

U.S. Department of Labor

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

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



Issue Date: 04 December 2008

CASE NO.: 2008-LDA-113

OWCP NO.: 02-153838

IN THE MATTER OF:

L. H.¹

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
c/o American Insurance Underwriters

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.
For The Claimant

JAMES L. AZZARELLO, ESQ.
For The Employer/Carrier

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

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

DECISION AND ORDER

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

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on April 23, 2008, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered eight exhibits, Employer/Carrier proffered 16 exhibits which were admitted into evidence along with one Joint Exhibit.² This decision is based upon a full consideration of the entire record.³

Post-hearing briefs were received from the Claimant and the Employer/Carrier by the due date of October 24, 2008. 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 Claimant's last day of exposure was December 25, 2006.
2. That Claimant's hernia injury occurred during the course and scope of his employment with Employer.
3. That there existed an employee-employer relationship at the time of the accident/injury.

² Claimant offered a "Rand Corporation report" as his exhibit no. 7, to be submitted post-hearing, which was never provided and has not been considered since it is not part of the instant record. (Tr. 65).

³ References to the transcript and exhibits are as follows: Transcript: Tr.____; Claimant's Exhibits: CX-____; Employer/Carrier's Exhibits: EX-____; and Joint Exhibit: JX-____.

4. That the Employer was notified of the hernia accident/injury on December 18, 2006 and the alleged psychological condition in July 2007.
5. That Employer/Carrier filed a Notice of Controversion on July 2, 2007.
6. That an informal conference before the District Director was held on November 29, 2007.
7. That Claimant received temporary total disability benefits from January 10, 2007 through June 26, 2007, in the total amount of \$26,746.56.
8. That Claimant's average weekly wage at the time of injury was \$1,965.51.
9. That medical benefits have been paid for Claimant's hernia injury pursuant to Section 7 of the Act.
10. That Claimant reached maximum medical improvement for his hernia injury on June 28, 2007.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury of Claimant's alleged psychological injury/condition.
2. The nature and extent of Claimant's disability.
3. Whether Claimant has reached maximum medical improvement for his alleged psychological injury/condition.
4. Entitlement to and authorization for medical care and services for Claimant's alleged psychological injury/condition.
5. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at the formal hearing, also provided a recorded statement to Employer on January 10, 2007, and was deposed by the parties on April 7, 2008. (EX-9; EX-10). Post-hearing, Claimant submitted a sworn statement listing 21 inaccuracies to which he disagreed from Dr. Griffith's report. (CX-8).

Claimant was 65 years of age at the time of the formal hearing. (Tr. 15). He completed high school and 90 credits of college work including trade and technical school in industrial electronics. Vocationally, he worked for Hughes Aircraft Company for 12 years as a technician and senior researcher. (Tr. 16). He has also owned and operated several restaurants, a computer shop, a landscaping service and a tax preparation business. (Tr. 17). During the five year period before employment with Employer, Claimant drove 18-wheeler trucks in 45 of the lower 48 states. (Tr. 19).

Claimant deployed to Iraq on December 1, 2005, for employment with Employer at "Al Taqaddum at Habbaniya," 80 miles northwest of Baghdad. (Tr. 19). His job was to drive trucks on base and "outside the wire." (Tr. 20). The trucks moved materials forward for the U.S. Marines. He spent half his driving time outside of the perimeter wire. He also spent "a great deal of time" at the flight line which was mortared "a lot." (Tr. 21). About 20 to 22 trucks were used in each of seven to nine missions per week. (Tr. 22).

Claimant worked seven days a week, at least 12 hours a day. He was in Iraq for about 387-390 days without a "R & R" break. (Tr. 22). The Mercedes cab-over trucks that he drove provided some protection with a ballistic blanket inside which would slow down an AK-47 round. Later Claimant drove an International truck which was built out of armor that would stop AK-47 rounds and offered some protection against rocket-propelled grenades, but not improvised explosive devices (IEDs). (Tr. 23). Claimant testified that there were attempted attacks on all the convoys which were protected by the Marines. He recalled one truck being destroyed or disabled during a convoy mission from an attack. Seven of 72 trucks were lost during his employment

in Iraq. He stated there was a constant danger on base or outside of the wire of being attacked by mortars. (Tr. 24). He testified that once an employee was injured "we never heard about them," the Employer would get them off base and out of the country. Some drivers were badly injured but none were killed. (Tr. 25).

Claimant testified that on December 23, 2006, he noticed a hernia and went to the medics. He stated he felt a muscle pull while strapping down a trailer load. (EX-9, p. 5; EX-10, p. 32). He was sent to a field hospital and evacuated the next day. (Tr. 25). While at the field hospital, a Marine was brought in off of a mission who was badly injured. Medical personnel were frantically working on the Marine who had lost his left leg below the knee and his right arm and part of his shoulder and "was pretty well cut up and bloody everywhere else." Claimant stated he observed the medical people working on the Marine for around a half hour from a distance of 15 feet and walked by the gurney en route to the doctor. (Tr. 26-27). He stated he "couldn't tell what they were doing I just knew they were trying to keep him alive." He added he had "never seen anything quite like that before. And for the first time-you know we knew we were in a war zone. We knew that the possibility of being injured was real but it had never been brought home to that extent." (Tr. 28).

Shortly after returning home, "maybe a couple of weeks," Claimant began having nightmares about trucks blowing up and mortar rounds going off. The nightmares would wake him and he could not go back to sleep. The nightmares happen three to four times a week and have continued to present. (Tr. 29). He did not experience "bad dreams" before going to Iraq. (tr. 33).

Claimant described a "flashback" while driving to his exam with Dr. Griffith as he crossed the White River in Arkansas "and all of a sudden I was back on the shore of Lake Habbaniya which was adjacent to the camp we were in over there." (Tr. 30). He stated he does not watch the TV news anymore because he does not want to see car bombs in Baghdad or "see anything that reminds me of that place." He also avoids social contact "with just about everyone," and stays home where "not very [many] people are welcome." He does not engage in fishing or group breakfasts as he did before going to Iraq to avoid dealing with people. (Tr. 31).

