

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

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

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

## 2. Claimant's Credibility and Prima Facie Case

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

On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a **prima facie** case that the alleged injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. Bonin v. Thames Valley Steel Corp., 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have caused his alleged injury); Alley v. Julius Garfinckel & Co., 3 BRBS 212, 214-215 (1976).

In the present matter, I find Claimant's credibility is lacking. I was not impressed with his general demeanor or his testimony, which was replete with inconsistencies and discrepancies, specifically, in regard to the mechanism of his alleged injuries. At formal hearing, Claimant testified he injured his left ankle, knee, and low back on January 30, 2005, as a result of a friendly fire mortar explosion. He stated the mortar explosion threw him forty or fifty feet, knocked him unconscious for a brief period of time, and caused his left leg to be "turned all the way around" with his foot "facing the back." He further testified four other workers died as a result of the explosion. Claimant stated that he was confined to his quarters for three weeks as well as being flown by helicopter to a "top secret base" and never worked after the alleged injury. However, this testimony is inconsistent with prior statements made by Claimant, the timeline of documented events, as well as Employer's health and time records and a statement made by Claimant's supervisor, Mr. Kevin Savoy.

Employer's health record indicates Claimant presented to the clinic at Camp Cedar on February 1, 2005, with complaints that his "gout is flaring up." Upon physical examination, Claimant's left ankle and foot were "unremarkable," and no discoloration or deformity was noted. The medic's diagnosis as of that date was "exacerbation of gout." Claimant was placed on bed rest. Notably, consistent with Employer's health record, Claimant's timesheet, which was signed by Claimant and his

supervisor, Mr. Savoy, indicates Claimant worked thirteen hours on both January 30 and January 31, 2005, but was subsequently on sick time from February 1, 2005.

On February 4, 2005, Claimant presented to the clinic for follow-up with complaints of increased pain in his left knee. The medic noted Claimant had "got to thinking," and recalled injuring himself as a result of stepping in a hole coming out of a truck on January 30, 2005. On questioning from the medic, Claimant stated he twisted his ankle and knee and heard and felt a pop. The medic also noted Claimant felt the pain was due to the hole incident rather than his gout, as he previously reported. Claimant continued to describe the mechanism of his alleged January 30, 2005 injury as stepping into a hole until January 4, 2007, when he presented to Dr. Cardona and, for the first time, described being injured as a result of a January 30, 2005 mortar attack. However, subsequent to his presentation to Dr. Cardona, in his original "Claim for Compensation," dated January 18, 2007, Claimant again indicated that he "Stepped of [sic] reefer truck into a hole. Twisted leg and ankle, back[.] Was raining. Hole was covered with water." Incredibly, Claimant testified at formal hearing that all of the Iraq medical records and treatment were fabricated.

The record does not support Claimant's allegations that he was injured as a result of a January 30, 2005 mortar attack. Claimant's supervisor, Mr. Savoy, stated he was not aware of Claimant sustaining any injuries as a result of a mortar attack or other type of explosion occurring while he worked in Iraq. He elaborated that Employer "utilized the services of a subcontractor named Tamimi... Since these subcontractors would be working alongside my employees at Camp Cedar, I would be aware of any significant injuries or deaths to any of these subcontractors. I am not aware, and there are no reports, of any of these Tamimi employees sustaining any deaths or injuries as a result of a mortar attack or other type of explosion." Mr. Savoy further stated: "An incident involving the destruction of a truck entering or near Camp Cedar resulting in multiple deaths and injuries would be an event that would become common knowledge to those of us working at Camp Cedar. I am not aware of any such event occurring and none have been reported to me."

Claimant alleges his "whole leg was turned all the way around" and his "foot was facing the back" as a result of the mortar explosion. However, inconsistent with such a severe leg injury, Claimant's timesheets indicate he worked not only thirteen hours on January 30, 2005, the date of his alleged

injury, but also worked thirteen hours on January 31, 2005, the day after the alleged injury. Further, according to Employer's medical record, Claimant's left ankle and foot were "unremarkable" and without discoloration or deformity as of February 1, 2005, two days after the alleged injury, which is, again, inconsistent with the severity of the injury as described by Claimant.

