

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act") and the regulations promulgated thereunder. This claim is brought by Karl B. Lane, Claimant, against his former employer, Bell Helicopter Company, Respondent, and its insurance carrier, CIGNA, Carrier. A hearing was held in Dallas, Texas on November 10, 1998 at which time the parties were represented by counsel and given the opportunity to offer testimony and documentary evidence and to make oral argument. The following exhibits were received into evidence:

- 1) Court's Exhibit No. 1;
- 2) Claimant's Exhibits Nos. 1-7, 9-14, 23-27, 29, 30, 39, 40, 42-45, 47, 49, 51, 53, 56, 58, 61, 64-72, 77-96, 98-104, 106, 107-122, 123-167; and
- 3) Employer's Exhibits A-W, Y.¹

Upon conclusion of the hearing, the record remained open for submission of written closing arguments which were received by both parties. This decision is being rendered after having given full consideration to the entire record.

Stipulations

After evaluation of the entire record, this Court finds sufficient evidence to support the following stipulations:

- (1) That an injury/accident allegedly occurred from January 17, 1991 through March 14, 1991;
- (2) That the fact of the injury/accident is disputed;
- (3) That there was an employer/employee relationship existing at the time of the alleged injury;
- (4) That the alleged injury arose in the course and within the scope of employment is disputed;
- (5) That the date the Employer was notified of the injury was January 16, 1995;
- (6) That the date of notification of the injury/death pursuant to Section 12 of the Act to Employer was made on January 16, 1995 and to the Secretary of Labor was made

¹ The following abbreviations will be used in citations to the record: CTX - Court's Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

on May 19, 1995;

- (7) That an informal conference was held on June 12, 1997;
- (8) That disability resulted from the injury is disputed;
- (9) That medical benefits and disability benefits have not been paid;
- (10) That maximum medical improvement has not been reached;
- (10) That the Notice of Controversion was filed on August 5, 1997; and
- (11) That Claimant's average weekly wage was \$1,369.25.

Issues

The unresolved issues in this proceeding are: fact of injury, causation, nature and extent of disability.

Summary of the Evidence

Testimonial Evidence

Gerald George

Gerald George testified that he was Claimant's co-worker during the Gulf War from January 4, 1991 through January 27, 1991. He stated that he and Claimant were issued pyridostigmine bromide antinerve gas pills and were instructed to take them by the military. TR 29, 30.

Mr. George testified that he heard explosions while in Jabayl which is located sixty kilometers south of the Kuwait border and seven miles north of Dharan, Saudi Arabia. He stated that he and Claimant were in a motel when chemical alarms sounded in Jabayl. Mr. George testified that he has had health problems since the war. TR 30, 31.

Mr. George testified that he is still employed by Respondent. He opined that Claimant was a very hard worker. TR 32.

Charles L. Bowen

Charles Bowen testified that he was employed by Respondent during the Gulf War and maintained contact with Claimant by telephone. He stated that he was never in the Gulf with Claimant. Mr. Bowen testified that he was located in Hurst, Texas at that time. He stated that Claimant called in periodically as instructed. Mr. Bowen testified that Respondent was under contract with the U.S. Marine Corps supplying technical direction for support of military aircraft. He stated

that Claimant was “very conscientious, a hard worker, always wanted to get the job done and do whatever it would take to get the job done.” TR 33, 34, 35.

Mr. Bowen testified that he spoke with Claimant over a dozen times during the six-week war. He stated that Claimant was instructed to call and speak directly to him concerning the conditions there. Mr. Bowen testified that during the Gulf War, Claimant and other tech reps recounted activity in the area including scud missile attacks and oil fire smoke. He stated that they “couldn’t believe the extent of the smoke in the area, how black the sky had turned.” Mr. Bowen testified that he could not recall discussing the PB pills or the oil smoke conditions with Claimant specifically. He stated that he did recall Claimant relating the incidence of scud missile attacks in his area. TR 34-36.

Mr. Bowen testified that he was terminated by Respondent because he exceeded his authority by releasing information to a Bell service center without authorization. He stated that he was not aware whether the disclosure had any consequences to Respondent. Mr. Bowen testified that he did not challenge his termination and is now a self-employed consultant. He stated that Claimant requested he testify as to the facts relating to Desert Storm occurring during his employment with Respondent. TR 39-42.

Karl Bruce Lane

Karl Lane testified that he was in the 101st Airborne and served in Vietnam. Claimant stated that he was not injured or exposed to Agent Orange during the conflict. Claimant testified that he has an associate degree in Aeronautics from Sacramento City College and additional training from Florissant Valley College in the AG-64 Apache helicopter. TR 43-47.

Claimant testified that he was hired by Respondent in 1988 to support another representative in the Persian Gulf because of this airframe expertise and his electronics background. Claimant stated that during his 1988 through 1990 tenure in the Gulf with Respondent, he did not have problems with short-term working memory loss, irritability, skin rashes, sleep dysfunction, chronic fatigue, depression, impotence, numbness, clumsiness, or cancer. He stated that prior to the Gulf War he considered himself in excellent health. Claimant testified that he had a family history of colon cancer including his father’s diagnosis in his late 50s or early 60s; his sister’s diagnosis at 38 or 39; and his brother’s diagnosis at 22. He stated these family members were diagnosed with a very slow growing cancer unlike his which was a poorly differentiated Dukes 3C. He stated that his family history precipitated his taking preventive measures including an annual colonoscopy, even though he was advised by his doctor that a colonoscopy every three years was sufficient. Claimant testified that he was told that he did not have to begin to have colonoscopies until he was in his fifties. He stated that he had a colonoscopy in March 1990 and did not have another until January 1992 because he was preparing to move. He stated that he did not fear colon cancer, but avoided carcinogens to the extent possible. TR 50-58, 140, 141, 144-146.

Claimant testified that he was not given a physical prior to going to the Gulf although he did have a physical at that time with Dr. Wiltse. He stated that, before leaving for the Gulf, he was inoculated for smallpox and tetanus and had an AIDS test. He added that after arriving in the Gulf

he was inoculated against anthrax and botulism toxoid and was given packets of twenty-one pyridostigmine bromide (PB) pills which were to be taken three a day for seven days. He added that he took more than two packets of PB during his stay in the Gulf. Claimant testified that Major B.J. Robinson, his immediate supervisor on the ground, advised in very strong terms that they take the PB. TR 59, 60, 63, 69.

Claimant testified that his main base of operations during the Gulf War was the Holiday Inn in Jabayl. As the ground war approached he moved toward Tanajib, just south of Al Kafji where the Iraqis invaded Saudi Arabia. He stated that he put 28,000 miles on his vehicle traveling to Bahrain, the Army repair depot in Damman, and Dharan. Claimant stated that he made numerous trips towards the front, Tanajib, Al Mashad, to aid ground forces and recover downed aircraft. He stated that the Marine helicopters he supported deployed forward on the first day of the war. Claimant testified that he slept in tents with his units. He stated that he was in the theater until March 13, 1991. TR 63-65.

Claimant testified that he was not as concerned about chemical weapons as he was about explosives in the area. He stated that the refineries and the ammonia plants could result in an explosion that would “have been like a mini nuke.” Claimant testified that this fear was a constant source of stress. He stated that on the 19th or 20th of January 1991 an explosion necessitated donning the gas mask and the full protective suit. Claimant stated that because he was asleep on his “good ear” he did not react to the explosion.² He stated that the British and Canadian chemical alarms went off when chemical weapons facilities were being bombed. Claimant testified that he was also exposed to oil fire smoke beginning February 20, 1991. He stated that the smoke was so dense with particulates that while driving, one had to stop to clear the windshield and the sand was black from oil residue. TR 68, 73, 74.

Claimant testified that he was never counseled to refrain from venturing near the tanks hit by depleted uranium mines because of the danger of depleted uranium dust. He stated that he tested positive for depleted uranium, a carcinogen. TR 76, 78, 80.

Claimant testified that he had never been criticized for an inability to stay on point prior to the Gulf War. He stated that his work record illustrates that he advanced steadily in his job. TR 67.

Claimant testified that DEET was sprayed on any exposed area of the body to repel sand fleas and gnats. He stated that he wore fatigues a majority of the time which allowed exposure of his arms, neck, and waist. Claimant testified that the temperature ranged from fifty degrees centigrade during the day to approximately seventeen degrees centigrade at night. TR 69-72.

Claimant testified that documentation supports that there was a constant, imminent threat of gas attack. He stated that he was issued a gas mask and a chemical protective suit. Claimant testified that he did not have cause to use the protective suit although he did utilize the gas mask ten to fifteen

²Claimant suffers from a congenitally closed ear. TR 77.

times in response to chemical alarms or individual notice. Claimant testified that he worked on helicopters that flew in areas where the chemical facilities were bombed. He stated that he was in Kuwait on March 10, 1991 when the plume of nerve gas from Khamisiyah occurred. TR 61, 62, 78.