Claimant testified he has problems with irritability and outbursts of anger since returning home and does not have patience with people anymore. Before going to Iraq, he had the patience to deal with the public daily when operating his businesses. He stated he could not do that now. (Tr. 32).

He decided he needed help and went to his personal physician, Dr. Antosh, who set up an appointment for him at Mid-South Health Systems where he was evaluated by a psychologist, Shunita Young, and a psychiatrist, Dr. Erby. He has seen Dr. Young a dozen times and Dr. Erby about six or seven times. He began receiving bills for his care that were unpaid. He has been paying for his psychological care. (Tr. 33-34). He takes medications for depression, sleep and high blood pressure. (Tr. 35-36). He was evaluated on one occasion by Dr. Deroeck who administered a MMPI test. (Tr. 37).

Claimant acknowledged that he is an alcoholic and began going to Alcoholics Anonymous meetings four or five years ago and quit drinking alcohol. Before going to Iraq he had not had a drink of alcohol for three years. He did not drink alcohol in Iraq, but since returning has had two alcoholic episodes in an effort to "escape for a little while." (Tr. 38). Before going to Iraq, Claimant had also been treated for depression in 1991 or 1992, and took Zoloft, an anti-depressant, for four or five years. He was having no problems with depression before deploying to Iraq and had not taken any medication for depression for at least a couple of years before deployment. (Tr. 40).

Claimant testified that with his sleep problems and mental confusion/depression, he could not return to his employment with Employer in Iraq. (Tr. 42). He stated he could not organize himself to do anything that has more than one step. He never had such problems before going to Iraq. (Tr. 47-48). Claimant was evaluated by Dr. Griffith one week before the formal hearing, but had not seen his report. He inquired of Dr. Griffith if he treated individuals with PTSD and if "he had come across anything that seemed to help," to which Dr. Griffith responded "For civilian PTSD you don't need to be treated because it will just go away in six months to a year." (Tr. 43). Claimant stated he has new medication which "is helping some," but he still gets "emotional and teary about different things, and . . . I have a lot of mental confusion . . . I can't line things up again." (Tr. 49).

Claimant testified that he has paid his pharmaceutical bills. In sum, he stated he was terrified seeing the injured Marine at the field hospital because "that could have been any one of us. That could have been anybody on that base that goes outside the wire." (Tr. 53). He explained that drivers were injured on convoys but they never knew the extent of the injuries and would only later find out through email with the injured worker. (Tr. 54-55).

On cross-examination, Claimant acknowledged that he could not see in detail the medical care being provided to the injured Marine and did not know the Marine or his name. Claimant did not sustain any physical injuries from an attack by insurgents. (Tr. 57). Claimant also recalled a rocket coming into the airbase, sliding down the pavement without going off and "everybody ran to the bunker." Claimant stated he was never in a truck which was blown up. (Tr. 58). He considers Dr. Shunita Young as his treating physician and Dr. Pierce as his general practitioner. (Tr. 59). He stated he informed Dr. Pierce of his depression and would be surprised that his medical notes do not indicate such a report or that the notes reveal his first report of depression was April 2, 2008. (Tr. 60-61). He considered Dr. Pierce's notes reflecting his drinking three alcohol drinks daily as "completely inaccurate." (Tr. 61).

Claimant confirmed that he has received monthly Social Security Disability benefits since September 2005 even while employed by Employer in Iraq. (Tr. 62). He began receiving Social Security Retirement benefits on March 1, 2008. (Tr. 63). He affirmed that he is not working presently because he does not like being around people. (Tr. 64).

Claimant testified that a truck in one convoy was hit, but he did not witness anything and only heard the explosion. (Tr. 66-67). Of the seven trucks lost during his employment, he never saw one get hit by an IED. During two convoys, small arms fire was taken, but his truck was not fired upon by insurgents. (Tr. 67). He was about 40-50 yards from the rocket which slid down the pavement and was about 60 yards from a building which exploded from rocket fire. No workers were injured. (Tr. 68). Regarding mortar fire on the base, he stated "nothing landed near, near where I was." (Tr. 71). He added "mortar attacks become fairly routine, and as long as you're there living in that environment, it's another day." (Tr. 72).

The Medical Evidence

On November 15, 2005, Claimant underwent a physical examination by Employer and was considered qualified for duty in Iraq. (EX-4, p. 6).

On December 18, 2006, Claimant presented to an Employer B-6 clinic with complaints of a tear in his abdominal area while ratcheting his load to a flatbed trailer. (EX-5, pp. 2, 8-9). He was diagnosed with a hernia and referred to a "military SST/P" for further evaluation. It was determined that surgical repair of his hernia was required and Claimant departed Kuwait on December 24, 2006. (EX-5, p. 3).

On January 8, 2007, Claimant was examined at the Antosh Medical Clinic for a bulge which protruded while strapping a load on a trailer. Claimant requested referral to a surgeon. The physician's assessment was umbilical hernia/depression. A prescription of Zoloft was given to Claimant. (EX-12, p. 2). On May 8, 2007, Claimant returned to the Antosh Medical Clinic for a consult on Zoloft and complaints of terminal insomnia. He was assessed with depression/PTSD, insomnia and fatigue. A referral was made to "Mid-South H & W." (EX-12, p. 3).

Dr. John Johnson

On January 18, 2007, Dr. Johnson examined Claimant based upon a referral from Dr. Antosh with complaints of a hernia while ratcheting a truck load. (EX-11, p. 20). On April 16, 2007, Dr. Johnson performed a laparoscopic incisional hernia repair. (EX-11, pp. 18-19). On June 28, 2007, Dr. Johnson commented that Claimant's surgical sites were well healed and he was "pretty much back to his normal activities." (EX-11, p. 16).

Dr. John Pierce

On April 6, 2007, Dr. Pierce ordered a CT scan of Claimant's abdomen and pelvis which revealed a midline abdominal wall hernia. (EX-17, p. 131). On July 26, 2007, Dr. Pierce examined Claimant who complained of shoulder and lower back pain after a motor vehicle accident. Dr. Pierce commented that Claimant's mental status exam exhibited no depression, anxiety or agitation. (EX-17, pp. 127, 129). On July 30, 2007, Claimant presented with left ankle pain and his mental status exam was again reflective of no depression, anxiety or agitation. (EX-17, pp. 124, 126).