At formal hearing, Claimant testified he claimed he stepped into a hole "because the only documents I brought back from Iraq was the same thing that y'all have, that I stepped in a hole. I have no proof saying I got blown up." Further, Claimant testified the overseas records describing a flare-up of gout and treatment for stepping into a hole are fabricated and that he never injured himself by stepping into a hole. While Claimant testified he witnessed a number of traumatic events in Iraq, none of these events have been corroborated by any credible evidence. The proponent of a rule or position has the burden of proof, by preponderance of the evidence, in cases resolved under the Administrative Procedures Act. See Greenwich Collieries, supra. Accordingly, I conclude that Claimant has not established by a preponderance of the record evidence that Employer's health record is fabricated or that Employer acted to cover up Claimant's alleged injuries sustained as a result of the alleged January 30, 2005 mortar explosion.

Further, I conclude that Claimant's uncorroborated testimony, which has been discredited, is insufficient to establish an accident occurred in the course of employment, or conditions existed at work, which could have caused his alleged left ankle, knee, or low back injuries or his alleged psychological injuries, including post-traumatic stress disorder. Accordingly, I find and conclude Claimant failed to establish a **prima facie** case of a compensable "injury" supporting a claim for compensation.

Had I found, however, that Claimant had established a Section 20(a) presumption of a **prima facie** claim, I nonetheless would deny benefits as I find Employer/Carrier satisfied their Section 20(a) rebuttal burden and, based upon the record as a whole, find Claimant did not establish that he suffered a compensable injury during his employment with Employer, as discussed below.

Claimant alleges he sustained injuries to his left ankle, knee and low back as a result of a January 30, 2005 mortar explosion and subsequently developed post-traumatic stress disorder as a result of traumatic events that he witnessed while employed with Employer in Iraq.

Thus, if his testimony is credited, which it is not, Claimant has arguably established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain as of January 30, 2005, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

### 3. Employer's Rebuttal Evidence

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

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT) (5<sup>th</sup> Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to

the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

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

I find that Employer/Carrier have rebutted the Section 20(a) presumption with the opinions of Drs. Barrash and Griffith.

Dr. Barrash testified regarding Claimant's physical injuries. Dr. Barrash opined Claimant had no injury to his low back. He opined Claimant "may have had a strain" of his left ankle, but testified that such a strain would have healed within several months of the injury with no expected residual disability. With respect to Claimant's left knee, Dr. Barrash opined that if Claimant suffered any injury, it would have been a strain that would have resolved itself approximately one month after injury without any permanent limitations. However, when questioned regarding the cause of any injury, Dr. Barrash responded: "Well there are conflicting stories, information. The information I have from the medical records is different than that which [Claimant] told me so I have to go by the medical records. I have no way of confirming or contesting that which he tells me." In any event, no matter what version Claimant advances regarding his traumatic injury, none of which are deemed credible, his injury has been compensated by Employer/Carrier, including Section 7 medical expenses.

Dr. Barrash noted Claimant displayed behavior suggesting symptom magnification. Specifically, he opined there were inconsistencies between Claimant's complaints and his examination, observed that Claimant changed the hand in which he was carrying his cane, and opined that people who injure a leg do not switch their cane from one hand to another. While Dr. Barrash diagnosed Claimant with minor complex regional pain syndrome, he opined the cause would be the left knee surgery performed on Claimant by Dr. Lintner. Accordingly, I find Dr. Barrash's testimony that Claimant presented conflicting information regarding his alleged injury and displayed behavior suggesting symptom magnification is sufficient to rebut the Section 20(a) presumption with respect to Claimant's physical injuries.

Further, Dr. Griffith opined Claimant does not suffer from post-traumatic stress disorder and is malingering. Specifically, he opined that "[w]ithout a history of trauma, the diagnosis of PTSD cannot be made. Furthermore, the nature of his story of trauma suggests that he is seeking support and the added contradiction is that he claims injuries that are at odds with one another." Accordingly, since I have found Claimant's **prima facie** case rebutted, I must consider and weigh all of the evidence of record.