Claimant testified that he prepared a list of symptoms he has exhibited since the Gulf War with the aid of his wife, a nurse. He stated that since his return from the Gulf War he has suffered skin rashes that leave scars. Claimant testified that the rashes are exacerbated by exposure to petroleum products. He stated that the rashes affect his feet and cause extreme pain. Claimant testified that also he has presented with extreme sleep problems, irritability, impotence, numbness, equilibrium problems, clumsiness, chronic fatigue, mental confusion, and short-term memory loss. Claimant testified that he has suffered with headaches and dizziness since the Gulf War. He stated that he also has problems with muscle weakness and pain, joint pain, and sensitivity to chemicals. Claimant testified that he used gloves and a mask in his attempt to work as a contractor because he reacted to the hydraulic fluids being used. TR 79, 81-85, 91, 93-95, 121, 123.

Claimant testified that he first learned of his cancer in January 1992 in South Africa when he started feeling ill and fatigued. He stated that he visited his doctor who sent him to a specialist who performed a colonoscopy and informed him that he had colon cancer. He added that he now wears an ileostomy bag as he could not maintain the "J" pouch.³ Claimant testified that he contracted hepatitis C from the blood transfusions received during this time. He stated that he is in the chronic stage of the disease. Claimant testified that he has had five major surgeries and thirteen one-day surgeries resulting in his missing approximately eight months of work. He added that he has not had a recurrence of the cancer. He stated that for the period of absence, Respondent stopped paying for his house overseas and his overseas bonus. Claimant testified that when he returned to the U.S. there was a period when he retained only 50% of his pay. He stated that he did not attribute his cancer to his exposure in the Gulf War because he did not realize that he was exposed to anything carcinogenic at that time. Claimant testified that he initially attributed his other symptoms to his moving across the world. He stated that he could relate his depression to his cancer, but could not relate his irritability, sleep dysfunction, or his memory or concentration problems to the same. TR 85-87, 92, 171, 172.

Claimant testified that he has paid for his own medical bills since the Gulf War. He stated that he wrote letters to the Secretary of Defense and his senator Senator Gramm because he became frustrated when he could not get proper medical care. TR 95-97.

Claimant testified that he was being treated by Dr. Didriksen for depression and she was counseling him and his wife on how to cope with the anger and stresses related to his illnesses. He stated that he underwent two complete days of neuropsychological testing by Dr. Didriksen. Claimant testified that he saw Respondent's physician, Dr. Romero, for thirty to forty-five minutes including the time that Dr. Romero was taking an outside call. TR 98-100.

³A "J" pouch is installed and sewn to the bottom of the anus. TR 86.

Claimant testified that he ceased working in early to mid-October 1998. He stated that after the war he remained with Respondent until September 4, 1997. Claimant testified that his irritability affected his work relationships, although he did try not to exhibit the same with customers. He stated that he had difficulty staying on task and would, therefore, take twice the normal time to complete a job. Claimant testified that in November 1994, he received a fax from fellow civil service workers that prompted civilian employees who had served in the Gulf to get a comprehensive clinical evaluation. He stated that he discussed this with his former boss, Dick Illingham, and requested an evaluation. Claimant testified that the request was made in a letter dated the 14th or 15th of January 1995. He stated that there were no hearings and his supervisor wanted him to “drop it.” He added that in September 1996 he retained an attorney to prosecute his claim against Respondent. Claimant testified that he was fired on September 3, 1997 after the first informal hearing before the district director. He added that he was in negotiations with ARAMCO when he was fired because he “could see what was going on.” TR 103-105, 128-130.

Claimant testified that after Steve Leohner was terminated he (Claimant) was told by Mr. Stravato not to speak to anyone concerning the termination. He stated that when someone called and inquired as to “what happened to Steve”, he would say he was fired without expounding. Claimant testified that he did speak to “one of the guys from Brazil” and they decided to contribute money to assist Mr. Leohner. He stated that he did not recall stating that Respondent had treated Mr. Leohner badly although he did believe that they had. Claimant testified that he used his own Internet service to send out e-mails to other reps to request assistance for Mr. Leohner. He stated that he did everything on his own time using his own resources, but had no intention to hide what he was doing. Claimant testified that he did not believe that he was fired because he did things his own way and because he did not put his expense sheets in on time. He stated that he believed that he was fired because he “pushed his suit” because he was told several times by Mr. Stravato to “back off” because it was jeopardizing his career. TR 135-139.

Claimant testified that he asked Dr. Marabel, his treating neurologist in Fort Worth, to send a letter to his attorney listing his symptoms and his opinion as to their cause. He stated that a previous report by Dr. Weiner in February or March 1994 was the first medical report supporting his claim that his symptoms were indicative Gulf War syndrome. TR 132, 133.

Claimant testified that after leaving Respondent he did contract work for American Aviation from October 1997 to February 1998. He stated that he was paid a gross salary of approximately \$1,000 every two weeks. He added that he was capable of inspecting an aircraft and determining if it needed maintenance or repair, but was incapable of performing many tasks due to his lack of upper body strength. Claimant testified that he left American Aviation because he believed their aircraft maintenance procedure was unsafe. He stated that he next worked for Maritime Aviation for three weeks where he was paid approximately \$1,500 every two weeks based on \$18 per hour and a seven-day-a-week, ten-hour day. He added that his duties involved removing coverings from the helicopters, checking the “levels”, and recovering the helicopters in the evening. Claimant testified he worked for Airplanes, Inc. from April through October of 1998 with a salary of \$7 per hour plus a per diem of \$11. He stated that he worked as little as twenty-four hours a week and as much as forty-eight hours. Claimant testified that he believed that he should not have been

working at that time because his condition affected his ability to perform optimally and, therefore, presented a safety issue. He stated that he left Airplanes, Inc. because of his health including problems with his feet and his skin. TR 105-111, 163-165, 167.

Claimant testified that he could not meet the requirements of a job description which included diagnosing and correcting trouble and modifying new and production electronic systems. He stated that he could definitely not meet the requirements of doing general maintenance on aircraft, nor could he carry out orders to execute specific repairs or maintenance on aircraft. Claimant testified that he would not work on aircraft because he would not put his license or anyone's life on the line because he knew he had a problem and wouldn't want to be in such a position of responsibility. He stated that his job with Respondent was in management and did not involve "turning wrenches." TR 177, 178.

Claimant testified that in 1992 he reported earnings of \$95,000 which included bonuses. He stated that in 1993 his W2 showed earnings of \$106,000. He added that he is presently incapable of earning an income because his body is now totally deteriorated. Claimant testified that, because of his deficiencies, he believes that he would endanger anyone on an aircraft on which he worked. He stated that the two accidents which occurred during his post-war tenure with Respondent would not have occurred if he were of the same ability as prior to the war because he would have been "sharp enough" to prevent the accidents. He stated that he relayed his belief to his supervisor, Mr. Stravato most recently in July or August 1997. Claimant testified that he would work until he exhausted himself to take his mind off the pain. TR 111-115.

Claimant testified that he did not feel that he had more autonomy in the field working overseas than he had working in the states. He stated that he returned to the U.S. in December 1993 as ordered by Mr. Stravato. Claimant testified that he preferred being overseas because he was reared overseas. He stated that when he returned in 1993 he took vacation time and had surgery in 1994 resulting in his being out from July 1994 until Christmas. He stated that on his return he volunteered to travel. Claimant testified that after 1995 he worked in the office. He stated that he was not unhappy with the move and still told people that he had the "best job at Bell Helicopter." Claimant testified that he was not able to properly perform his job within the eight hour day. He stated that, due to his deficiencies, he had to complete his assignments at home with the assistance of his wife. Claimant testified that he agreed with Mr. Stravato's assertion that he was technically very qualified because he was very knowledgeable in his area of expertise. TR 153-160.

Claimant testified that he did not believe that his entire personnel file was provided by Respondent. He stated he was rated a three (on a scale of five) by Mr. Stravato which he considered a bad rating because he had always rated a five when he was in the Gulf. Claimant testified that he did not believe that Mr. Stravato ever gave a five. TR 160, 161.

Claimant testified that his wife has a health plan at work, but that he is excluded because they concluded that his injuries were a result of a war. He stated that the same exclusion prohibited him from coverage under insurance provided by Airplanes, Inc. Claimant testified that most insurance companies and most life insurance companies specifically forbid the inclusion of such individuals. He

stated that he did file a claim against Respondent and Carrier. TR 168-170.

Leslie Lane

The parties stipulated to the fact that Leslie Lane, Claimant's spouse, would present testimony consistent with Claimant's, that she is a registered nurse, and that she is unaware of any reason for Claimant's symptoms other than the Gulf War. TR 180, 181.