On August 24, 2007, Claimant reported continued problems with back pain. (EX-17, p. 121). On September 25, 2007, Claimant presented with an ear ache and reported no depression, anxiety or agitation. (EX-17, pp. 117-118). On October 9, 2007, Claimant returned to Dr. Pierce with continued ear infection, but reported no depression, anxiety or agitation. (EX-17, pp. 96, 98). On December 4, 2007, Claimant continued to report back and neck pain. (EX-17, p. 84). On December 21, 2007, Claimant reported for thyroid test results and a scaly patch of skin on his nose. His mental status exam revealed no depression, anxiety or agitation. (EX-17, pp. 78, 80). On January 7, 18 and 30, 2008, Claimant again reported no depression, anxiety or agitation on his mental status exam. (EX-17, pp. 60, 62, 66, 68, 74, 76).

On February 18, 2008, Claimant was admitted to St. Bernards Medical Center for alcohol abuse after being found unresponsive at home. Alcohol abuse was listed as a new problem by Dr. Pierce. (EX-17, pp. 16, 37-39). His admission diagnosis was alcohol abuse and a litany of other medical conditions/problems were listed, none of which included depression or PTSD. (EX-17, p. 35). On February 25, 2008, after being released from the hospital, Claimant was examined by Dr. Pierce in follow-up and no depression, anxiety or agitation was noted on mental status exam. (EX-17, pp. 12-13). On March 6, 2008, the only new problem listed after the hospitalization was herniated lumbar disc. (EX-17, pp. 9-10).

On April 2, 2008, for the first time, Dr. Pierce comments that depression is a new problem for Claimant. (EX-17, pp. 4-5). No further progress notes from Dr. Pierce are contained in the record.

Mid-South Health Systems, Inc.

On May 25, 2007, Claimant presented to Mid-South Health Systems, Inc., based on a referral from Dr. Antosh for anxiety and depression. Claimant reported he had been prescribed medication to treat his depression for years, but recently began having symptoms of anxiety. He further reported his symptoms worsened in March 2007 when he began isolating himself, waking up disoriented thinking that he was in Iraq and walking around

his home looking for bombs. He stated he was "pre-occupied with thoughts about Iraq and people that were blown up." Shunita Young, LMSW, and Dr. David Erby opined that Claimant's provisional diagnosis was Depressive Disorder, NOS; Rule Out: Post-Traumatic Stress Disorder (PTSD). (CX-1, p. 1).

On June 7, 2007, Claimant returned to the clinic reporting having "a long history of depressive episodes" and "symptoms of PTSD (dreams, avoidance of stimuli, flashbacks, etc.) since returning home from Iraq." He reported that "this is his first time being treated for anxiety." The primary diagnoses were Post-Traumatic Stress Disorder and Depressive Disorder. It was determined that psychiatric evaluation was needed. (CX-1, p. 2).

On June 8, 2007, Dr. Erby conducted a psychiatric evaluation of Claimant who presented with "depression and posttraumatic symptoms." Claimant reported his past use of Zoloft for several years. He reported his work experience in Iraq and having "a lot of PTSD symptoms, primarily nightmares, sleep trouble and flashbacks," and "having a hard time getting out of his house." He also reported driving trucks in a "prime area for random mortar attacks. He apparently saw a lot of people who were killed and injured." He stated he used alcohol and marijuana up until 2005, but "stopped all of that then." His thought content contained "some episodes of thinking he was back in Iraq dodging roadside bombs and other lethal devices." (CX-1, p. 8). Dr. Erby's pertinent diagnosis was Posttraumatic Stress Disorder, Depressive Disorder NOS. His current GAF was 54. (CX-1, p. 9).

On June 15, 2007, the Adult Diagnostic Assessment of Claimant additionally revealed that he "avoids watching television because he becomes horrified when he sees or hears reports about Iraq. Several of his coworkers were killed in Iraq . . . and he often finds himself preoccupied with thoughts about Iraq and people that were blown up." (CX-1, p. 10). He reported no prescription drug abuse or alcohol use in the past 12 months. (CX-1, p. 13). A treatment plan was offered to Claimant. (CX-1, p. 15).

The initial master treatment plan indicated problems with "primary support, occupation and social environment." His current GAF score was 45. Dr. Erby certified that Claimant had a serious mental illness (SMI) by meeting the criteria for (1) currently or at any time during the past year having had a diagnosable mental, behavioral or emotional disorder of

sufficient duration to meet the diagnostic criteria specified with the DSM-IV and (2) **and** the disorder has resulted in functional impairment which meets a criteria for substantially interfering with or limiting one or more major life areas. Dr. Erby further opined that Claimant's functional impairment met the following criteria: lacked any legitimate productive role; had a serious role impairment in his main productive roles, for example consistently missing at least one full day of work per month as a direct result of his mental health; and had serious interpersonal impairment as a result of being totally socially isolated, lacking intimacy in social relationships, showing inability to confide in others and lacking social support. (CX-1, p. 3).

On July 3, 2007, in a progress note, Claimant reported his sleep has improved but his anxiety had not. He was provided psychoeducation about PTSD and expressed an understanding of the importance of stopping his self-isolation. (CX-1, p. 17). On July 17, 2007, there was no significant change in Claimant's mood or thought process. He reported a recent flashback while driving through an intersection that was very similar to one he remembered in Iraq. He reported socializing more with friends and realizing he missed having such contact. (CX-1, p. 18). His current GAF was 55 and he was scheduled to return in two weeks. No other progress notes are contained within the record.

George M. DeRoeck, Ph.D.

