Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge
Second Injury Fund only)

Injury No.: 99-151763

Employee: John E. Adams

Employer: Advanced Employment Concepts
a/k/a Traffic Control (Prior award)

Insurer: Reliance Insurance Co. (Prior award)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: Alleged August 31, 1999

Place and County of Accident: Alleged Phelps County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, heard oral argument, and considered the entire record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated June 6, 2005. The award and decision of Administrative Law Judge Leslie E. H. Brown is attached hereto solely for reference.

I. Preliminary Matters

The stipulations of the parties, issues in dispute and summary of the evidence were accurately recounted in the award issued by the administrative law judge and will not be repeated by the Commission unless special emphasis necessitates.

The administrative law judge awarded employee permanent total disability benefits from the Second Injury Fund in the weekly amount of $275.47 beginning October 30, 2003, for 280 weeks, and thereafter, for life, in the weekly amount of $578.48. The administrative law judge also concluded that the Second Injury Fund is subrogated to the rights of the employee, pursuant to the provisions of section 287.150 RSMo, and was entitled to credit on the award, as apportioned by the provisions of section 287.150 RSMo.

Employee filed an Application for Review with the Commission alleging the administrative law judge erred as to the following issues: (1) the commencement date determined in the award concerning the obligation of the Second Injury Fund to pay the employee permanent total disability benefits; (2) determining a greater amount of permanent partial disability attributable to the primary injury than was awarded the employee solely against the employer by a final award issued by the Division of Workers' Compensation (Division) dated June 24, 2002; and (3) the administrative law judge misinterpreted and misapplied the provisions of section 287.150 RSMo concerning the subrogation rights awarded the Second Injury Fund.

The Second Injury Fund also filed an Application for Review with the Commission alleging that the award issued by the administrative law judge was erroneous based on the following: (1) the finding by the administrative law judge that there was an actual and measurable disability at the time the primary injury was sustained which was of such seriousness as to constitute a hindrance or obstacle to employment or re-employment; (2) if the employee is deemed to be permanently and totally disabled, the competent and substantial evidence compels a finding that the primary work injury alone rendered employee permanently and totally disabled; (3) the award of permanent total disability against the Second Injury Fund is not supported by substantial and competent evidence and is against the overwhelming weight of the evidence; and (4) the administrative law judge erred in not admitting and

considering the medical report of Dr. Liss (Second Injury Fund Exhibit No. 3).

The Commission, as discussed below, finds there is a lack of competent and substantial evidence to base a finding of the presence of an actual and measurable disability at the time the work injury was sustained of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. Without such proof, the claim against the Second Injury Fund must fail. Consequently, the award against the Second Injury Fund issued by the administrative law judge is reversed. This finding is dispositive of the claim, and renders moot all other allegations of error in the two Applications for Review.

II. Second Injury Fund Liability: General Principles of Law

Section 287.220 RSMo provides that in a case of permanent total disability, both administrative law judges and the Commission must make three findings respecting disability: (1) there must be a determination of the percentage of disability resulting from the last injury standing alone; (2) there must be a finding that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or re-employment; and (3) there must be a determination that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

In considering Second Injury Fund liability, and paraphrasing the language of the Missouri Court of Appeals, Eastern District, in the case of *Messex v. Sachs Electric Company*, 989 S.W.2d 206, 214 (Mo. App. E.D. 1999), the Commission must decide if there is competent and substantial evidence of a preexisting disability and if there is a failure of proof, any claim against the fund must fail. As succinctly stated by the court at pages 214 and 215:

> "When a claim is made against the Fund for permanent disability compensation, statutory language and case law make it mandatory that the claimant provide evidence to support a finding, among other elements, that he had a preexisting permanent 'disability'. Section 287.220.1; *Leutzinger v. Treasurer of Missouri, Custodian of Second Injury Fund*, 895 S.W.2d 591 (Mo. App. E.D.1995) (emphasis added). The disability, whether known or unknown, must exist at the time the work-related injury was sustained *and* be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed. *Id.; Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo. App. E.D.1995).
>
> … Fund liability is only triggered by a finding of the presence of an actual and measurable disability at the time the work injury is sustained."

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury Fund liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). The employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing vs. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995). In the instant case, employee's sole alleged preexisting disability is Attention Deficit Disorder (ADD).

As developed below, the Commission cannot conclude or determine that employee's alleged preexisting disability, ADD, was an actual and measurable disability at the time the work injury was sustained of such seriousness as to constitute a hindrance or obstacle to employment or re-employment.