Armand Stravato

Armand Stravato, Director for Commercial Field Support for Respondent since 1990, testified that he was employed by Respondent for thirty-seven years and currently supervised field support for commercial, international and foreign military. Mr. Stravato stated that he hired Claimant as a customer support representative subsequent to the Gulf War. He stated that it is company policy to hire from within the company and Claimant approached him for the position for which he was technically qualified. Mr. Stravato testified that he hired Claimant after receiving a recommendation from his prior immediate supervisor, Carl Davis. He stated that Claimant was first assigned to South Africa as a customer support representative representing the company in all aspects of technical support. Mr. Stravato testified that a representative must be licensed by the FAA to sign off on maintenance work on aircraft, although his position is advisory. He stated that Claimant's position mandated fiscal responsibility as a representative manages large amounts of the company's money. Mr. Stravato testified that Claimant was stationed in South Africa for two years including the date on which he was diagnosed with colon cancer. He stated that he recommended that Claimant return to the U.S., but Claimant chose to remain in South Africa. Mr. Stravato testified that Claimant was ordered to return to the U.S. because there was a problem with his excessive absences for an undefined period. He stated that he did not replace Claimant in South Africa. Mr. Stravato testified that technically Claimant was outstanding, but he did have problems with fiscal responsibility manifested by his tardiness with expense accounts and nonpayment of bills. He added that there was confusion concerning a sum of money put in Claimant's account for his medical bills which he was obligated to return. Mr. Stravato testified that Claimant could not enter the hospital for his colon surgery without paying the bill beforehand and the sum advanced was to cover the initial costs to be repaid later by Respondent's insurer. Mr. Stravato testified that he remained Claimant's supervisor on his return to the U.S. He stated that his salary on return to the U.S. was \$45 or \$50,000 when he returned, but did not include a housing allowance as it did overseas. Mr. Stravato testified that Claimant's W2 included an overseas bonus of 25%, housing allowance, rental car, and children's education. He stated that Claimant's 1992 and 1993 W2s would include the additions to his salary. Mr. Stravato testified that Claimant's duties in the Dallas/Fort Worth home office included assisting him, supporting field reps, traveling to "hot spots", and filling in for vacationing field reps. He stated that Claimant traveled two or three times a year for the three years he was assigned to the home office including trips to Lafayette, Louisiana and Canada. TR 184-200.

Mr. Stravato testified that from the time he hired Claimant he had problems consistently in the areas of administration and fiscal responsibility. He stated that he also had problems with Claimant's ability to complete a mission without being reminded. Mr. Stravato testified that he

questioned Claimant's honesty because when he repeated questions he received different answers. TR 201, 202.

Mr. Stravato testified that Claimant never spoke to him regarding chronic fatigue. He stated that Claimant was very active, very hyper and had to be told to slow down. Mr. Stravato testified that Claimant told him that he completed work at home, but did not include that he needed his wife's assistance. He stated that Claimant was irritable at times with fellow employees adding that Claimant's personality was very aggressive. Mr. Stravato testified that he did not find Claimant incapable of remembering, but could not say whether Claimant exhibited an inability to concentrate although he did leave a lot of tasks uncompleted. He stated that "Mr. Lane has the ability to go off in five ways at the same time and gets confused." TR 203-206.

Mr. Stravato testified that (he) Claimant did not complain about stress any more than any other employee. He could not recall if Claimant had complained about an inability to sleep. Mr. Stravato testified that he had a good relationship with Claimant, both business and personal, and had no ill feelings toward him concerning his job performance. He stated that he coached Claimant for two years to become a good representative and team player, but Claimant never seemed to take his advice. Mr. Stravato testified that when he disobeyed a direct order not to discuss the termination of another employee, he completed a memorandum to Claimant's file. He stated that when he took the memo to the personnel director, he recommended that Claimant be terminated for insubordination. Mr. Stravato testified that Claimant admitted in the presence of a witness that he lied to him relative to the solicitation to benefit Mr. Lerner. TR 206-212.

Mr. Stravato stated that he was not aware that Claimant filed a claim against Respondent while still employed. He was unaware that Claimant filed a claim against either Respondent or its carrier until he was informed by counsel two months prior to the current hearing. He stated that he was aware that Claimant had rashes and hepatitis. Mr. Stravato testified that Claimant brought a doctor's note to him stating that he was capable of traveling within a year to a year and a half prior to his dismissal. He stated that he did not believe that Claimant had physical problems performing his job. TR 214-217.

Mr. Stravato testified that he did not know Claimant prior to his returning from the Gulf War. He stated that he did not review Claimant's performance evaluations prior to testifying. Mr. Stravato testified that he gave annual performance evaluations because it is considered when determining salary increases. He stated that he gave Claimant threes on the evaluations. Mr. Stravato testified that he was not aware that Claimant received fives on his evaluations before the Gulf War, but would be surprised if he had received fives. He added that everyone evaluates differently and he doesn't give fives. Mr. Stravato testified that his memo of August 27, 1997 referenced Claimant's "forgetfulness" which he believed, along with his tardiness, was intentional. TR 219, 220, 222, 223.

Medical Evidence

William J. Rea, M. D.

Dr. William J. Rea, board certified in general surgery, cardiovascular surgery and environmental medicine, testified by deposition that he is director of the Environmental Health Center in Dallas. Dr. Rea testified that he has treated veterans of the Gulf War for toxic exposure and has testified before Congress on the issue of Gulf War illness. He stated that he has also treated Claimant for toxic exposure. CX-166 pp. 6-8, 45.

Dr. Rea testified that after Claimant manifested a positive Bromberg or tandem Bromberg, he ordered a computerized balance test with Dr. Martinez who specializes in balance studies. He stated that Dr. Martinez found Claimant's motor and sensory function tests to be abnormal. Dr. Rea testified that he then had Dr. Didriksen do brain mapping which exhibited toxic encephalopathy secondary to physical condition. Claimant also manifested poor coping ability and fatigue and deficiencies in tactual perception, motor strength speed, visual scanning, and tracking abilities. He stated that blood tests showed Claimant's blood contained toluene, 2-methylpentane, 3 methylpentane, and hexane which could have come from oil fires. Dr. Rea testified that the objective autonomic nervous system test showed nonspecific changes. He stated that an MRI of Claimant's brain was normal, but a SPECT type CAT scan established a classic pattern of toxicity, a salt and pepper pattern in the soft tissue of the temporal lobes. He added that, to his knowledge, there is no other cause for the salt and pepper pattern. Dr. Rea stated that Claimant also exhibited a lack of uniformity in coloration of the brain and unequal temporal lobe size. He stated that Claimant manifested all the criteria for neurotoxicity. Dr. Rea testified that Claimant's manifestations are compatible with Gulf War veterans. He stated that an additional test, a computerized thermograph which presented blocked regulation region in the brain was also compatible Claimant's problems. CX-166 pp. 9-12, 39.

Dr. Rea testified that Claimant's echocardiogram and stress test were normal as was his immune profile. He stated that Claimant reacted to phenol, xylene, and formaldehyde in objective double-blind provocation skin tests indicating sensitivity related to prior exposure to those chemicals which could be associated with oil well fires. He added that a majority of sensitive veterans were sensitive to the aforementioned three chemicals. Dr. Rea testified that Claimant also hypersensitivity to inhaled petroleum drive, ethanol, formaldehyde, toluene, xylene, and the pesticide organophosphate. He stated that Claimant also tested positive for depleted uranium which he believed to be a carcinogen. Dr. Rea testified that tests indicated that Claimant was genetically susceptible to organophosphates. He stated that the balance, the CAT, and skin challenge tests were all objective. CX-166 pp. 13-17, 20, 41.

Dr. Rea testified that Claimant had a colonoscopy in 1990 immediately prior to the Gulf War and another in 1992 which was positive for colon cancer. He stated that in all probability the exposure to depleted uranium and other carcinogens like mustard gas during the Gulf War triggered Claimant's cancer. He added that mild neuropsychiatric changes occur after exposure to even low doses of nerve agents. Changes include irritability, lack of concentration, memory problems, sleep disturbances, anxiety, depression, and problems with information processing and psycho motor tasks. Dr. Rea testified that records indicate that 15,000 Gulf War veterans have been diagnosed with

tumors, although there is currently no scientific study related to the tumors. Dr. Rea testified that Claimant's symptoms are compatible with those of other Gulf War veterans particularly the forty or fifty veterans he has examined. CX-166 pp. 17-20, 46, 47; CX-118.

Dr. Rea testified that Claimant's current deficits would impair his ability to supervise aircraft. He stated that Claimant's deficits are permanent and progressive. CX-166 pp. 20.

Dr. Rea testified that he is treating Claimant by adopting a program of massive avoidance of pollutants. He stated that experience has proven that if contaminated individuals can cleanse a massive amount of pollutants from their systems, they can recover to a degree. Dr. Rea testified that the other method utilized is the ingestion of nutrients which fuel the individual's detoxification system. He stated that he is also using heat therapy to mobilize toxins which are fat soluble and lipophilic and adhere to the body's fat cells and the nervous system. Dr. Rea testified that he is about to test Claimant for secondary sensitivities to foods, molds and pollens because many of these individuals will experience a "spreading phenomena" and will require allergy shots. He stated that they are also building immune boosters from Claimant's blood, a procedure developed at the Environmental Health Center and used with Gulf War veterans. CX-166 pp. 21, 22.