Dr. DeRoeck performed a psychological evaluation of Claimant on February 25, 2008, and was deposed by the parties on July 24, 2008. (CX-7). Claimant was referred for an evaluation of his "post traumatic stress." He described his Iraq experience as including "witnessing a lot of things, i.e., explosions, individuals getting blown apart and a good deal of death and dismemberment." Associated with his hernia injury, he revealed seeing a young Marine he had met earlier that day getting treatment for a missing shoulder and leg. It is noted that since that time, Claimant has had symptoms associated with posttraumatic stress "inclusive of intrusive thoughts, flashbacks, fear of foreshortened future, preoccupation and difficulty with memory for events surrounding that day." (CX-1, p. 19). Claimant also reported being "depressed a lot," seeing "this guy's face when I try to sleep and I can't get any." He indicated difficulties associated with being in Iraq and not

being allowed to have guns and being on "our own because the Marines were trying to protect themselves and the convoy." The identification of symptoms and exacerbation were noted with Claimant's injury "in tandem with both emotional and social impact of seeing another individual injured."

Claimant acknowledged moderate drinking in his younger years and since Iraq "I've hit it a lot harder" and "tried to drink myself to death once." He reported "three or four bad binges over the past year." (CX-1, p. 20). He identified visual flashbacks of the injured Marine and reported he "was supposed to be on that mission he went on." (CX-1, p. 21).

Dr. DeRoeck administered the Beck Depression Inventory II on which Claimant scored a 16 indicative of a moderate depression range. Claimant reported an inability to sleep and having less appetite, lack of energy, restlessness and irritability, a loss of pleasure and suicidal ideation without a plan or intent. The Beck Anxiety Inventory revealed "a number of indicators consistent with posttraumatic stress such as feelings of being terrified, moderately nervous, scared, sweating not due to heat and being moderately unable to relax. The MMPI-II test results revealed a tendency to identify with indicators of psychological distress. Claimant had elevation of a number of scales and indicated difficulty with confusion and being worrisome, on edge and tense. Posttraumatic stress indicators were also elevated. His depressive scale was 2.5 standard deviations above the mean which is above the level of clinical significance. Claimant also presented as an ambivert and mistrustful. (CX-1, p. 21).

Dr. DeRoeck's impressions were that Claimant presented with a good deal of psychological distress, self-medicating over the past year with binge alcohol and was at risk for further decompensation associated with his tendency to abuse alcohol. Claimant presented with "symptoms of depressive symptomology (sic)." Based on the DSM-IV, Dr. DeRoeck diagnosed Claimant with "Posttraumatic Stress Disorder-Rule Out Chronic Depressive Disorder, NOS and Alcohol Abuse-Episodic." It was recommended that he be seen for treatment of posttraumatic stress. (CX-1, p. 22).

Dr. DeRoeck testified that he has treated patients with post-traumatic stress disorder to include active duty military individuals. (CX-7, pp. 7-8). At the time of his deposition he had evaluated Claimant and participated in two counseling sessions. (CX-7, p. 9). He diagnosed Claimant with Post-

Traumatic Stress Disorder and stated he was familiar with the DSM-IV and believed Claimant met the criteria for such a diagnosis. (CX-7, p. 10). Based on testing and his evaluation, he testified Claimant was not malingering and he has ruled malingering out. (CX-7, p. 11). He deposed Claimant needs additional care for his PTSD and depressive disorder particularly and opined that Claimant would benefit from an antidepressant medication. (CX-7, p. 12).

Dr. DeRoeck testified that "temporally" Claimant's PTSD and depression are related to his exposures in the war zone of Iraq although the onset was delayed until he moved back to the United States. He further opined that Claimant's PTSD symptoms are compatible with having been exposed to violent events in the Iraq war zone. He also opined that Claimant could attempt or function in a low stress job that would involve routine tasks without "a lot of environmental stressors such as loud noise, heat, cold, things like that." (CX-7, pp. 13-14). He would not recommend Claimant return to the war zone in Iraq. He opined that Claimant's condition would get better. (CX-7, p. 14).

Dr. DeRoeck acknowledged that Claimant had not identified a prior course of treatment for depression and he was not aware that Claimant had a pending case and was looking for compensation. (CX-7, pp. 17, 47). He noted Claimant presented for a treatment evaluation. Dr. DeRoeck confirmed that he had not read or had access to any medical records from other sources regarding Claimant. (CX-7, p. 18). He made a clinical judgment that Claimant's post-traumatic stress disorder is related to the criteria as listed in the DSM-IV. He affirmed that Claimant's history of alcohol abuse, failed marriages and treatment for depression can recur and manifest itself with symptomatology of a depressive disorder. (CX-7, p. 19). He treated Claimant for both PTSD and his depressive disorder. (CX-7, p. 20).

Dr. DeRoeck acknowledged that Claimant reported coming home from Iraq because he could not handle the stress of his job. Claimant did not relate anything about a hernia operation. Dr. DeRoeck stated it would not be uncommon for PTSD symptoms to emerge after Claimant returned home from Iraq. (CX-7, p. 21). He uses a cognitive behavioral treatment and "some desensitization techniques" in treating PTSD patients to desensitize the patient from his primary anxiety from the traumatic events that occurred, such as "witnessing violent acts in the context of a combat zone." (CX-7, pp. 22-23). By reprocessing such thoughts into "a way that is less stressful to him," he can function at a higher level. Dr. DeRoeck affirmed

that Claimant had "seen some things in the hospital and witnessed some activities out on the road" which were "basically describing symptoms commensurate with the onset of post traumatic stress." (CX-7, pp. 23-24). Although he could not independently verify the events related by Claimant, he opined the individual's perception of the events is of most importance and that quite often the individual may distort the reality of what happened as a part of their way to cope, "but still it's their assessment of having witnessed or been involved in a situation in which there was potential for serious bodily injury or death." (CX-7, pp. 24-25, 36). He noted that the individual's perception is not considered exaggerated. (CX-7, p. 26).

Dr. DeRoeck used the frequency scale in the MMPI-II to evaluate Claimant's honesty and the level of stress that he was experiencing and the "lie scale" and defensiveness scale for validity. He also evaluated the clinical scales for "whatever was above the level of clinical significance," one of which was a supplementary scale "for post traumatic stress, schizophrenia, psychosthenia, which has to do with worry, paranoia, depression and hysteria." (CX-7, p. 32). He determined from the honesty scale that Claimant identified himself as being in a moderate to significant level of psychological distress. From the lie scale, he determined that Claimant was very genuine in his description and not overly defensive. (CX-7, p. 33). He considered Claimant's MMPI-II test results to be valid. (CX-7, p. 36).