III. Facts

The employee attempted to provide evidence to support that he had a preexisting permanent disability, i.e., ADD, of such seriousness to constitute a hindrance or obstacle to employment or re-employment, through the testimony of the employee himself, as well as Dr. Stillings. The Commission finds the testimony of both employee and Dr. Stillings to be fraught with such inconsistencies and contradictions, of an irreconcilable nature, as to render their testimony unbelievable, unpersuasive and unconvincing to support a finding of a preexisting disability as alleged, ADD.

In summary fashion, concerning the issue of employee's alleged preexisting disability, ADD, employee offered the following trial testimony: prior to the primary injury occurring August 31, 1999, employee experienced trouble

concentrating, and his mind tended to wander; he left school after the tenth grade because of poor grades, trouble keeping up, falling in with the "wrong crowd" and "getting into a lot of trouble"; he was held back in the sixth grade due to problems with Math and Reading; and he did not remain at the same job for any extended time, rarely over two years, because he lacked interest in showing up for his job as scheduled, he would get side-tracked, and would not stay on task.

Employee's description at trial of the concentration problems and difficulty staying on task that he suffered before the August 31, 1999, work injury is in stark contrast to the picture of employee's abilities painted by the remainder of the evidence. In contrast to employee's trial testimony, the medical records reveal that before 2003, employee never mentioned to any treating medical professional, including psychiatrists, that he experienced trouble concentrating or that his mind tended to wander. Employee initially gave Dr. Stillings a history that the reason he left school was to support his pregnant girlfriend who subsequently gave birth to his child. They eventually married. Employee admitted that no employer ever fired him from any job. Rather, the principal reason employee gave for leaving his prior employment was to accept a better paying job in order to enhance his position in life. Employee passed his GED exam and his CDL exam on his first attempt. Prior to August 31, 1999, employee consistently denied any history of mental healthcare; denied any problems concerning his occupational history; never indicated any problems staying on task; and stated he was in good shape and able to perform heavy-duty labor without problems or limitations. The bulk of the evidence, as summarized in this paragraph, impeaches employee's description of the difficulties he experienced before his work injury.

Dr. Stillings is a board certified psychiatrist who was initially retained by the employer to render psychiatric treatment for the employee subsequent to the work-related accident occurring August 31, 1999. Dr. Stillings treated the employee at the employer's request through March 20, 2001. At no time during this time frame did Dr. Stillings diagnose ADD. The diagnosis of Dr. Stillings during this time frame was primary insomnia causally related to the primary injury and an occupational problem (employee was not working), not directly related to the accident.

During this period of treatment, Dr. Stillings subjected the employee to an MMPI and the interpretation of Dr. Stillings was that employee was prone to use his subjective complaints to assume the sick role and to manipulate for secondary gain. It appeared to Dr. Stillings that employee was exaggerating his pain complaints. Dr. Stillings found that employee's cognitive functions were intact; his verbal comprehension and concentration were good; his intellectual function was in the normal range; and his insight and judgment were both intact. Dr. Stillings found that employee could return to work but excluded his former employment. There was no diagnosis, discussion, or mention whatsoever of ADD or any ADD like symptoms during the period of treatment provided at the request of the employer.

An award on hearing was issued June 24, 2002, awarding the employee benefits from the employer. The claim against the Second Injury Fund remained open. Subsequently, employee returned to Dr. Stillings at the request of employee's attorney. Dr. Stillings began additional treatment at the employee's request that continued until approximately October 2003.

In 2003, Dr. Stillings rendered a new diagnosis, i.e., because of the August 31, 1999, work injury, the employee had a depressive disorder, chronic severe and unremitting, as well as a pain disorder. Dr. Stillings was of the opinion that these two conditions caused employee lack of concentration, inability to assimilate new information, inability to stay on task, depressed mood, sleep disturbances, poor concentration, anxiety, disinterest, fatigue, focus on pain complaints, rarely leaving his house, poor personal hygiene, inability to structure his day, inability to formulate goals, inability to develop plans to achieve goals, inability to implement plans efficiently or to initiate things in life, easily distracted and impairment of executive functioning from a cognitive standpoint.

In the spring of 2003, after treating employee off and on since the accident August 31, 1999, Dr. Stillings realized or came to the medical opinion that employee had preexisting ADD. Dr. Stillings stated that this diagnosis became obvious upon mental status examination and upon interviewing employee's girlfriend. This was also coupled with the fact that employee apparently could not stay on task.