Dr. Rea testified that there are two types of afflicted Gulf War veterans those that become ill immediately and those that slowly degenerate. He stated that Claimant falls in the second category as do about half of the veterans. Dr. Rea testified that there is no typical duration of complaints, but about 60% of individuals in the second category return to normal after treatment. He stated that he did not believe Claimant had reached maximum medical improvement. Dr. Rea testified that he is not aware of any veterans diagnosed with colon cancer, but is aware of some diagnosed with Hepatitis C. CX-166 pp. 27-30.

Dr. Rea testified that he believed that Claimant was not capable of maintaining his position with Respondent due to his brain dysfunction, fatigue, and need to refrain from even minute exposure to chemicals to which he is sensitive. Dr. Res added that he based his diagnosis of brain dysfunction on the SPECT scan, the brain mapping by Dr. Didriksen, and numerous physical exams he has completed on Claimant. He stated that Claimant's brain toxicity engenders changes in function and flow manifested by Claimant's short-term memory loss, confusion, imbalance, headaches, sleep problems, and decreased attention and comprehension. Dr. Rea testified that Claimant would not be able effectively to solve a novel problem if presented with one by a customer. CX-166 pp. 31-33, 37.

Dr. Rea testified that Claimant's testing abnormal on two of six sensory balance tests indicates a severe impairment. He stated that Claimant also tested abnormal on motor sensory tests. Dr. Rea testified that Claimant's congenital ear abnormality was not balance related. CX-166 pp. 35, 36.

Dr. Rea testified that Claimant's condition has deteriorated over time because of exposure to low doses of toxins which, in sensitive individuals, gradually wears out the body's systems. He stated that the chemicals xylene, formaldehyde and phenol can be found in car exhausts, city air, degreasers,

press board, plywood, polyester clothes, carpets, synthetic fibers, foam. CX-166 pp. 38-40.

Dr. Rea testified that depleted uranium is deactivated uranium used to strengthen metals. He stated that when such a metal is struck forcefully the uranium is reactivated and can contaminate the surroundings. CX-166 pp. 42, 43.

Nancy Didriksen, Ph.D.

Dr. Nancy Didriksen, clinical health psychologist, testified that she has evaluated and treated individuals with environmentally induced illness since 1984. Dr. Didriksen stated that she has also taught a class in Environmental and Nutritional Influence on Behavior for seven years at the University of North Texas. CX-167 pp. 5-8.

Dr. Didriksen testified that she first examined Claimant on June 24, 1998 and completed a neuropsychological consultation on June 25, 1998. She stated that Claimant presented with varied neurocognitive dysfunctions including memory problems, decreased attention and concentration, slowed thinking, and difficulty with comprehension. Dr. Didriksen testified that she administered to Claimant the entire Halsted Raytan neuropsychological test battery for adults, in addition to supplementary tests, including the Wechsler Adult Intelligence Scale Revised (WAIS-R). The scores are necessary to derive the general neuropsychological deficit scale (GNDS). She stated that Claimant completed oral and written versions of the Symbol Digit Modalities Test, the Benton Visual Retention Test, the Third Edition of the Wechsler Memory Scale, the Bender Gestalt test, the Wide Range Achievement Test Revision, and the Comprehensive Neuropsychological Screen. Dr. Didriksen testified that Claimant also underwent personality testing to determine the impact of any brain dysfunction on personality function and to alert the examiner of personality problems which may influence neurocognitive function. She stated that she administered the test herself over a period of ten to 12 hours. Dr. Didriksen testified that it is difficult to determine the degree of impairment from an interview because individuals rely on skills they have used to compensate for their deficiencies. She stated that she did notice that she often had to repeat instructions to Claimant. Dr. Didriksen testified that Claimant attended during the interview fairly well, but was very circumstantial in his answers, constantly elaborating. She stated that this trait was consistent with the personality of a salesman or customer service representative, but Claimant's condition was exaggerated. CX-167 pp. 9, 10, 12, 58-60.

Dr. Didriksen testified that Claimant exhibited a normal variation among the three primary factors of the WAIS-R test. She stated that usually with neurotoxic exposure, damage is diffuse across the brain and, resultingly, there may not be a large discrepancy between the primary factors of the WAIS-R. Dr. Didriksen testified that she did not have an IQ for Claimant prior to the Gulf War. She added that although Claimant's IQ presented slightly above average, it does not necessarily represent normal functioning for Claimant. She stated that she requested Claimant to produce any documentation that would evidence above average functioning. Dr. Didriksen testified that Claimant produced a 1986 letter by the Director of Education, Department of the Army commending Claimant on being an excellent teacher and having the confidence of his superiors to take a "mission order and run with it." She stated that Claimant also presented letters of commendation for training programs

from Bell Helicopter and the Marine Corps. Dr. Didriksen testified that Claimant completed three years of college. She opined that Claimant's numerous commendations along with the fact that the average IQ of a college undergraduate is 115 leads to a reasonable assumption that Claimant had a higher than average IQ. CX-167 pp. 14-18.

Dr. Didriksen testified that Claimant tested 39, mild approaching moderate impairment, on the Halsted Raytan Battery which consists of a very comprehensive neuropsychological battery that yields a general neuropsychological deficit scale score indicating one's overall level of functioning.⁴ She stated that one subtest, the category test, which has the greatest significance for everyday functioning, is most sensitive to dysfunction.⁵ Dr. Didriksen testified that on this test Claimant fell in the severely impaired range with a score of 71, where 65 and above is severely impaired. She stated that the Halsted Raytan Battery is considered unparalleled in determining dysfunction. Dr. Didriksen testified that, when compared with individuals of the same education level, Claimant fell in the 16th and 12th percentiles on the impairment index and the category tests. She stated that she believed that this is inconsistent with Claimant's performance during and prior to the Gulf War. She added that Claimant's performance IQ fell below one percentile. Dr. Didriksen testified that Claimant was straightforward and cooperative and did not evidence malingering, putting forth his best effort. She stated that the fact that he scored above average on some of the subtests supported the belief that he was putting forth his best effort. Dr. Didriksen testified that the serial seven tested administered by Dr. Romero is a gross measure of mental status, but does not measure higher order functioning. CX-167 pp. 18-20, 22- 27.

Dr. Didriksen testified that Claimant was administered the Comprehensive Neuropsychological Screen, which looks at specific areas typically impaired in patients exposed to neurotoxins. She stated that Claimant again scored mild to moderate impairment, missing many of the items typically missed by patients neurotoxically exposed. Dr. Didriksen testified that Claimant also exhibited impairment on the Symbol Digit Modalities Test and the Benton Visual Modalities Test, which is included in the World Health Organization's core battery of tests for sensitivity for neurotoxic effects. She stated that Claimant also tested below average for his age group on the Wechsler Memory Scale which tests auditory and verbal memory in addition to attention and concentration. Dr. Didriksen testified that she believed the score Claimant exhibited on the Memory Scale was not consistent with Claimant's performance before and during the Gulf War. She stated that a memorandum from Claimant's superior referencing lack of timeliness in submitting reports to which Claimant stated that he had forgotten illustrates that at the time of that memo, August 1997, Claimant was having memory dysfunction. Dr. Didriksen testified that memory problems at work were reported by all patients post toxic exposure. She stated that such patients also do absent-

⁴Dr. Didriksen testified that the moderately impaired range begins at 41. CX-167 p. 18.

⁵Dr. Didriksen testified that the subtests measures abstract reasoning ability, concept formation, problem solving ability, judgment, and incidental memory. She stated that this test is much more indicative of the "real world" than the others. CX-167 p. 19.

minded things which have the potential for danger, ie. leaving machinery running, which tends to promote a “checking behavior.” CX-167 p. 27-35; RX-Q.

Dr. Didriksen testified that Claimant also measured impaired on the Bender Gestalt, an oral perceptual motor test, and the Wide Range Achievement Test (WRAT) which consists of academic functioning including reading, spelling, and arithmetic. She stated that Claimant scored at the high school level in reading (25th percentile) and sixth grade level in spelling (7th percentile) and arithmetic (9th percentile). Although Dr. Didriksen testified that Claimant had experienced some learning difficulties early in his history which could have interfered with the acquisition of basic skill, she stated that the aforementioned scores were below the expected based on Claimant’s performance prior to and during the Gulf War. Dr. Didriksen testified that Claimant’s lack of success on the math portions of the tests could be due to forgetting how to complete such problems particularly considering the prominence of the use of calculators. CX-167 pp. 35-37, 91-93.

Dr. Didriksen testified that Claimant was administered the Clinical Analysis Questionnaire as a diagnostic test for personality characteristics instead of the MMPI because historically chemically sensitive patients were incorrectly interpreted. She stated that Claimant had elevations on five of the seven depression scales. Dr. Didriksen testified that irritability is very common in individuals who experienced toxic exposure because certain toxic substances cross the blood brain barrier and cause chronic illness which causes crankiness. She stated that Claimant was perceived as being uncooperative and was reported as making negative comments about Bell Helicopter after the Gulf War which was inconsistent with his performance and receipt of commendations prior to the War. CX-167 pp. 37-39, 45-47; RX-W.