Based upon Claimant's presenting symptoms, the clinical mental status evaluation and the validity indicators on the MMPI-II, Dr. DeRoeck ruled out the possibility of Claimant's malingering. (CX-7, p. 37). Dr. DeRoeck indicated that Claimant's flashbacks and intrusive thoughts focused on the wounded Marine he had seen in the hospital in Iraq. He expects, in time, such intrusive thoughts of Claimant to recede. (CX-7, p. 38). Claimant's reported nightmare images are varied and he does not have a consistent nightmare, "a lot of them are not even recalled." Dr. DeRoeck described an "ambivert" as an individual who is "midway between an extrovert and introvert," who is comfortable both in social and non-social settings. (CX-7, p. 39).

As of his second counseling session with Claimant, Dr. DeRoeck opined that depression was emerging as a more salient issue than the post traumatic stress symptomatology. (CX-7, p. 40). He modified his diagnosis on Axis I to change Depressive

Disorder as the most significant diagnosis and in descending order post traumatic stress disorder and would not consider the condition to be chronic. Claimant's depressive disorder is characterized with "a lot of anxiety in a typical kind of a sleep pattern" which he called "dysomnia" or difficulty with sleep. (CX-7, p. 41).

Dr. DeRoeck opined that Claimant's descriptions of other people being injured and the Marine being treated in the hospital from severe injuries were the triggering events which met the criterion A for PTSD in the DSM-IV. Criterion B of the DSM-IV for PTSD was met by Claimant's re-experiencing these events as intrusive thoughts and nightmares. Claimant's re-experiencing intrusive thoughts and nightmares would not interfere with certain types of employment according to Dr. DeRoeck, but Claimant would need a job where there is not as much environmental stress as his former job in Iraq, and long distance driving could be construed as a significant stressor. (CX-7, pp. 42-43). Under Criterion C of the DSM-IV, Claimant meets the criterion with diminished interest and participation in activities, not wanting to leave the house and go places and avoiding activities and situations that would be associated with a trauma. (CX-7, p. 44). Although Dr. DeRoeck thinks Claimant meets the criteria for PTSD, he feels Claimant is more bothered with his depression. (CX-7, p. 45).

Dr. DeRoeck opined that Claimant's history of depression would make him more susceptible to having problems in the future after traumas with stressful exposures. Claimant's exposure to trauma could have caused a re-emergence of his depressive condition. (CX-7, p. 46). Without knowing the details of Claimant's prior psychological condition, Dr. DeRoeck could not opine whether Claimant had an aggravation or was experiencing a natural progression of his prior condition. (CX-7, p. 47). Nevertheless, he further opined that any pre-existing psychological condition would have been aggravated or accelerated by "what went on overseas" inclusive of needing medical surgery and treatment which can worsen an underlying depression or bring back symptoms. (CX-7, p. 48).

On August 12, 2008, Dr. DeRoeck prepared a report at the behest of Counsel for Claimant in response to Dr. Rubenzer's comments/opinions. He opined that elevations on the "frequency" score (F-score) are often associated with the experience of psychological distress as are Claimant's, i.e., PTSD and depression. He re-affirmed that Claimant experienced actual threat or death or serious injury and events of horror at the

hospital in Iraq per the DSM-IV. Contrary to Dr. Rubenzer's belief that there was no evidence of foreshortened future, he noted Claimant feared attacks by terrorists within the United States, ruminating about the potential of car bombs exploding and killing innocent victims and worried about "other 9-11" type attacks occurring, all of which support a conclusion of meeting Criteria C-7 of the DSM-IV for PTSD. He observed that there was an indication of overlap between Criteria C-4 for PTSD and depression. He also observed that the question is not whether Claimant meets the criteria of PTSD, but to what level of severity. He opined Claimant had clear evidence of an underlying depressive disorder. He agreed with Dr. Rubenzer that a prior mood disorder is a risk factor for the development of PTSD following a stressor, i.e., "onset of posttraumatic stress auguring a preexisting mood disorder (depression)," which, in his opinion, was the case with Claimant. (CX-9).

Dr. John D. Griffith

At the request of Employer/Carrier, Dr. Griffith conducted a psychiatric examination of Claimant on April 15, 2008. (EX-13). He reported on Claimant's family, educational and marital background. (EX-13, p. 1). He noted Claimant's past psychological history included depression for which he began taking Zoloft for about three years beginning in about 1998 or 1999 and alcohol dependency. He also noted Claimant's past medical history and his 2006 (sic) hernia repair. (EX-13, p. 2).

Claimant reported his worst stressor while in Iraq was seeing "a young soldier missing both an arm and a leg while both were in a hospital." He began to dwell on the futility of war and reported he was never wounded himself. Claimant reported that after returning to the United States and having his hernia operation he began "to experience insomnia, flashbacks, depression, a feeling he was in danger from Muslim attacks in the U.S., and 'bad dreams' of the same truck blowing up (with changes in people who were in the truck)." Claimant reported his symptoms had persisted for more than one year with no improvement. He also reported "drink[ing] heavily until he passes out, then drinks himself into oblivion again and again." Dr. Griffith noted that Claimant reported "no definite plans for the future but has thought of starting a small business. He says he is fixed financially for his retirement."

Dr. Griffith described Claimant's reported "typical day" and what he wanted which was "\$1,114.44 a week (\$57,950.88/yr) for the rest of his natural life or until he resumes working." His diagnosis was Axis I: Alcohol dependency with no important stressors other than age on Axis IV, and no psychiatric impairment aside from unpredictable drinking on Axis V.