In contrast to the direct testimony of Dr. Stillings, the Second Injury Fund brought out on cross-examination that although it was obvious in the spring of 2003 employee had pre-existing ADD, there was no such diagnosis or opinion between 1999 and 2003; Dr. Stillings had previously found that employee's cognitive functions were

intact, his verbal comprehension and concentration were good, his intellectual function was in the normal range and his insight and judgment were both intact; Dr. Stillings admitted that employee's conditions of depressive disorder, chronic severe and unremitting, as well as a pain disorder, overlapped with the symptomatology of ADD and were difficult to distinguish; Dr. Stillings admitted that an individual who has difficulty staying on task can also be a direct symptom of primary, severe, unremitting and chronic depressive disorder; Dr. Stillings further admitted that employee's girlfriend upon whom Dr. Stillings relied, met employee subsequent to the primary injury and was not able to furnish any information as to the employee's abilities of any nature prior to the work injury; Dr. Stillings did not converse with any of employee's teachers, parents or anyone who actually knew him in his younger years; Dr. Stillings did not rely on any school records; Dr. Stillings did not review any employment records; Dr. Stillings did not do any testing for ADD; Dr. Stillings opined that tests utilized for the diagnosis of ADD do not have validity scales; and Dr. Stillings admitted that while he was treating employee prior to 2003, in behest of the employer, he never made any mention of the employee being unable to stay on task nor was there a diagnosis of ADD.

Dr. Wetzel, a clinical psychologist, performed a records review at the request of the Second Injury Fund. Dr. Wetzel was requested to render an opinion as to whether or not he believed there was enough information contained solely in the records to support a diagnosis of ADD, and Dr. Wetzel felt there was not sufficient information to reach such a conclusion. Dr. Wetzel testified that problems with controls of attention are seen in depression and many other disorders besides ADD, and there was nothing in the records he reviewed suggesting that employee's attention problems were particularly associated with ADD as opposed to his depression.

Dr. Wetzel stated that to diagnose ADD in an adult a clinician attempts to get information about the individual, including conversing with the individual's parents, among others. Dr. Wetzel, who was in charge of the Washington University's psychological assessment laboratory for a number of years, testified that there are several tests that help in the diagnoses of ADD, and some of them do have validity scales. Dr. Wetzel testified there is an overlap between the symptoms of a major depression, pain disorder and ADD.

IV. Findings of Fact and Conclusions of Law

The Commission does not find the testimony of the employee and Dr. Stillings credible or convincing, to base a finding that employee had a preexisting disability as alleged, ADD. The Commission finds the trial testimony of both to be in apparent anticipation of litigation, as it was fraught with inconsistencies and contradictions, rendering the testimony of each witness lacking in credibility and unreliable to base any finding, determination or conclusion that employee had a preexisting permanent disability constituting a hindrance or obstacle to employment or re-employment, i.e., ADD.

As discussed above, employee's trial testimony and assertions that prior to the work injury on August 31, 1999, he had trouble concentrating and staying on task and his mind tended to wander were all impeached and unsupported by the evidence. Employee's testimony at trial, in apparent anticipation of the instant litigation, is not reliable, and is not probative in determining whether or not employee had a preexisting disability as alleged, ADD.

The Commission also does not find the testimony of Dr. Stillings credible or reliable to base a finding and conclusion that employee had a preexisting permanent disability, ADD, which was of such seriousness to constitute a hindrance or obstacle to employment or re-employment. In the preceding section, we pointed out the stark contrasts between Dr. Stillings' impressions and diagnoses during his first period of treatment of employee (August 1999 through March 2001) and his second period of treatment of employee beginning in 2003. Dr. Stillings testified that in 2003, after performing a mental status examination and speaking with employee's girlfriend, employee's ADD became obvious. The Commission finds this testimony somewhat disingenuous due to the fact that Dr. Stillings used the word obvious when in fact he had been treating employee for more than three years when the condition became "obvious"; and employee's girlfriend at that time had no knowledge whatsoever of employee's history prior to the accident occurring August 31, 1999.

Dr. Stillings relied heavily on his belief that employee was unable to stay on task to support his diagnosis of ADD. During Dr. Stillings' first period of treatment, he specifically noted that employee's cognitive functions were intact, his verbal comprehension and concentration were good, and his intellectual function was in the normal range; and he never mentioned it was obvious to him that employee was unable to stay on task. The Commission simply

does not accept a diagnosis based upon Dr. Stillings' newfound belief.