Dr. Didriksen testified that mild neuropsychiatric changes occur even on low dose exposure to nerve agents such as organophosphates. The effects include inability to concentrate, memory problems, sleep disturbances, anxiety, irritability, depression, and problems with information processing and psycho motor tasks. Dr. Didriksen testified that Claimant’s symptoms and test results are compatible with exposure to organophosphates. CX-167 pp. 40-42; CX-94.

Dr. Didriksen testified that Claimant, on two profile mood state tests, tested as having increased tension, depression, anger, and decreased vigor and activity. She stated that Claimant also completed the Adult Neuropsychological Questionnaire assessing neuropsychological functioning. Dr. Didriksen testified that although it does not have the consistency or validity checks inherent in the MMPI, it is effective as part of a psychological profile. She stated that the tests administered to Claimant presented consistent findings. CX-167 pp. 42-44, 47.

Dr. Didriksen testified that because of Claimant’s exposure to organophosphate pesticides, DETE, and mustard gas; ingestion of pyridostigmine bromide tablets; inoculations for anthrax and botulism toxin and because Claimant has no prior history of alcohol or drug abuse, or head injury she believed that Claimant’s neurocognitive deficits were caused by his exposure during the Gulf War. Dr. Didriksen stated that she has treated only five Gulf War patients, but has treated between 100 and 200 patients with exposure to pesticides. CX-167 pp. 48-50.

In response to Dr. Romero's query as to why Claimant could perform well on the more comprehensive WAIS-R batteries while performing poorly on batteries with a narrower scope, Dr. Dikriksen testified that the tests do not measure the same things. An individual can have a very normal IQ while exhibiting neuropsychological impairment. She stated that the consistency among similar tests established that Claimant was not malingering. Dr. Didriksen testified that generally malingerers have incomplete histories and test results are inconsistent or outrageous. She stated that her experience with this population also cued her to malingerers. Dr. Didriksen testified that Claimant's symptoms were compatible with those reported by Gulf War veterans as reported in the literature. She stated that Claimant is an individual who has learned to tough out all kinds of things. He has coped with significant amounts of physical pain associated with his cancer surgery. Dr. Didriksen testified that she has observed repeatedly that individuals suffering from toxic exposure cope with their dysfunctions until they no longer can. She stated that upon analysis of the areas of Claimant's dysfunction and the negative impact on Claimant's family, the toll the illness has taken becomes more evident. CX-167 pp. 53-55, 80-82.

Dr. Didriksen opined that Claimant should not continue to do the type of work he was doing because his deficits preclude the judgment and memory integral to even routine tasks and, therefore, present a safety problem. She stated that Claimant's memory difficulties, impaired executive functions, abstract reasoning, problems solving, decision making and judgment deficits all limit his ability to perform his job with Respondent. Dr. Didriksen added that Claimant's years of experience may carry him through if tasks are not novel, but opined that Claimant would decompensate when presented with a novel problem because he is significantly impaired. She stated that the degree of impairment is not usually manifested until "the stress is on." Dr. Didriksen testified that she could not determine how long Claimant's impairments existed, but added that they usually develop and worsen over time, but Claimant stated that he "wasn't the same when he returned to the United States after his Gulf War experience. She stated that Claimant's neurocognitive deficits are probably

permanent to some degree. Dr. Didriksen testified that she is not aware of any literature that links neurocognitive dysfunction with colon cancer or Hepatitis C. CX-167 pp.56, 57, 67, 83, 84.

Dr. Didriksen testified that Claimant did have a wealth of technical knowledge to which Mr. Strombano may have been referring in his memo of August 1997 when stating that Claimant was very qualified. She stated that Claimant's current position mandating him to wear office attire and to work in a building with other office personnel may be an element in Claimant's behavioral and relationship problems. Dr. Didriksen added that it would have to be discerned what weight should be assigned to those factors in terms of the degree of dysfunction that is evident by August 1997. She stated that the dysfunction present at that time is evident from the memo from Mr. Stravato which elucidated infractions, including a lack of timeliness in completing time sheets and reports, for which Claimant had never previously been written up. Dr. Didriksen noted that Claimant had been commended in the past by Mr. Stravato for his outstanding representation of Respondent under adverse conditions. CX-167 pp. 70-73, 75.

Dr. Didriksen testified that she submitted her bill to an insurance company for payment and

it was denied. She stated that Claimant paid the \$1,400.00 bill himself. CX-167 pp. 78, 79.

Dr. Didriksen testified that 10% to 15% of her practice is devoted to chronic fatigue patients. She stated that chronic fatigue is a multi-factorial illness which is diagnosed by a physician. Dr. Didriksen stated that chronic fatigue may present within months or years of exposure, and all Gulf War veterans have manifested the illness. She stated that Claimant requested an evaluation for Gulf War Syndrome in 1995. Dr. Didriksen testified that Claimant's fatigue was complicated by his cancer. CX-167 pp. 63-65.

Dr. Didriksen testified that the primary reason for the difference in her findings as opposed to Dr. Romero's were based on the comprehensiveness of her examination of Claimant. She stated that Claimant could influence the results of his tests but, in a comprehensive battery as that administered, he would have to be very sophisticated. Dr. Didriksen testified that individuals who are deliberately malingering usually "give out" resulting in a lack of consistency in their scores. She stated that in the case of Claimant, there was consistency and what he stated were his dysfunctions were identical to those measured. Dr. Didriksen stated that she would not have been able to determine "much of anything" from the brief evaluation administered by Dr. Romero. CX-167 pp. 93-95.

Jorge Romero M. D.

Dr. Jorge Romero, a board certified neurologist, testified by deposition that he administered a neurological exam to claimant on August 12, 1998. Dr. Romero testified that Claimant stated that he was asymptomatic prior to Desert Storm, but had been unwell since his return with complaints of fatigue; ataxia; vertigo; short-term memory problems; anxiety and irritability; sexual dysfunction; muscle aches and pains; numbness; pain in extremities; and difficulty in writing, reading, and

concentrating. He stated that Claimant had also admitted having colon cancer and hepatitis C, both diagnosed post Gulf War. RX-V pp. 13-17.

Dr. Romero testified that upon neurological examination, he found Claimant to be capable of insight and judgment, which are higher cognitive functions than memory and calculation. He stated that Claimant also did well with problem solving and calculations (i.e. seven plus eight, nineteen minus twelve) and was able to engage in fluent conversation with excellent comprehension. Dr. Romero testified that Claimant performed the serial seven test (repeatedly subtracting seven from one hundred), used to discern both calculation and attention span, well. He stated that Claimant was able to maintain the task without distraction. RX-V pp. 17-23.

Dr. Romero testified he used quick screening tests for motor and sensory skills including digital opposition and grip strength and observation of motor behavior. He stated that he did not recall how much direct testing he did with Claimant, but found his motor exam to be symmetrical, well coordinated, and without evidence of impairment. Dr. Romero testified that his overall finding was no neurological abnormality. RX-V pp. 23-25.

Dr. Romero testified that Dr. Marable first attributed Claimant's impotence to disc disease related an auto accident then altered that opinion to state that his impotence was related to his toxic exposure. He stated that he could not determine from Dr. Marable's report the basis for his altered opinion, but added that it could be because of a subsequent report by the Department of Defense in late 1996 or early 1997 admitting that large numbers of Gulf War veterans were exposed to low levels of chemical warfare agents. Dr. Romero testified that he found inconsistencies in Dr. Didriksen's report. Dr. Didriksen administered both the Wechsler Memory Scale which consists of five or six subtests which gauge different aspects of memory, short-term memory, long term memory, retention, and visual memory and the Wechsler Adult Intelligence Scale Revised which is a basic IQ test. Dr. Romero stated that Dr. Didriksen's findings that Claimant performed very well on the intelligence test while performing poorly on the memory tests is not consistent as some of the subparts of the intelligence test relate to memory. He stated that this brings into question the possibility of malingering by Claimant. Dr. Romero testified that based on his conversation with Claimant and his examination, he found no cognitive disability and, therefore, there is no treatment indicated. RX-V pp. 29-33, 46, 47.

Dr. Romero testified that he was not asserting that an individual with a high IQ could not suffer cognitive slowing after a toxic exposure, but did assert that if one with a high IQ was given an IQ test post toxic exposure and the IQ is preserved there is no deficit. He stated that he did not believe that Claimant's performance of the memory test was compatible with a his high score on the intelligence test. Dr. Romero opined that a short-term memory problem as exhibited by Claimant's test is incompatible with a high IQ. He stated that he was not aware of Claimant's IQ prior to the Gulf War, but could ascertain with some accuracy Claimant's "premorbid" IQ by comparing his verbal scores pre and post assault. RX-V pp. 34-37.