Dr. Griffith opined that Claimant had a long history of alcoholism and his prognosis is poor "because he continues to blame circumstances for his drinking (more lately "PTSD"). His major stressor in Iraq was seeing the wounded soldier which Claimant claims "caused him to become permanently and totally disabled." Dr. Griffith further opined that "Because [Claimant] was not connected with the soldier by virtue of kin or friendship, it is difficult to connect this observation with such devastating incapacitation of a civilian worker who does not have a scratch on him." (EX-13, p. 3). Although Dr. Griffith ordered a MMPI-II test on the same date of evaluation, his report is devoid of any results obtained from such testing or its Extended Score Report. The validity profile information provided of record was not specifically interpreted with respect to Claimant but revealed only symptomatic patterns, none of which support a finding of any disorder other than arguably a Dysthymic Disorder. (EX-15; EX-16).

Steven J. Rubenzer, Ph.D.

At the request of Counsel for Employer/Carrier, Dr. Rubenzer, a forensic psychologist, reviewed the evaluations of Claimant conducted by Dr. DeRoeck and Dr. Griffith. He was asked to opine on the appropriateness of the diagnosis of PTSD by Dr. DeRoeck and disputed by Dr. Griffith. Dr. Rubenzer did not perform an independent personal assessment of Claimant.

In reviewing the report of Dr. DeRoeck, he noted that Claimant obtained moderate elevations on the measures of depression and anxiety. He observed that Dr. DeRoeck reported there was no evidence of embellishment of deficits on the MMPI-II, but did not indicate which of the many validity scales were considered in reaching such a conclusion. Dr. Rubenzer reviewed the profile and answer sheet from the MMPI-II and opined that contrary to Dr. DeRoeck's statement of no indication of exaggeration, Claimant obtained a T score of approximately 95 on the F scale, the manual for which indicates scores of 91 and above are "probably invalid" due to random responding, reading difficulty or uncooperativeness/faking bad. It is noted that Claimant answered only the first 400 questions on the test of

which 15 were unanswered. Dr. Rubenzer further observed that moderate elevations on newer response style indicators, despite not completing 15 items of the test, and other well-established response scales could not be scored because the entire test was not given, but some newer specific feigning scales were not elevated. (EX-18, p. 1).

Dr. Rubenzer also reviewed the report of Dr. Griffith which noted that Claimant began experiencing symptoms after he returned from Iraq in 2006. He reviewed the MMPI-II test given by Dr. Griffith on which none of the fake bad scales were elevated. There was no indication of exaggeration or faking on the MMPI-II. However, he observed the PK scale, which is designed to measure PTSD symptoms, was not substantially elevated, which did not seem to support a diagnosis of PTSD, "although this scale has shown poor sensitivity in one recent study."

Contrary to Dr. Griffith's "skepticism that viewing the injury of an unrelated person would lead to total and permanent disability," Dr. Rubenzer opined that the DSM-IV no longer requires such a relationship between the injured Marine and Claimant. He agreed that Criterion A for PTSD would have been met if events transpired as Claimant described and if he responded with intense fear, helplessness or horror. (EX-18, p. 2). He concluded contrary to Dr. DeRoeck's opinion that there was no evidence of exaggeration, the one scale he scored was elevated enough "so exaggeration is a very real possibility." He noted that Claimant's report to Dr. Griffith that he planned to open his own business contradicted Dr. DeRoeck's report that Claimant experiences a foreshortened future. He opined that if Claimant symptoms were presumed valid he would meet DSM-IV diagnostic criteria A, B, D, E and F. He further opined that the two reports of Dr. DeRoeck and Dr. Griffith do not appear to report the three (of seven) necessary features to meet criterion C and the only feature clearly noted (foreshortened future) appeared to be contradicted in the evaluation of Dr. Griffith.

Dr. Rubenzer opined that the connection between experiencing PTSD symptoms and being unable to work is not well established and that the notion of disability due to PTSD is a relatively recent phenomenon. He observed that Claimant's primary bad experience reportedly linked to his PTSD symptoms was seeing a severely wounded Marine, but it was unclear how his daily environment would be likely to trigger unwanted recollections of the Marine. He opined "there are reasons to question whether [Claimant] has PTSD and whether this condition

renders him disabled and unable to work. Further, he concluded that there was evidence of exaggeration in the MMPI-II administered by Dr. DeRoeck. (EX-18, p. 3).

The Contentions of the Parties

Claimant contends that he sustained a hernia injury on December 23, 2006, and while seeking treatment was exposed to a "badly-injured Marine" in a field hospital. He returned to the U.S. the following day and "shortly" thereafter began having "nightmares" and "flashbacks" of events from his Iraq experiences. He avers he has a history of depression which was aggravated or accelerated by his experiences in Iraq. He asserts he is entitled to compensation and medical treatment for his psychological condition caused by exposures in a zone of special danger while employed by Employer in Iraq. He seeks temporary total disability benefits from June 27, 2007 to present and continuing until he reaches maximum medical improvement.

Employer/Carrier does not dispute that Claimant suffered a hernia injury while employed with Employer in December 2006 for which medical treatment was provided and compensation paid. Employer/Carrier contend Claimant's psychological condition is caused by a long history of drug and alcohol abuse and family problems and is not work related.

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/psychological harm or pain, and (2) an accident

occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); 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. Claimant's Prima Facie Case

a. The Hernia Injury

Based on the stipulations of the parties, and the record evidence, I find and conclude that Claimant sustained a hernia injury on or about December 23, 2006, while strapping down a trailer load in the course and scope of this employment in Iraq. Employer/Carrier do not dispute Claimant's hernia injury and have paid Claimant temporary total disability compensation benefits from January 10, 2007 through June 26, 2007, based on his average weekly wage of \$1,965.51 and medical benefits associated therewith pursuant to Section 7 of the Act.

b. The Psychological Injury

Claimant contends that he has a history of depression which was aggravated or accelerated by his experiences in Iraq. He avers that he is entitled to compensation and medical treatment and care for his psychological condition caused by exposures in the zone of special danger. Claimant testified to events that transpired while he drove supply trucks "outside the wire" during which two convoys were hit by small arms fire and one truck was hit by an explosion. His truck was not hit by small arms fire and he only heard, but did not witness, the truck explosion. He described mortar attacks on the flight line where he also worked and a rocket coming into the airbase and sliding down the pavement without exploding. He acknowledged that none of the mortars "landed near where I was."