Finally, Dr. Stillings' testimony is rendered unpersuasive because he did not take any affirmative steps to support his diagnosis of ADD. Dr. Stillings did not converse with employee's teachers; Dr. Stillings did not converse with employee's parents or anyone who actually knew employee in his younger years; Dr. Stillings did not rely on any school records; Dr. Stillings did not rely on nor did Dr. Stillings review any employment records; and as mentioned above, Dr. Stillings performed no testing in order to confirm his clinical diagnosis of ADD. The Commission finds Dr. Stillings did not substantiate his trial testimony.
In contrast, the Commission finds the testimony of Dr. Wetzel and his opinions to be probative, credible and reliable. Dr. Wetzel described what a practitioner generally does in order to diagnose ADD in an adult, which involves interviewing not only the individual, but also the individual's parents, as well as performing some tests that have validity scales.

As mentioned previously, fund liability is only triggered by a finding of the presence of an actual and measurable disability at the time the work injury is sustained. See *Messex*, supra. In the instant case, there is a lack of substantial, competent, and reliable evidence to support a finding that employee had a preexisting permanent disability of ADD which was a measurable disability at the time the work injury was sustained of such seriousness as to constitute a hindrance or obstacle to employment or re-employment.

The credible evidence consistently supports a finding that employee never had any problems, complaints, limitations, symptoms or indications of ADD up to and at the time of the primary injury occurring August 31, 1999. Due to this lack of proof of any measurable preexisting disability at the time of the primary injury, the Second Injury Fund cannot be liable for benefits.

V. Conclusion

The instant record is devoid of substantial and competent evidence providing some evidence to support a finding and determination that employee had a disability prior to the work injury sustained August 31, 1999. Due to this lack of proof, the instant claim against the Second Injury Fund must fail.

The Commission concludes that the Second Injury Fund has no liability on account of this injury.

Due to the conclusion there is no Second Injury Fund liability on account of this injury, all remaining issues are moot.

Given at Jefferson City, State of Missouri, this 19th day of June 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

_____
Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

_____
Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon

my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified.

The award and decision of the administrative law judge finding that employee is entitled to compensation from the Second Injury Fund is supported by competent and substantial evidence and should be affirmed.

The testimony of Dr. Stillings is the most credible, persuasive, and worthy of belief. Dr. Stillings treated employee from 1999 through the time of trial. Contrary to the decision of the majority, Dr. Stillings relied upon records from employee's school years in reaching his diagnosis of ADD. Dr. Stillings described the records he reviewed and explained why they supported his diagnosis. Dr. Stillings pointed out periods when employee dropped out or school or earned failing and incomplete grades. Dr. Stillings explained that individuals with severe ADD have significant impairment in learning.

The administrative law judge was correct in finding that employee suffered from the actual and measurable disability of attention deficit disorder that was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment. As such, the award against the Second Injury Fund for permanent total disability benefits should stand.

I do not believe Section 287.250 RSMo grants the administrative law judge or this Commission the authority to determine the subrogation interest of the Second Injury Fund. In *Cole v. Morris*, 409 S.W.2d 668 (Mo. 1966), the Missouri Supreme Court acknowledged that the Second Injury Fund is not entitled to subrogation under the Workers' Compensation Law.

> If we are confined to the subrogation section of the statutes (§ 287.150) for authority for crediting the Fund with the amount recovered by respondent from the third party, then obviously the Fund is not entitled to the credit…Subrogation is founded on principles of justice and equity, and its operation is governed by principles of equity.

Cole,409 S.W.2d at 669-670.

The Supreme Court went on to exercise its equitable powers to find the Second Injury Fund was entitled to a credit in *Cole*. We have no equitable powers so we are confined to the subrogation section of the statutes. "A cardinal principle of all administrative law cases is that an administrative tribunal is a creature of statute and exercises only that authority invested by legislative enactment. " *Farmer v. Barlow Truck Lines*, 979 S.W.2d 169 (Mo. banc 1998).

In any event, the subrogation or credit due the Second Injury Fund as calculated by the administrative law judge is excessive. The administrative law judge overstated the amount employee received under the settlement. The administrative law judge was of the misunderstanding that through the settlement employee received $107,000 cash plus an annuity paying $392.02 per month. In fact, the annuity was purchased with $75,000 taken from the $107,000.

I respectfully dissent from the decision of the majority of the Commission reversing the award of permanent total disability benefits against the Second Injury Fund.