Dr. Romero testified that he had no special expertise in Gulf War illness or environmental medicine. He stated that he has seen two or three patients with organophosphate poisoning associated with the Vietnam War. Dr. Romero testified that he was not familiar with the recent federal law that identified thirty-three toxins to which Gulf War veterans were exposed. He stated that he was aware that veterans had some exposure to nerve gases and some antidotes such as pyridostigmine bromide. Dr. Romero testified that Claimant informed him that he received inoculations against anthrax, botulism toxin, and the nerve gas sarin. He stated that Claimant did refer to written notes during the examination to relate his experience, but did not read from them. Dr. Romero testified that he also examined Claimant's eyes and tested his gait by observing his walk. He stated that there were no written tests except for a request of Claimant to draw two intersecting pentagons. RX-V pp. 38-46.

Dr. Romero testified that there are no progressive chronic manifestations of organophosphate poisoning absent acute manifestations. He stated that he was not familiar with the literature positing that some individuals were more susceptible to organophosphates nor was he familiar with literature stating that pyridostigmine bromide could breach the blood-brain barrier when an individual is under stress. Dr. Romero testified that he had not seen the report of Dr. Clement Furlong of the University of Washington regarding Claimant's susceptibility to low level nerve gas and other

organophosphate exposure. He stated that he was not familiar with any of the literature on the effects of the synergistic reaction between pyridostigmine bromide and some pesticides. Dr. Romero testified that he was also not aware of a report of elevated levels of depleted uranium in Claimant, but was aware that depleted uranium is a toxin to which veterans were allegedly exposed in the Gulf War. He stated that he has not done any studies or had any special experience with depleted uranium. Dr. Romero testified that he was not familiar with the September 1998 Journal of the American Medical Association article regarding Gulf War veterans or the article in the Archives of Clinical Neuropsychology entitled Neuropsychology Correlates of Gulf War Syndrome. He stated that he was familiar with postural sway analysis of those exposed to toxins. He added that he did not do the sophisticated computerized test to determine Claimant's postural sway, but instead used the Bromberg test which is based on visual observation. Dr. Romero testified that he did review Claimant's SPECT scan which exhibited some abnormalities, but which he discounted because there was no differential diagnosis only a diagnosis of neurotoxic exposure. He stated that he has not studied Gulf War veterans, but did believe that veterans of all wars return with some ailments. Dr. Romero testified that he was not familiar with specific articles delineating the effects of exposure to nerve agents, but did know how to detect malfunctions through a valid neurologic examination, therefore, such articles were not important clinically. He stated that he did not test for chronic fatigue, irritability, difficulty in concentrating (except for speaking to him), or difficulty sleeping. Dr. Romero testified that he did not perform any objective tests such as an MRI, CAT scan, or EMG. He stated that Claimant was very cooperative and straightforward, but he had doubts about his truthfulness. Dr. Romero testified that based on his conversation with Claimant he was not convinced that all of his symptoms and complaints were real. He stated that he did not recall having to repeat instructions to Claimant. He added that the Wechsler test was used to quantify memory loss for research purposes and was no better or worse than the tests he used. RX-V pp. 49-67, 69, 72.

Dr. Romero testified that he charged the defense \$340 for Claimant's initial consultation, \$350 per hour for a review of the records, and \$600 per hour for the deposition time. He stated that he has never testified for a plaintiff in a civil case. Dr. Romero testified that five to ten percent of his income comes from testifying in civil cases for defendants. RX-V p. 48.

Barry Sanders, M. D.

Dr. Barry Sanders, board certified in internal medicine and gastroenterology, testified by deposition that he rarely testifies as an expert in litigations and initially saw Claimant as a second opinion. He stated that he sees patients with colon cancer and with chronic fatigue syndrome. Dr. Sanders testified that he took Claimant's history and performed a physical examination. He stated that Claimant presented with multiple complaints including a history of colon cancer and hepatitis C. Dr. Sanders testified that on physical exam, other than manifestations related to the aforementioned illnesses, he found nothing extraordinary. He stated that one cannot tell from the designation of Duke's C how long the cancer had existed. Dr. Sanders testified that generally colon cancer develops slowly from a normal bowel, then a polyp (a benign tumor), and ultimately the polyp becomes malignant with the process extending over a ten year period. He stated that there are very unusual cases where a cancer may develop without an antecedent polyp, for example in patients who have

longstanding ulcerative colitis. RX-W pp. 9-16.

Dr. Sanders added that in some genetic forms of cancer, the evolution is more rapid mandating surveillance intervals of less than three years with some high risk groups tested annually. He stated that genetic factors include familial colonic polyposis and familial non-polyposis cancer syndromes. Dr. Sanders testified that relevant medical literature proposes that a familial colonic cancer is established when more than one or two generations of multiple cancers, occur usually with the victim under the age of fifty. In such cases there is a high risk of developing a cancer over a short period of time. He stated that Claimant's greatest risk factor was his family history which included a father, brother, and sister with colon cancer. Dr. Sanders testified that Claimant's history would concern a gastroenterologist who would recommend colonic surveillance approximately ten years prior to the onset of the earliest familial diagnosis with a colonoscopy every one or two years. Claimant's undergoing a colonoscopy in 1990 and then in 1992 was normal for someone with his genetic history. Dr. Sanders testified that a lesion may have gone undetected in the 1990 test, becoming more obvious in 1992. He stated the notation of nonspecific sigmoid mucosal inflammation on Claimant's 1990 exam was not significant. Dr. Sanders testified that Dr. Cook's notation in February 1993 noted histology showing involvement of the proximal nodes is also not significant. He stated that irrespective of his family history, Claimant is young to have experienced colon cancer. RX-W pp. 16-22.

Dr. Sanders testified that he did believe that Claimant is cured of his colon cancer and not disabled from it. He stated that Claimant presented with chronic hepatitis C which indicates elevated liver enzyme levels beyond six months associated with the hepatitis C virus, but that the possibility of a cure remains viable. The elevation of the liver enzymes, not the level of elevation is significant because any elevation indicates inflammation of the liver. Dr. Sanders testified that there is no objective test for chronic fatigue. He stated that Claimant's fatigue may be related to his hepatitis. Dr. Sanders testified that the average duration from infection with hepatitis C to cirrhosis is twenty years and it would be unusual for one to have significantly advanced liver disease after four years. He stated that only a liver biopsy could determine the extent of damage. RX-W pp. 24-30.

Dr. Sanders testified that radiation is a carcinogen. He stated that Claimant's history without sophisticated genetic testing, would not establish that he is more susceptible to cancer than the average individual. RX-W pp. 30-32.

Dr. Sanders testified that he was not an expert in Gulf War illnesses. He stated that he was familiar with the literature and government studies in only a "superficial, cursory way." RX-W p. 33.

Wynne M. Snoots, M. D.

Dr. Wynne Snoots, an orthopedic surgeon, examined Claimant on August 11, 1998 upon request by Carrier. Dr. Snoots stated in a letter that Claimant by history is being considered to have post Gulf War Syndrome. He opined that Claimant's musculoskeletal complaints and findings were consistent with an average individual of his age. RX-B pp.1,2.

Lawrence S. Weprin, M. D.

Dr. Lawrence Weprin, otolaryngologist, evaluated Claimant on July 27, 1998 finding only a congenital auricular atresia of the right ear. He stated that he found no additional problems relative to the ear, nose, and throat exam. RX-C.

G. John Pickens, M. D.

Dr. G. John Pickens evaluated Claimant on August 7, 1998 upon request of Carrier. Dr. Pickens' impression included a history of kidney stones, family history of prostate cancer, and erectile dysfunction. He stated that he could not determine whether Claimant's kidney stones and erectile dysfunction were secondary to chemical exposures in Desert Storm, but added that erectile dysfunction has been proposed due to Desert Storm Syndrome. RX-D pp. 1,2.

Jerrold M. Grodin, M. D.

Dr. Jerrold Grodin, a cardiologist, examined Claimant on September 14, 1998 at the request of Dr. Rea. Upon physical exam, Dr. Grodin opined that Claimant is in excellent cardiovascular health. RX-E p. 1.

Daniel M. Ingraham, M. D.

Dr. Daniel Ingraham, a dermatologist, examined Claimant on September 3, 1998 for a painful foot problem. Dr. Ingraham, upon physical exam, stated that Claimant had eczema related to fungus with secondary bacterial infection. Claimant was also examined by Dr. Ingraham's associate, Dr. Tho Nguyen who diagnosed hyperkeratosis and fine papules and vesicles on both palms. Dr. Ingraham opined that Claimant exhibited hand and foot eczema resulting in pain with walking and tenderness in his hands. He stated that the eruptions could be due to malabsorption of Zinc due to his bowel surgery. Dr. Ingraham included that he was not an expert on Gulf War Syndrome or skin findings associated with Hepatitis C. RX-H p. 1, 2.

Dr. Durakovic

In a missive dated October 19, 1998, Stella Gresham, research coordinator of the Uranium Project, writing for Dr. Durakovic stated that Claimant's specimen's indicated elevated levels of U-235 and U-238. She stated that such levels were compatible with contamination by Depleted Uranium. CX-161.