Claimant testified to observing a critically wounded Marine in a field hospital who had lost his left leg below the knee, his right arm and part of his shoulder. He stated he had never seen anything like that before which for the first time brought home that he was in a war zone. He further testified that a couple of weeks after returning home, he began to have nightmares about trucks blowing up and mortar rounds going off and about the wounded Marine. He had a flashback while driving

which depicted Iraqi terrain. He developed problems with irritability and outbursts of anger and lack of patience and decided he needed help.

Claimant was evaluated and counseled by psychologist Shunita Young and psychiatrist Erby at Mid-South Health Systems. He was given a provisional diagnosis of Depressive Disorder, NOS, rule out PTSD. Dr. Erby performed a psychiatric evaluation during which Claimant "reported a lot of PTSD symptoms," primarily nightmares, sleep trouble and flashbacks. Dr. Erby commented that Claimant had "apparently seen a lot of people who were killed and injured." Dr. Erby diagnosed Claimant with PTSD, Depressive Disorder, NOS.

Dr. DeRoeck, a psychologist, evaluated Claimant for PTSD, during which Claimant apparently reported "witnessing a lot of things, explosions, individuals getting blown apart and a good deal of death and dismemberment." Claimant reported being depressed and seeing the face of the injured Marine when he tries to sleep. Dr. DeRoeck noted Claimant had symptoms associated with PTSD which were supported by administered testing. He diagnosed Claimant with PTSD and depressive disorder which were temporally related to Claimant's exposures in the war zone of Iraq. Dr. DeRoeck also ruled out malingering by Claimant.

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. 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 an 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).

Thus, if Claimant's testimony is credited, he has established a **prima facie** case that he suffered a psychological "injury" under the Act, having established that he suffered a harm or pain on or about December 25, 2006, his last day of exposure in the zone of special danger, 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).

2. 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) (5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

Substantial evidence is evidence that provides "a substantial basis of fact from which the fact in issue can be reasonably inferred," or such evidence that "a reasonable mind might accept as adequate to support a conclusion." New Thoughts Finishing Co. v. Chilton, 118 F.3d 1028, 1030 (5th Cir. 1997); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

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

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

At the behest of Employer/Carrier, Dr. Griffith conducted a psychiatric examination of Claimant. Claimant reported his worse stressor while in Iraq was seeing the wounded Marine. He experienced insomnia, flashbacks, depression, a feeling of danger from Muslim attacks and "bad dreams of the same truck blowing up." Claimant reported drinking heavily until he passes out. Dr. Griffith diagnosed Claimant with Alcohol Dependency and **no** psychiatric impairment. He further concluded that since Claimant was not connected with the wounded Marine by kin or friendship, it was difficult to connect this observation with such devastating incapacitation of a civilian worker.

Forsenic psychologist Rubenzer reviewed the evaluations of Drs. DeRoeck and Griffith to render an opinion regarding the appropriateness of the diagnosis of PTSD. He disagreed with Dr. DeRoeck's opinion that there was no indication of exaggeration from the MMPI-II since Claimant obtained a T score of 95 on the F scale indicative of probable invalidity. He commented that the PK scale on Dr. Griffith's MMPI-II testing was not substantially elevated which did not support a diagnosis of PTSD. He disagreed with Dr. Griffith's observation about a lack of relationship to the wounded Marine since the DSM-IV no longer requires such a connection. He noted the exaggeration between Claimant's report to Dr. Griffith that he planned to open his own business which contradicted Dr. DeRoeck's report that Claimant experienced a foreshortened future. He concluded that although Claimant appeared to meet the DSM-IV diagnostic criteria A, B, D, E and F, he did not appear to meet the C criteria of three of seven necessary features listed. He opined that was reason to question whether Claimant had PTSD and

whether the condition rendered him disabled and unable to work in view of the evidence of exaggeration in the MMPI-II administered by Dr. DeRoeck.

In view of the foregoing, I find based on the opinions of Dr. Griffith and Dr. Rubenzer that Employer/Carrier rebutted Claimant's **prima facie** case of a psychological injury.

3. Weighing All the Evidence

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

The 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.

In the present matter, I find Claimant to have embellished his exposure to events in the zone of special danger when interviewed by various consulting psychologists/psychiatrists which is at variance with his formal hearing testimony.

Claimant testified that he did not sustain any physical injuries during any of his convoys or from mortar attacks. His truck was never fired upon nor the subject of an explosion. Although one truck was hit during a convoy, he did not witness anything and only heard the explosion. Apparently he never witnessed any injury inflicted upon any other drivers since he stated "once an employee was injured we never heard about them," and did not explicitly describe any such injuries. No co-workers were injured during mortar attacks of the flight line either. On his last day in Iraq while in a field hospital, he witnessed the critical injuries sustained by a Marine and the frantic efforts of medical personnel to keep him alive. He acknowledged he did not know the Marine or his name.

At Mid-South Health Systems, Claimant reported being preoccupied with people being blown up, although he never testified to witnessing any such tragedies. He informed Dr. Erby that he had seen "a lot of people who were killed and injured," contrary to his formal hearing testimony. He also reported during the Adult Diagnostic Assessment that "several of his co-workers were killed in Iraq," which also conflicts with his hearing testimony. Such misinformation formed the basis, in part, for Dr. Erby's diagnosis of PTSD which I find unpersuasive and unsupported.

In his reports to Dr. DeRoeck, Claimant claimed to have witnessed "a lot of things, explosions, individuals getting blown apart and a good deal of death and dismemberment," not explicated at the formal hearing. He expressed a fear of a foreshortened future, based apparently upon attacks by terrorists within the United States, potential car bombs

exploding and killing victims and another "9-11" type attack, ruminations which he did not describe at the formal hearing or in deposition. In his descriptions of the wounded Marine, Claimant incredibly informed Dr. DeRoeck that he too was supposed to be on the mission in which the Marine was injured. In addition to the foregoing embellishments, Claimant failed to report to Dr. DeRoeck that he had a prior course of treatment for depression and that he had a pending compensation case. Dr. DeRoeck was not presented and had not read any of Claimant's prior medical records from other sources. Inconsistently, Claimant informed Dr. DeRoeck that he returned from Iraq because he could not handle the stress of his job, and failed to mention the need for hernia repair. Based on Claimant's presenting symptoms, including the half-truths and embellishments, Dr. DeRoeck diagnosed PTSD and ruled out malingering.