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John J. Hickey, Member

AWARD

Employee: John E. Adams

Injury No. 99-151763

Dependents: N/A

Before the
DIVISION OF WORKERS' COMPENSATION

Employer: Advanced Employment Concepts

Additional Party: N/A

Insurer: Reliance Insurance Company

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: JAK/df

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: 8-31-99
5. State location where accident occurred or occupational disease was contracted: Phelps County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Driving company truck at job site on interstate highway when struck from behind by tractor-trailer truck.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: neck, back, psychiatric problems
14. Nature and extent of any permanent disability: 25% BAW re: back & neck; 25% BAW re: psych
15. Compensation paid to-date for temporary disability: $11,569.40
16. Value necessary medical aid paid to date by employer/insurer? $10,607.00
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: $919.24
19. Weekly compensation rate: $578.48/$303.01
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None

18 weeks of temporary total disability @ $578.48 = 10,412.64 less 3 wk credit for unemployment
Net due $8677.20

220 weeks of permanent partial disability from Employer $66,662.20

0 weeks of disfigurement from Employer

0 Permanent total disability benefits from Employer

22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
0 weekly differential () payable by SIF for weeks beginning
and, thereafter, for Claimant's lifetime

TOTAL: $75,339.40

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Attorney Ray B. Marglous

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John E. Adams

Injury No: 99-151763

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Advanced Employment Concepts

Additional Party: N/A

Insurer: Reliance Insurance Company

Checked by: JAK/df

STIPULATIONS

The parties stipulated to the following:

1. The claimant sustained an accident and injury arising out of and in the course of his employment on or about August 31, 1999 in Franklin County, Missouri.
2. The employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law.
3. The employer's liability was insured by Reliance Insurance Group.
4. The employer had notice of the injury and a claim for compensation was filed within the time prescribed by law.
5. The employee's average weekly wage was $919.24 and the rate for temporary total disability benefits was $578.48.
6. The employer has paid temporary total disability benefits totaling $11,569.40 covering a period of 20 weeks.

7. The employer has paid medical benefits to date in the amount of $10,607.00.

ISSUES

1. Is Employee entitled to additional Temporary Total Disability, and if so, for what period and amount?
2. Is Employee entitled to Permanent Partial Disability, and if so, what is the nature and extent of that disability?
3. Is Employee entitled to future medical treatment provided at the expense of Employer?

EXHIBITS

The Claimant offered the following exhibits, which were admitted into evidence:

Exhibit A: Medical Report of Dr. Schlafly dated June 26, 2001
Exhibit A1: Medical Report of Dr. Schlafly dated July 23, 2001
Exhibit B: Medical Report of Dr. Liss dated March 19, 2001
Exhibit C: M.R.I. of the Lumbar Spine from St. John's Medical Center & M.R.I. of the Cervical Spine from St. John's Medical Center dated November 20, 1999.
Exhibit D: Medical Records From Phelps County Regional Medical Center
Exhibit E: Medical Records From S.S.M. Rehabilitation Center

The Employer/Insurer offered the following exhibits, which were admitted into evidence

Exhibit 1: Medical Records From Dr. Stronsky.
Exhibit 2: Medical Records From Dr. Stillings

FINDINGS OF FACT

In addition to the medical records admitted as exhibits, the only evidence offered at hearing was the live testimonyof the claimant.

The Claimant, John E. Adams, is a 32-year-old Caucasian male born in Kirkwood, Missouri, on May 17, 1966. He testified that he is a divorced father of three who completed the eleventh grade and obtained a G.E.D., but has had no formal education since he left school. Claimant first worked as an auto mechanic, and then in the construction field as a laborer. In 1987 he became an over-the-road truck driver. Claimant drove trucks until 1993 when he returned to working as a laborer. He worked as a laborer in construction until he obtained employment with Traffic Control, Inc. in June 1999. Claimant worked for Traffic Control, Inc. until his work-related accident of August 31, 1999. He has not worked since that time except for approximately 15 days when he helped a friend at a restaurant.

Claimant testified that he injured his neck, back, and suffers from psychiatric problems as a result of the accident on August 31, 1999. On that day Claimant was driving a truck as part of his job performing highway construction on U.S. Interstate 44 in Phelps County, Missouri. The truck driven by Claimant was equipped with a flashing yellow arrow directing traffic around obstacles including vehicles and workers performing highway repairs on the roadway. Claimant drove the truck to protect co-workers marking the center lane of the highway.