Dr. Theodore R. Simon, M. D.

Dr. Theodore Simon performed a SPECT scan on Claimant. In a letter dated June 24, 1998 Dr. Simon states that Claimant's observed "salt and Pepper" pattern with shunting of the soft tissues

and temporal asymmetry constitute part of a pattern which has been seen in patients with neurotoxic exposure. He added that the degree of involvement is mild. CX-11.

Charles D. Marable, M.D.

Dr. Charles Marable, a neurologist, treated Claimant for lumbar and cervical disc disease since December 1996. In a letter dated December 3, 1997, Dr. Marable opined that Claimant suffered from pyridostigmine poisoning or Gulf War syndrome. Dr. Marable references Claimant symptomatology as being indicative of syndrome 2, confusion and ataxia, the most serious of the three syndromes that constitute Gulf War illness. He requests that Claimant see a recognized expert of Gulf War syndrome. CX-5 p. 2, 3.

Other evidence

Concentra Managed Care, Inc.

A labor market survey of the Dallas, Texas area was conducted between October 12, 1998 and October 22, 1998 by Concentra Managed Care, Inc. The survey identified the following positions available:

1. EFW, Inc.; Jet Technician
2. Bombardier Business Jet Solutions; Aircraft Activity Analysis
3. Cragin Aviation Services; Aircraft Mechanic
4. Red Bird Airmotive; Aircraft Mechanic
5. Omni Flight Helicopters; Aircraft Mechanic
6. Aviation Management Group; Aircraft Mechanic
7. Millionair; Aircraft Mechanic; Aircraft Mechanic
8. Lockheed Martin Tactical Aircraft Systems; Specialist (Project Manager)
9. The Saber Group; Project Manager
10. Southwest Airlines Co.; Airframe and Power Plant Mechanic. RX-I.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon the Court's observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, the Court has been guided by the principles enunciated in Director, OWCP v. Maher Terminals, Inc., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, the Court may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on its own judgment to resolve factual disputes or conflicts in the evidence. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251, 28 BRBS

43 (1994).

I. Fact of Injury

To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between the work and harm. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his injury was causally related to his employment if he establishes that he suffered a physical injury or harm and that working conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. See Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989). An accidental injury occurs if something unexpectedly goes wrong within the human frame. An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee might have been. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (5th Cir. 1954). The claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980). However, the claimant must show the existence of working conditions which could have conceivably caused the harm alleged. See Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D.C. Cir. 1982).

Once Claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). The employer must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and employment or working conditions. Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982); Del Vecchio v. Bowers, 296 U.S. 280 (1935).

1. Claimant's Showing of a Harm

The first prong of Claimant's prima facie case requires him to establish the existence of a physical harm or injury. The Act defines an injury as the following:

accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as natural or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. § 902 (2).

Claimant alleges that he sustained exposure to toxic substances while employed by

Respondent during the Gulf War in Saudi Arabia and Kuwait from January 17, 1991 through March 14, 1991. This Court notes that the medical evidence presented establishes a harm. Prior to Claimant's service in the Gulf he was asymptomatic as evidenced by his physical examination in 1990. The testimony of Dr. William J. Rea, a specialist in environmental medical, established that Claimant suffers from symptoms which are compatible with those of Gulf War veterans who have been diagnosed with Gulf War illness. Dr. Rea noted that Claimant's SPECT scan established a classic pattern of neurotoxicity, a salt and pepper pattern in the soft tissue of the temporal lobes. Additionally, the Dr. Nancy Didriksen, clinical health psychologist, supports Dr. Rea's diagnosis. After evaluating Claimant's performance on the Halsted Raytan Battery, a comprehensive neuropsychological battery that yields a general neuropsychological deficit scale score indicating one's overall level of functioning, Dr. Didriksen opined that Claimant exhibited mild approaching moderate impairment. Dr. Romero, a neurologist chosen by Respondent to evaluate Claimant, found Claimant not to be impaired. Dr. Romero, who testified that he had no expertise in Gulf War illness or environmental medicine, rendered his diagnosis after performing a subjective neurological exam without additional objective testing. Thus, this Court gives greater weight to the findings of Drs. Rea and Didriksen which are based on more objective and comprehensive evaluations.

Claimant argues that his colon cancer was precipitated by his exposure to toxic chemicals during his employment with Respondent. Conversely, this Court finds that the evidence presented does not support such a determination. Claimant's family history establishes that Claimant was at high risk of colon cancer. Claimant's father, sister, and brother were all diagnosed with the disease prior to Claimant's diagnosis. Thus, this Court finds that Claimant's colon cancer was not caused by a work-related injury, and is, therefore, not compensable.

Thus, it is evident that Claimant has proven a harm as the medical evidence and comprehensive diagnostic studies reveal Claimant sustained an injury. This, in and of itself, is sufficient to meet the first prong of Claimant's prima facie case.

2. Claimant's Showing of a Work Accident

In order to invoke the Section 20(a) presumption, Claimant must show, by a preponderance of the evidence, the occurrence of an accident or the existence of working conditions which could have caused the harm. In the instant case it is uncontested that Claimant was employed by Respondent in Saudi Arabia and Kuwait during the Persian Gulf War and that he was stationed in contaminated areas. Evidence established that Claimant was issued pyridostigmine bromide antinerve gas pills and was exposed to pesticides, depleted uranium, and oil fire smoke during the war. Dr. Didriksen testified credibly that there is a reasonable medical probability that Claimant's neurocognitive deficits were caused by his exposure to the aforementioned agents. Additionally, Dr. Rea testified that Claimant's symptoms are compatible with those of other Gulf War veterans particularly the forty or fifty he has examined. Thus, this Court finds that Claimant has met his burden of proving that working conditions existed that could have caused the harm.

Furthermore, this Court finds that although Title XVI, of Division C, of Public Law 105-277, "Service Connection for Persian Gulf War Illnesses" does not directly relate to civilian defense

workers, it should be considered as an element in establishing Claimant's prima facie case.

Therefore, this Court finds that Claimant's exposures to toxic substances during his employment with Respondent in the Gulf War is the cause in fact of Claimant's multisystem chronic illness and is therefore compensable.

II. Nature and Extent of Disability

Disability under the Act means "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to either have no loss of wage earning capacity, a total loss, or a partial loss. The employee has the initial burden of proving total disability.

To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

Drs. Rea and Didriksen, Claimant's treating physicians, both testified that Claimant is not capable of returning to his regular employment with Respondent. Specifically, Dr. Rea testified that he believed that Claimant was not capable of maintaining his position with Respondent due to his brain dysfunction, fatigue, and need to refrain from even minute exposure to chemicals to which he is sensitive. Dr. Rea added that Claimant would be ineffectively in novel problem solving if presented with such by a customer. Dr. Didriksen, opined that Claimant could not return to his employment with Respondent because his deficits preclude the judgment and memory integral to even routine tasks, and, therefore, present a safety problem.

With respect to Claimant's ability to return to previous employment, this Court finds that Claimant is unable to return to his usual employment as a customer representative due to his work-related injury. Claimant has met this burden based upon the opinions of his treating physicians, Drs. Rea and Didriksen. Both found that Claimant would not be able to return to his previous employment. More, when examining Claimant's testimony with respect to the duties of a customer representative and the restrictions placed on Claimant, this Court notes that it is evident that Claimant was not able to return to his previous employment due to his work-related injury.

Accordingly, the Court finds that Claimant cannot return to his regular employment as a customer representative based upon the aforementioned medical opinions. Claimant has therefore established a prima facie case of temporary total disability as of September 4, 1997.

Suitable Alternative Employment / Partial Disability

Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

1. Suitable alternative employment October 7, 1997 through February 27, 1998.

For the period October 7, 1997 through February 27, 1998 Claimant did contract work for American Aviation earning approximately \$1,000 per two weeks. Therefore, Claimant was alternatively employed for this period and is, therefore, temporarily partially disabled for this period. Thus, Claimant's compensation is diminished by his earnings for the period.

2. Suitable alternative employment March 1998

For three weeks (3 weeks), Claimant was employed by Maritime Aviation earning \$1,500 per two weeks based on \$18 per hour and a seven-day-a-week, ten hour day. Therefore, Claimant was alternatively employed for this period and is, therefore, temporarily partially disabled for this period. Thus, Claimant's compensation is diminished by his earnings for the period.

3. Suitable alternative employment April 15, 1998 through October 15, 1998.

For the period April 15, 1998 through October 15, 1998 (28.4 weeks) Claimant was employed by Airplanes, Inc. from April through October 1998 earning \$7 per hour plus a per diem of \$11. Therefore, Claimant was alternatively employed for this period and is, therefore, temporarily partially disabled for this period. Thus, Claimant's compensation is diminished by his earnings for the period.