#### **4. Weighing All the Evidence**

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

As discussed above and weighing all the evidence, I find and conclude Claimant lacks credibility and the record does not support Claimant's allegations that he was injured as a result of a January 30, 2005 mortar attack. Further, I find and conclude Claimant's uncorroborated testimony is insufficient to establish an accident occurred in the course of employment, or conditions existed at work, which could have caused his alleged left ankle, knee, or low back injuries or his alleged psychological injuries, including post-traumatic stress disorder. Incredibly, nor were any medical records offered into the record to corroborate Claimant's alleged shrapnel arm wound while in Iraq.

Drs. Doctor, Kennington, Cardona, and Decker opined Claimant suffered from PTSD. However, I am not persuaded by their opinions, as the diagnosis of each of these individuals is based upon Claimant's subjective complaints and history, which I find to be incredible. When asked whether it was his opinion that Claimant was malingering or operating out of secondary gain motivation, Dr. Cardona responded: "Well, when I saw him, he was a very sick man." However, I am not persuaded by Dr. Cardona's opinion, as he did not perform any objective testing to rule out malingering and opined that "Just Iraq is a traumatic event." The only other individual to address malingering out of those who diagnosed PTSD was Dr. Kennington, who did administer the MMPI-2 and corresponded to Claimant stating: "I received your request for a follow-up letter regarding differential diagnoses, based on the results from your evaluation. Upon reviewing your results, I do not find evidence to substantiate any further diagnosis, including that of Malingering." However, I find Dr. Kennington's opinion to be inadequate, as she did not provide any further explanation of her opinion, specifically, whether she ruled out malingering based upon any objective testing.

I was more persuaded by Dr. Griffith, who recognized that Claimant "claims injuries that are at odds with one another" and that "[w]ithout a history of trauma, the diagnosis of PTSD cannot be made." Dr. Griffith explained that he concluded Claimant was malingering based upon his interview with Claimant and Claimant's MMPI-2 results, particularly the fake bad scale. While cross-examination of Dr. Griffith established he is not an expert in the scoring and interpretation of the MMPI-2, I find such lack of expertise does not diminish Dr. Griffith's ability to utilize the results of such testing as a factor in forming his professional opinion.

With respect to Claimant's physical injuries, I was persuaded by Dr. Barrash, who noted "there are conflicting stories, information..." and noted inconsistencies between Claimant's complaints and his examination as well as behavior suggestive of symptom magnification. Such behavior and inconsistencies on Claimant's part observed by Dr. Barrash comport with other behavior displayed by Claimant, namely, providing multiple versions of the traumatic event he contends caused his injuries. Dr. Barrash did diagnose "minor" complex regional pain syndrome. However, he opined the cause of the syndrome was the surgery performed on Claimant's knee by Dr. Lintner, not any injury in Iraq. Further, while objective testing of Claimant's left knee via the February 17, 2005 MRI revealed a "probable" tear of the posterior horn of the lateral

meniscus for which Claimant later had surgery with Dr. Lintner, Dr. Barrash noted a partial tear of the meniscus could not be caused by Claimant's gout and can be asymptomatic. Claimant denied he ever injured himself falling into a hole. Employer's medical record establishes the only treatment Claimant received while employed with Employer in Iraq was in relation to an exacerbation of his pre-existing gout condition, which no doctor of record opined was related to Claimant's working conditions while employed with Employer in Iraq. Therefore, without any credible traumatic event, I find no causal relation between any of Claimant's objectively observed injuries and his employment with Employer in Iraq.

Accordingly, due to the internal and external inconsistencies, discrepancies, and contradictions noted in Claimant's testimony and the evidence of record, I find and conclude Claimant failed to establish by a preponderance of the credible evidence that he suffered a work-related accident and resulting injury to his left ankle, knee, and low back or witnessed or experienced trauma and resulting post-traumatic stress disorder or any other psychological injury while employed by Employer in Iraq.

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

#### **V. ORDER**

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

**ORDERED** this 28th day of November, 2008, at Covington, Louisiana.

**A**

LEE J. ROMERO, JR.  
Administrative Law Judge