Mr. Adams testified that on the day of the accident an 18-wheeler tanker truck filled with gasoline ignored the signs and warnings, drove into a closed portion of the road, and ran into the rear of the truck driven by the Claimant at a rate of speed exceeding 55 M.P.H. The force of the impact pushed Claimant's truck forward 75 – 100 feet causing him to hit the truck in front of him. Claimant's truck turned over on the highway and rolled into a ditch causing his injures. Claimant crawled out of the window of his truck before flames engulfed it. There were no seatbelts in the Claimant's truck. Immediately following the impact, the 18-wheeler tanker truck exploded, and Claimant watched and heard the driver scream as he burned

to death while trapped in the cab of the tractor-trailer.

Claimant testified that he does not recall many of the details but understands that following the accident he was taken to Phelps County Regional Medical Center in Rolla, Missouri. His primary complaints involved pain in his low back, pelvis, right leg, neck, and head with headaches. X-rays were taken of Claimant's pelvis, cervical spine, lumbar spine, and right leg. The emergency room physician instructed Claimant not to return to work for the following two days. He was given Motrin and pain pills and advised to see his employer's doctors. (Claimant's Exhibit D).

Mr. Adams testified he was referred by his employer/insurer to Dr. David L. Stronsky at the St. Louis Orthopedic Institute. During Claimant's first visit with Dr. Stronsky on September 15, 1999 he complained of pain and stiffness to his neck and low back with radiating pain into his legs. Claimant stated that he was unable to sit, cross his legs, or put on his shoes. Dr. Stronsky's initial diagnosis was a low-back and cervical strain associated with muscle spasms. Also at this initial visit Dr. Stronsky opined Claimant's range of motion in his neck was limited by 15%. X-rays of Claimant's spine revealed a narrowing of the L5-S1 disc and Claimant was told not to work and to start physical therapy. He referred Claimant to physical therapy at SSM. (Employer/Insurer Exhibit 1).

At a follow-up visit on October 13, 1999 Dr. Stronsky noted Claimant would benefit from physical therapy to his neck as well as his back, and he prescribed additional treatments. Claimant received physical therapy through November 9, 1999, when the physical therapist determined treatment would no longer improve Claimant's condition. (Claimant's Exhibit E).

On November 10, 1999 noting that Claimant still suffered severe pain, Dr. Stronsky prescribed pain pills and ordered an MRI of the cervical and lumbar spine. (Employer/Exhibit 1).

The MRI revealed a disk protrusion at L4-L5 and degenerative disk disease at L5-S1 and a disk bulge at C5-C6 (Claimant's Exhibit C). On December 20, 1999, which was Claimant's last visit with Dr. Stronsky, the physician conducted a rating and final evaluation of Claimant on behalf of the employer. The doctor opined Claimant had a 5% permanent partial disability to the body as a whole referable to the back injury defined by the Guide to Evaluation of Permanent Impairment of the American Medical Association 4th Edition. He noted Claimant was able to return to work from an orthopedic standpoint, but he would defer to Dr. Stillings as to whether or not Claimant was psychologically ready to return to work. Dr. Stronsky prescribed Naprelan to ease Claimant's pain. (Employer/Insurer Exhibit 1).

As noted, Dr. Stronsky referred Claimant to SSM Rehabilitation for physical therapy. Claimant had no previous physical therapy and no previous back injury. The initial assessment noted Claimant had constant pain, tingling in the legs, and some cramping. Among the goals were to improve Claimant's pain, improve his lumbar extension, and improve his posture. Treatment consisted of joint mobility, stretching, strengthening, and heat. On November 9, 1999 treatment was ended when the therapist noted the goals have not been met due to Claimant's poor response to the physical therapy. (Claimant's Exhibit E).

On November 20, 1999 Claimant underwent an MRI of the lumbar and cervical spine at St. John's Mercy Medical Center. The MRI of the lumbar spine revealed disk space narrowing at the L5-S1 level, and a disk bulge at the L4-5 level. The MRI of the cervical spine revealed a prominent spur projecting into the neural foramen at the C4-5 level and a disk bulging at the C5-6 level and at the C6-7 level. (Claimant's Exhibit C).

Claimant was then referred by the employer/insurer to Dr. Stillings for a psychiatric evaluation. Dr. Stronsky stated Claimant needed psychiatric treatment. Claimant's psychological complaints included insomnia, nightmares of the accident scene, nightmares of the driver screaming, flashbacks of the flames, mood problems, a loss of concentration, and a fear of returning to work. Dr. Stillings opined Claimant had adjustment disorder associated with the work-related accident and would benefit from psychiatric treatment and medication.

Dr. Stillings treated Claimant on a regular appointment basis from December 10, 1999 for several months and noted improvement in attitude and sleep disturbances until April 26, 2000. At this visit the doctor noted that Mr. Adams had a set back where he was overwhelmed with anxiety when he attempted to return to work. Medication was increased, psychotherapy reinstituted along with plans to desensitize himself to the work environment with a gradual return to the work place.

As to the next office visit on May 10, 2000 Dr. Stillings noted that the Claimant experienced extreme anxiety on three occasions when he returned to the work place. He noted Claimant would be unable to return to his former job from a psychiatric standpoint. Dr. Stillings noted that he would see Mr. Adams in two weeks and expected that he would reach

maximum medical improvement (MMI) at that time. (Employer/Insurer Exhibit 2). Claimant did not return for further treatment.

In his reevaluation of Claimant on behalf of the employer/insurer on March 13, 2001, Dr. Stillings opined Claimant received no mental healthcare since his last visit and that Claimant had taken no psychotropic medications since his last visit. Dr. Stillings indicated that additional treatment to deal with the work-related insomnia would be beneficial. The doctor indicated that the Claimant was able to work or attend a vocational retraining program with the only restriction being that he would not return to his former job. He further stated that until treatment is completed it was premature to assess the Claimant's permanent partial disability (PPD). (Employer/Insurer Exhibit 2).

On March 19, 2001 Dr. Jay Liss, a psychiatrist, evaluated Claimant. Dr. Liss noted Claimant had no history of psychiatric problems prior to the work-related accident, but presently suffered from nightmares triggered by highway travel, trucks, and accidents related to the work-related accident. The doctor notes the Claimant suffered from panic symptoms when attempting to return to work. He told Dr. Liss he feels sad and happy, he feels hopeless, and he feels he has failed. Claimant had thoughts of suicide, he has little energy, he cannot concentrate, and he lost interest in pleasurable things. Claimant scored a 45 on the Beck Diagnostic test, a score in the serious range. Dr. Liss opined Claimant suffered from severe anxiety. Dr. Liss diagnosed Post Trauma Stress Disorder and enduring stress, including being disabled and an inability to work.
Dr. Liss stated Claimant suffered from symptoms for a period long enough for Claimant to be considered disabled. He opined Claimant is permanently and totally disabled, stating it unlikely Claimant could return to work at any level. Dr. Liss believed Claimant needs continued medication and psychotherapy. (Claimant's Exhibit B).

Mr. Adams was also examined and evaluated by Dr. Bruce Schlafly, a board certified orthopedic surgeon, on June 26, 2001. Claimant informed Dr. Schlalfy he experienced low back pain that precluded him from running, bending over, and lifting. Claimant had difficulty sitting for prolonged periods of time and is unable to walk long distances. Since the accident Claimant has had pain and tingling in his legs and suffers from headaches. Dr. Schlafly conducted several tests on the Claimant to provide an accurate rating of his injuries and disabilities.

Work restrictions included no bending, no lifting over 25 pounds, and no work involving running, prolonged walking, or climbing of ladders. Dr. Schlafly stated Claimant is limited to stooping and squatting and should not lift more than 20 pounds overhead. He suggested Claimant receive an evaluation from a spine surgeon and possibly receive treatment from a pain management specialist. (Claimant's Exhibit A and Exhibit A1).

Based on the medical records and his interview with Claimant, Dr. Schlafly opined Claimant has a 10% permanent partial disability of the neck referable to the body as a whole as a result of his work-related accident of August 31, 1999 and a 20% permanent partial disability of the low back referable to the body as a whole as a result of the work-related accident of August 31, 1999.

RULINGS OF LAW

TEMPORARY TOTAL DISABILITY

The law states compensation must be paid to an injured employee during the continuance of temporary disability up to four hundred (400) weeks. 287.170 R.S.Mo (2001). Despite a lack of definition in the statutes, Temporary Total Disability law should be interpreted according to its plain meaning. Under Missouri law, "any employment" as utilized by the statute means any reasonable and normal occupation or employment. Phelps v. Jeff Wolk Const. Co., 803 S.W.2d 641, 645 (Mo. App. E.D. 1991).

Temporary Total Disability benefits are intended to cover healing periods and are warranted beyond the point at which the employee is capable of returning to work. Williams v. Pillsbury Co., 694 S.W.2d 488, 489 (Mo. App. E.D. 1985). Such awards compensate an employee for a reduced ability to work during a healing period following an injury. Id.

To obtain a Temporary Total Disability award, evidence must show an employee was unable to return to any reasonable employment during a healing period. Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 820 (W.D. App. 1995).

Dr. Liss and Dr. Stillings both opined Claimant needs additional psychiatric treatment for primary insomnia. Dr. Stillings further stated that until treatment was complete he could not rate Claimant. An evaluation by Dr. Liss one week later also states Claimant still suffered a great deal of pain and that he has been unable to return to work due to his psychiatric problems. Dr. Liss opined Claimant is permanently and totally disabled due to his symptomatology, and opined Claimant requires additional medication and psychotherapy.

Claimant received no psychiatric treatment following his last visit with Dr. Stillings on May 10, 2000. Both psychiatrists state that Claimant needs additional treatment. Claimant stated he tried to work but due to injuries to his neck, low back, and psychiatric problems, he has been unable to work except for approximately 15 days helping a friend at his restaurant.

I find Claimant is a credible witness who experienced a traumatic accident, but feel that he has not done all that he could do to move on and return to the workforce. I find the evidence submitted concerning Claimant's psychiatric problems and need for continued treatment is substantial and competent. I find that both Dr. Stillings' and Dr. Liss' opinions that Claimant requires additional psychiatric treatment credible.

In spite of the recommendations, Claimant chose to discontinue psychiatric treatment on his own by not returning to see Dr. Stillings in May 2000. He has not sought any further treatment on his own since that time. Dr. Stillings felt that Claimant should not return to his prior employment. However, he felt that Mr. Adams was capable of retraining and should be either working in another job or learning a new job. Dr. Stillings felt that Mr. Adams would be at MMI on or about May 22, 2000.

I find that Employer/Insurer is liable for an additional temporary total disability payment for the 18 weeks from January 17, 2000 when TTD was discontinued to May 22, 2000 at the weekly benefit amount of $578.48. The total sum owed to the Claimant for this benefit is $10,412.64 to which the Employer/Insurer is entitled to a 3-week credit of $1,735.44 for the period of time that Claimant collected unemployment benefits and claimed to be fit to work. The Employer/Insurer is ordered to pay the Claimant $8,677.20 for TTD benefits.

PERMANENT PARTIAL DISABILITY

The medical records as to Claimant's physical and psychiatric history and treatment, Claimant's testimony, and the testimony of the physicians show the presence of permanent partial disabilities to Claimant's neck, low back, and psychiatric resulting from the work-related injury sustained on August 31, 1999. The Claimant, as stated previously, is credible. He testified as to the chronic nature of his injuries, and the disabilities he suffers from, including neck pain, back pain with radiating pain to his legs, and psychiatric problems. Claimant recalled the restrictions he is under due to his injuries, including an inability to lift. Claimant takes pain medication.

Claimant has objective findings of muscle spasms. The MRI of the lumbar spine noted disk space narrowing and disk protrusion at the L5-S1 level, and a disk bulge at L4-5 level. The MRI of the cervical spine showed a prominent spur projecting into the neural foramen at the C4-5 level with impingement noted, a disk bulging at the C5-6 level and at the C6-7 level and a disk bulge at T6-7. Surgeries were not recommended. Both Dr. Stronsky and Dr. Schlafly opined the injuries resulted from the work-related accident. The only dispute appears to be the percentage of disability to award the Claimant regarding this injury. I further find that Claimant suffers from psychiatric problems.

Based on the totality of the evidence I find the claimant suffered a 25% permanent partial disability of the body as a whole referable to the neck and back as a result of the work-related injury of August 31, 1999, and 30% permanent partial disability of the body as a whole referable to psychiatric problems at the rate of $303.01. The Employer/Insurer is hereby ordered to pay the Claimant the sum of $66,662.20 for PPD benefits.

FUTURE MEDICAL TREATMENT

No future medical treatment is awarded since the Claimant failed to complete the care authorized by the Employer/Insurer in May 2000. In addition the Claimant has not sought to continue with this type of care on his own since that time.

This Award is subject to an attorney's lien of 25% in favor of Ray B. Marglous, Claimant's attorney.

Date: _____ Made by: _____

JO ANN KARLL
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____
Lawrence D. Leip
D*irector*
Division of Workers' Compensation