4. Suitable alternative employment post October 15, 1998.

Respondent relies on the labor market survey conducted by Concentra managed Care, Inc. from October 12, 1998 through October 22, 1998 in the Dallas, Texas area. Concentra's labor market survey demonstrated various job openings in the Dallas area. This Court finds that although

the survey includes positions for which Claimant has adequate technical skills, the identified positions would require Claimant to exercise diagnostic, management, and organizational skills which would be infeasible due to his neurocognitive impairments in judgment, performance of executive functions, abstract reasoning, problem solving and decision making resulting from his work-related injury. Additionally, Dr. Didriksen, Claimant's treating neuropsychologist, opined that novel tasks, with which Claimant would surely be faced in alternative employment, could cause Claimant to decompensate causing further increase in Claimant's deficiencies.

III. Section 48a

Section 48a of the LHWCA reads as follows:

It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. The discharge or refusal to employ a person who has been adjudicated to have filed a fraudulent claim for compensation is not a violation of this section. Any employer who violates this section shall be liable to a penalty of not less than \$1,000 or more than \$5,000, as may be determined by the deputy commissioner. All such penalties shall be paid to the deputy commissioner for deposit in the special fund as described in section 944 of this title, and if not paid may be recovered in a civil action brought in the appropriate United States district court. Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination: Provided, That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation. The employer alone and not his carrier shall be liable for such penalties and payments. Any provision in an insurance policy undertaking to relieve the employer from the liability for such penalties and payments shall be void.

33 U.S.C. § 948a.

Commission of a Discriminatory Act

For liability to attach under Section 48a, the employer must discriminate against the claimant because of the filing of a claim under the LHWCA, or testifying in a proceeding under the LHWCA. Buchanan v. Boh Bros. Constr. Co., 741 F.2d 750 (5th Cir. 1984)(claimant had no cause of action under Section 49 where his current employer discharged him due to a claim brought under the Jones Act against a former employer even though claimant was currently engaged in work under the

LHWCA); Gondolfi v. Mid-Gulf Stevedores, 621 F.2d 695, 697, 12 BRBS 394 (5th Cir. 1980) (claimant was discharged for reporting late to work without a proper excuse).

Such discrimination must be committed by an employer after the filing of a claim (or testifying) to properly trigger Section 48a protection. Geddes v. Director, OWCP, 851 F.2d 440, 443, 21 BRBS 103 (CRT) (D.C. Cir. 1988) (claimant was discharged after criticizing his employer at a public hearing).

Procedure and Burden of Proof

The ultimate burden of persuasion lies with the claimant in a Section 48a case. Martin v. General Dynamics Corp., Elec. Boat Div., 9 BRBS 836, 838 (1978). A claimant's burden of proof is less than that required in a normal civil action, i.e., less than a preponderance of the evidence. Doubtful questions of fact must be resolved in favor of a claimant. A claimant bringing a claim under Section 48a bears the burden of proof that an injured claimant bears when he seeks compensation under the LHWCA. Geddes v. Benefits Review Bd., 735 F.2d 1412, 1417, 16 BRBS 88 (CRT) (D.C. Cir. 1984).

In establishing a prima facie case under 48a, Claimant must prove that:

- (1) the employer committed a discriminatory act, and
- (2) The discriminatory act was motivated by animus against him because of his pursuit of the LHWCA claim.

The second prong of the test may be satisfied in a mixed motive situation, i.e., where discriminatory animus played some part in the discriminatory act. Geddes, 735 F.2d at 1415 (“[A]n employer who discriminates against an employee both because the employee filed a compensation claim and because of other, independent reasons nonetheless violates [S]ection 49.”) Williams v. Newport News Shipbuilding, 14 BRBS 300, 303 (1981) (“Although ‘customary’ harsh discharge policies are not alone a sufficient basis upon which to find a violation of Section 48a, the provision has been violated when termination was in part motivated by an employee’s pursuit of compensation.”).

Once a claimant has established his prima facie case of discrimination, the burden shifts to the employer to prove that its animus was not even partially motivated by the claimant’s exercise of his rights under the LHWCA. Geddes, 735 F.2d at 1417 (the employer is more likely than not to have greater access to the evidence on the particular issue than would the claimant); Rayner v. Maritime Terminals, Inc., 22 BRBS 5, 7; Jaros v. National Steel & Shipbuilding, Co., 21 BRBS 26, 29-30; Leon v. Todd Shipyards Corp., 21 BRBS 190, 192.

In deciding a Section 48a case, the judge must examine the circumstances surrounding the alleged discrimination. The circumstances of the discharge may be examined to determine whether animus may be inferred from the surrounding circumstances when determining whether the

employer's reasons for taking the discriminatory action are credible or merely pretext. See, e.g., Williams v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 300 (1981).

In the instant case, Claimant argues that he was terminated because he "pushed his suit" under the LHWCA, thus his termination was in violation of Section 48a. Claimant testified that he was counseled several times by Mr. Stravato, his supervisor, to "back off" because it was jeopardizing his career. Claimant was terminated by Respondent on September 3, 1997 after the filing of the claim and just after the first informal hearing before the district director.

Respondent argues that Claimant was terminated for insubordination and is, therefore, not entitled to disability compensation benefits. Mr. Stravato stated that he was not aware that Claimant had filed a claim against Respondent while still an employee. Mr. Stravato testified that Claimant disobeyed a direct order not to discuss the termination of another employee and was therefore terminated. There is no evidence of record of any documented prior infractions of company procedure or policy committed by Claimant. Additionally, while Mr. Stravato testified that Claimant had problems with tardy submission of expense accounts and payment of bills, he acknowledged that Claimant's technical knowledge was outstanding. Furthermore, evidence establishes that Claimant received a commendation for outstanding service from the Commanding General of the Marine Corps Air Wing for his "dedicated efforts and superb technical assistance" in the Gulf war, during which "he shared many hardships and difficulties, while making a real and significant contribution to aircraft readiness and combat effectiveness. The training and technical assistance that he provided was critical...". Also, Claimant was lauded by the head of Respondent's military support division for his "dedication, professionalism and expertise" which was "unprecedented."

The Court found Claimant's testimony straight-forward, generally unequivocal, and credible throughout the hearing. Specifically, this Court finds credible the testimony of Claimant stating that he was counseled by Mr. Stravato to relinquish his claim or jeopardize his position. Additionally, the proximate timing of the protected activity vis-a-vis the adverse action tends to support an inference that discriminatory animus played some part in the discriminatory act. Furthermore, the Court finds implausible Mr. Stravato's testimony that he had no knowledge of Claimant's action in this case until just prior to the hearing before this Court. In addition, this Court finds it dubious that Respondent would terminate Claimant, an admitted valued employee with outstanding technical expertise and commendations from both the Commanding General of the Marine Corps Air Wing and the head of Respondent's military support division, based solely on one act of noncompliance.

Thus, this Court finds that upon examination of the circumstances surrounding the alleged discrimination as evidenced in the record Claimant has established a prima facie case under 48a. Furthermore, Respondent has not met its burden of proving that its adverse personnel action was not motivated by Claimant's filing a claim under the Act. Therefore, Claimant has established by a preponderance of the evidence that Respondent unlawfully discharged him in violation of Section 48a.

As this Court does not find that Claimant was justifiably discharged for insubordination, Claimant's work related injury is compensable.

IV. Necessary and Reasonable Medical Expenses

Section 7(a) of the Act provides that:

(a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require.

33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'g 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary only where the claimant is seeking reimbursement for medical expenses already paid. The court held that the prior request requirement applies at all times. Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977).

Section 7(d)(2) of the Act provides in pertinent part that:

(2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the

interest of justice to do so.

33 U.S.C. § 907(d)(2).

The Court has found that Claimant established causation with respect to his multisystem chronic illness. Thus, Claimant is entitled to reasonable and necessary past and future compensable medical treatment associated with the work-related injury. However, as this Court has found that Claimant's colon cancer is not a work-related injury, any medical expenses related to that illness are not compensable.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability from September 4, 1997 through present, based on an average weekly wage of \$1,369.25 with the exclusion of the following periods⁶;

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from October 7, 1997 until February 27, 1998 weeks based on an average weekly wage of \$1,369.25 minus Claimant's wages of \$500 per week;

(3) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from March 9, 1998 until March 27, 1998 based on an average weekly wage of \$1,369.25 minus Claimant's wages of \$750 per week;

(4) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from April 15, 1998 until October 15, 1998 based on an average weekly wage of \$1,369.25 minus Claimant's wages of \$280 per week;

(5) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

(6) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

⁶The periods of employment and the wages earned are calculated according to the testimonial evidence presented by Claimant. TR 105-109.

(7) Employer/Carrier shall pay or reimburse Claimant for reasonable medical expenses, with interest in accordance with Section 1961, which resulted from the injury. See 33 U.S.C. §907.

(8) Employer/Carrier shall be fined \$5,000 for violating Section 48a. 33 U.S.C. § 948a.

(9) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

Entered this ____ day of _____, 1999, at Metairie, Louisiana.

JAMES W. KERR, JR.
Administrative Law Judge

JWK/cmh