Dr. DeRoeck subsequently changed Claimant's diagnosis on Axis I to Depressive Disorder as more significant than PTSD. However, he opined that Claimant's exposure to trauma could have caused a re-emergence of his depressive condition, but without knowing the details of Claimant's prior psychological condition, he could not opine whether Claimant had an aggravation or experienced a natural progression of his prior depressive condition. Nevertheless, he further inconsistently opined any pre-existing psychological condition would have been aggravated or accelerated by "what went on overseas," without any further explication.

Dr. Griffith's report has been attacked by Claimant as faulty and inaccurate in his post-hearing letter-exhibit, much of which centered around his past alcoholism and not the substance of his opinions. (CX-8). Claimant did not dispute informing Dr. Griffith that he thought of starting a small business which is contrary to the conclusion reached by Dr. DeRoeck that he had a fear of a foreshortened future.

Dr. Rubenzer, on whose opinions I place the most probative value, was associated to evaluate the opinions of both Drs. DeRoeck and Griffith. He did not personally evaluate Claimant. He questioned the opinion of Dr. DeRoeck's reliance on the MMPI-II results regarding "no evidence of embellishment of deficits" without further indication of the validity scales considered. The record establishes that Claimant certainly embellished his exposures while in Iraq which formed the basis of Drs. Erby and DeRoeck's conclusions that he suffered from PTSD. Dr. Rubenzer also disagreed with Dr. DeRoeck's conclusion that there was no indication of exaggeration on the MMPI-II when the T score

indicates the profile is probably invalid due to random responding, reading difficulty or faking bad. He noted Claimant failed to answer 15 of the first 400 questions. He further commented that the MMPI-II results from testing administered by Dr. Griffith revealed a PK scale that was not substantially elevated and which is designed to measure PTSD and was not supportive of such a diagnosis. He disagreed with Dr. DeRoeck's opinion that there was no evidence of exaggeration since a MMPI-II scale was so elevated "exaggeration was a very real possibility." He further opined that, if Claimant's symptoms were presumed valid, he would meet the DSM-IV criteria for PTSD except for Criteria C in which the only feature noted (foreshortened future) appeared to be contradicted in the evaluations between Dr. DeRoeck and Dr. Griffith. In sum, he reasoned for the foregoing reasons, that there was a basis to question whether Claimant had PTSD and whether he is disabled and unable to work in view of the exaggeration noted.

Dr. Erby and psychologists Young and DeRoeck opined that Claimant suffered from PTSD and a depressive disorder. However, I am not persuaded by their opinions since their diagnoses are based upon Claimant's subjective complaints and history which were enhanced and embellished and which I find unreliable. Claimant presented half-truths and embellished his exposures in Iraq. There is no doubt that he witnessed an extreme stressor in observing the critically injured Marine at the field hospital. None of the other events upon which consulting providers relied were substantiated by his formal testimony or deposition.

Dr. DeRoeck is the only provider who offered an opinion about the causation of Claimant's current depressive disorder, yet he could not define the condition as an aggravation, and thus a compensable injury, or the natural progression of his pre-existing depressive condition. I am not persuaded by his contradictory inexplicable opinion that nonetheless Claimant's pre-existing depressive condition would have been aggravated or accelerated by his overseas exposure, which I find unreasoned. Furthermore, only Dr. DeRoeck ruled out malingering which was based upon testing and Claimant's subjective presentation which was incomplete and inaccurate. Thus, I find his opinion regarding malingering to be unpersuasive and unsupported. Moreover, Dr. Rubenzer concluded that exaggeration by Claimant was a very real possibility which, in conjunction with his failure to provide accurate information to Dr. DeRoeck, buttresses my conclusion that Dr. DeRoeck's opinions are unreasoned and should not be credited.

Accordingly, in view of the inconsistencies, discrepancies and embellishments noted in Claimant's testimony and the variances in the evidence of record as noted above, I find and conclude Claimant failed to establish by a preponderance of the credible evidence that he suffered a work-related psychological injury resulting in post-traumatic stress disorder or depressive disorder or any other psychological injury while employed by Employer in Iraq. In view of the foregoing findings and conclusions, the remaining issues regarding the nature and extent of disability related to Claimant's alleged psychological injury, whether he has reached maximum medical improvement from his alleged psychological injury and entitlement to medical services for his alleged psychological injury are rendered moot.

B. Nature and Extent of Disability

The parties stipulated, and the record supports, that Claimant suffers from a compensable hernia injury, and has received temporary total disability compensation benefits from January 10, 2007 through June 26, 2007 in the total amount of \$26,746.56. His medical benefits for his hernia injury have been paid pursuant to Section 7 of the Act and he reached maximum medical improvement on June 28, 2007, at which time Dr. Johnson opined he could perform his normal activities. Claimant confirmed that he could drive trucks again. (EX-10, p. 45). Thus, I find and conclude that on June 28, 2007, Claimant no longer suffered a wage-earning loss related to his hernia work-injury.

V. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. 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.⁴ A

⁴ 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

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. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Claimant's claim for compensation benefits and medical services for an alleged work-related psychological injury while employed by Employer in Iraq is hereby **DENIED**.

2. Employer/Carrier shall pay Claimant compensation for temporary total disability from January 10, 2007 to June 26, 2007, based on Claimant's average weekly wage of \$1,965.51, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

3. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's December 23, 2006, work-related hernia injury, pursuant to the provisions of Section 7 of the Act.

4. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

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 Claimant is entitled to a fee award for services rendered after **January 11, 2008**, the date this matter was referred from the District Director.

5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 4th day of December, 2008, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge