

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 04-039816

Employee: Scott L. Eiken
Employer: Harley Davidson Motor Co.
Insurer: American Casualty Co.

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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 24, 2009. The award and decision of Administrative Law Judge R. Carl Mueller, issued February 24, 2009, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 1st day of September 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Scott L. Eiken Injury No: 04-039816
Dependents: N/A
Employer: Harley Davidson Motor Co.
Additional Party: N/A
Insurer: American Casualty Co.
Hearing Date: January 26, 2009 Checked by: RCM/cm

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: April 27, 2004
5. State location where accident occurred or occupational disease was contracted: Kansas City, Platte County, Missouri
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: Employee was lifting a wheel assembly from assembly line when he felt pain in his back.
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: Body as a whole
14. Nature and extent of any permanent disability: Three percent (3%) – body as a whole
15. Compensation paid to-date for temporary disability: \$15,806.25
16. Value necessary medical aid paid to date by employer/insurer? \$23,771.34
17. Value necessary medical aid not furnished by employer/insurer? N/A

- 18. Employee's average weekly wages: \$650.80
- 19. Weekly compensation rate: \$433.87 TTD; \$347.05 PPD
- 20. Method wages computation: By Stipulation
- 21. Amount of compensation payable:

Medical Expenses

Medical Already Incurred	\$23,771.34
Less credit for expenses already paid	(\$23,771.34)
Total Medical Owing	\$0.00

Temporary Disability

28 and 6/7 weeks (04/28/2004 through 11/02/2004).....	\$11,652.51
Less credit for benefits already paid.....	(\$15,806.25)
Total TTD Owing (Credit due Employer).....	(\$4,153.74)

Permanent Partial Disability

3% whole body disability (.03 x 400 weeks) x \$347.05/week.....	<u>\$4,164.60</u>
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Total Award:..... \$10.86

- 22. Second Injury Fund liability: N/A
- 23. Future requirements awarded: None

The compensation awarded to the claimant shall be subject to a twenty-five percent (25%) lien totaling \$2.72 in favor of Kevin Kruse, Attorney, for reasonable and necessary attorney's fees pursuant to Mo.Rev.Stat. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Scott L. Eiken

Injury No: 04-039816

Dependents: N/A

Employer: Harley Davidson Motor Co.

Additional Party: N/A

Insurer: American Casualty Co.

Hearing Date: January 26, 2009

Checked by: RCM/cm

On January 26, 2009, the employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Scott L. Eiken, appeared in person and with counsel, Kevin Kruse. The employer appeared through attorney, Samantha Benjamin-House. The Claimant did not file a claim against the Second Injury Fund. The primary issue the parties requested the Division to determine was whether Mr. Eiken is permanently and totally disabled. For the reasons noted below, I find that the disability Mr. Eiken suffered attributable to his April 27, 2004 injury is three percent (3%) to his body as a whole.

STIPULATIONS

The parties stipulated that:

1. On or about April 27, 2004 (“the injury date”), Harley Davidson Motor Co. (“Harley Davidson”) was an employer operating subject to Missouri’s Workers’ Compensation law with its liability fully insured by American Casualty Co.;
2. Claimant was Harley Davidson’s employee working subject to the law in Kansas City, Platte County, Missouri;
3. Claimant sustained an accident arising out of and in the course of his employment;
4. Claimant both notified Harley Davidson of his injury and filed his claim within the time allowed by law;
5. Claimant earned an average weekly wage of \$650.80 resulting in a compensation rate of \$433.87 for temporary total and \$347.05 for permanent partial disability compensation;

6. Harley Davidson provided Claimant with medical care costing \$23,771.34; and,
7. Harley Davidson provided Claimant with temporary total disability benefits totaling \$15,806.25 for 36.43 weeks from April 28, 2004 through January 7, 2005.

ISSUES

The parties requested the Division to determine:

1. Whether Claimant suffered any disability and, if so, the nature and extent of the Employee's disability and whether the employee is permanently and totally disabled?
2. Whether Harley Davidson must reimburse the Claimant for medical expenses totaling \$644.49?
3. Whether Harley Davidson must provide the Claimant with additional medical care?
4. Whether Claimant received a TTD overpayment of \$9,111.48 for which the employer/insurer should receive a credit?

FINDINGS OF FACT

Claimant testified on his own behalf and called Lisa Eiken as a witness. Claimant's Exhibits A, B, C, D, H and I were admitted into evidence without objection; Exhibits E and F were admitted into evidence with objection; and, Exhibit G was not admitted into evidence. The Claimant's Exhibits are as follows:

- Exhibit A – Deposition, Timothy Frey, D.O., January 8, 2009
- Exhibit B – Deposition, James S. Zarr, M.D., January 20, 2009
- Exhibit C – Deposition, Gregory E. Walker, M.D., January 19, 2009
- Exhibit D – April 21, 2004 Offer of Employment
- Exhibit E – June 11, 2004 Letter of Termination¹
- Exhibit F – Reason for Termination²
- Exhibit G – Prescription Expenses³
- Exhibit H – Dr. Walker (60-day letter)
- Exhibit I – Dr. Lemons (60-day letter)

¹ Objection: Irrelevant; overruled.

² Objection: Irrelevant; overruled.

³ Objection: no foundation; sustained

Harley Davidson called witnesses Dustin Smith and Leonora Vestal and presented the following exhibits all of which were admitted into evidence without objection except for Exhibit 9 which was admitted into evidence with objection:

- Exhibit 1 – Deposition, Jeffery Wayne Brown, January 21, 2009
- Exhibit 2 – Dr. Ciccarelli (60-day letter)
- Exhibit 3 – Deposition, David Ebelke, M.D., January 9, 2009
- Exhibit 4 – Deposition, Michael J. Dreiling, January 19, 2009
- Exhibit 5 – Deposition, George Harris, PhD., January 22, 2009
- Exhibit 6 – Deposition, Terry Cordray, January 22, 2009
- Exhibit 7 – Deposition, John Pro, M.D., January 20, 2009
- Exhibit 8 – Job Task Description
- Exhibit 9 – Social Security File⁴

Based on the above exhibits and testimony of the witnesses, I make the following findings. Claimant is a married, 39-year-old male, who lives with his wife and five children in Parkville, Missouri. He received his high school diploma in 1989. Claimant was employed with Harley Davidson for about one week when he sustained a work-related accident.

Claimant is morbidly obese. He is six feet, one inch tall and weighs four hundred fifty-five pounds. Claimant has weighed in excess of three hundred eighty-five pounds since the age of twenty-one. Prior to his accident, Claimant has suffered from various health conditions including sleep apnea, hypertension, fatty infiltration of the liver, gastroesophageal reflux disease and irritable bowel syndrome. Claimant's personal treating doctor, Dr. Frey, counseled him to lose weight for several years prior to the date of accident. Several doctors who have evaluated or treated Claimant since his April 27, 2004 work-related accident have indicated that Claimant's obesity is hindering his recovery and, as a result, his ability to work.

On April 21, 2004, Claimant was offered a "Production Technician I" assembly position at the Harley Davidson plant in Kansas City, Missouri. *See*, Claimant's Exhibit D. His job included lifting wheels weighing from twenty-eight to thirty-eight pounds off the assembly line, attaching a rubber tire component and valve stem to the wheels, and returning them to the line, in a repetitive fashion thirty times per hour. Based on the testimony of his supervisor, Dustin Smith, I find that Claimant struggled physically to keep up with the job prior to the date of accident.

On April 27, 2004, Claimant was working on the wheel assembly line and felt a sharp pain in his low back. The next day Claimant tried to work but due to the pain was only able to work two hours, then went to the emergency room. He was diagnosed with a muscular strain in his back, was given an injection and instructed to follow up with Corporate Care.

Claimant underwent an MRI on May 11, 2004. This first MRI was "suboptimal and non-diagnostic". *See*, Employer's Exhibit 2 at 30. For that reason, Claimant underwent a second MRI on May 12, 2004. The radiologist noted that the second MRI was "severely compromised due to large body habitus". *Id.* The second MRI report notes:

⁴ Objection: irrelevant and no foundation; overruled.

There appears to be focal herniated nucleus pulposus of L3-4 with extrusion of disc material posterior to the L3 vertebral body. **This is very poorly seen** on images provided and is seen best on the sagittal T1 and axial T1 weighted images. **Clinical correlation should be made since the quality of the images is extremely limited.** This abnormality is not clearly identified on the axial T2 images obtained. However, the T2 images are of less quality than the T1 weighted images due to lack of signal to noise. The remainder of the disc levels are unremarkable. No neuroforaminal narrowing is noted. (Emphasis added)

Id.

Corporate Care ordered Claimant undergo physical therapy and referred him to David K. Ebelke, MD. Dr. Ebelke's curriculum vitae is contained in Employer's Exhibit 3 at pages 26-33 and documents that he is a spine surgeon certified by the American Board of Orthopaedic Surgery. Dr. Ebelke devotes ninety-nine percent of his work to treating patients. *See*, Employer's Exhibit 3 at deposition page 4, lines 15-19 (exhibit page 2), and 26. Dr. Ebelke diagnosed Claimant with a lumbar sprain/strain. Dr. Ebelke found that Claimant was experiencing some muscle spasm in the lumbar region, but appeared to present some symptom magnification. At his January 9, 2009 deposition, Dr. Ebelke testified, in reference to the Claimant and the second MRI:

Right now I can state within a reasonable degree of medical certainty he does not have a disk herniation; and I can also state back then, when I reviewed that scan, within a reasonable degree of medical certainty, that was not a disk herniation.

Id. at deposition page 37, lines 12-17 (exhibit page 11).

Dr. Ebelke opined that Mr. Eiken had reached maximum medical improvement in "July of 2004", suffered no disability from the April 27, 2004 accident, and required work restrictions related solely due to his "body habitus and not because of this injury." *Id.* at 16.

Dr. Ebelke referred Claimant to treat with a physiatrist, Dr. Zarr, who first saw Mr. Eiken on June 9, 2004. *See*, Claimant's Exhibit B at 4:10-14. Dr. Zarr recommended physical therapy and prescribed Ultracet, Vicodin, and a sequential electrical stimulator unit due to persistent low back pain as the result of the April 27, 2004 accident. *Id.* at 5. On June 30, 2004 Claimant had a second appointment with Dr. Zarr who advanced him to a work hardening program on a daily basis for two to three weeks. *Id.* at 11:12-14. However Claimant was unable to tolerate the activity due to the pain in low back. *Id.* at 12:21. On July 16, 2004 Dr. Zarr saw Claimant again and determined that he had reached maximum medical improvement and returned him to work with the restriction of performing full-time sedentary work with the ability to change positions as needed for comfort. *Id.* at 13:14-25. Dr. Zarr also assigned a rating of three percent of the whole body at that time. *Id.* at 14:2. Dr. Zarr saw Claimant for the last time on November 3, 2004 following Claimant's completion of three lumbar steroid epidural injections with Dr. James Scowcroft, with no benefit. At that time Dr. Zarr maintained his three percent permanent disability rating. *Id.* at 15:16-19. After reviewing the opinions of Dr. John Pro, Dr. Zarr opined

that Claimant “. . . has been and still is employable at the sedentary work capacity level.” *Id.* at 18:1-19:3, and 32. However, upon viewing a surveillance video (Employer’s Exhibit 1, deposition exhibit 4) of Mr. Eiken that showed his activities over a period of several hours that included standing, walking, bending, twisting, and lifting light objects, Dr. Zarr changed his opinion and concluded that Claimant was “capable of performing light-duty work lifting up to 25 pounds.” *Id.* at 22:18-23:6. I conclude that both Dr. Ebelke and Dr. Zarr are very well qualified medical experts and adopt their findings as fact.

Despite Dr. Zarr’s opinion that Mr. Eiken had reached maximum medical improvement, Harley Davidson nonetheless referred him to John M. Ciccarelli, MD, with The Spinal Institute of Kansas City for a second opinion. *See*, Employer’s Exhibit 2 at 4. Dr. Ciccarelli’s curriculum vitae documents that he currently practices medicine as a spinal specialist at Shawnee Mission Medical Center and Saint Luke’s Hospital; was Chief of Spinal Reconstructive Surgery at The Johns Hopkins University Hospital; and is a member of both the North American Spine Society and the American College of Spine Surgery. *Id.* at 9-10. Dr. Ciccarelli both examined Mr. Eiken and reviewed his medical records including the two MRI exams. Dr. Ciccarelli noted that the MRI did not demonstrate any finding that would “. . . fit the patient’s complaints and pattern of symptoms . . .” *Id.* at 7. Dr. Zarr also noted that during the examination Mr. Eiken was “. . . able to get up off the exam table and ambulate in the exam room demonstrating good dorsiflexion of the ankle” as well as “support his body weight and arise from a seated position without assistance” and that both findings were “very inconsistent compared to focal testing of these muscle groups.” *Id.* Dr. Ciccarelli concluded that Mr. Eiken:

- suffered only a “lumbar strain”
- was not a surgical candidate
- “had inconsistent findings with respect to any focal radiculopathy based upon his testing and during his physical exam”
- should continue with work conditioning under the guidance of a physiatrist

Id. at 7.

I conclude that Ciccarelli is a very well qualified medical expert and adopt his findings as fact.

Claimant sought treatment from his personal doctor, Timothy Frey, D.O., with Creekwood Family Care and from Richard E. Rattay, MD with the Headache and Pain Center on July 19, 2005. *See*, Claimant’s Exhibit A at 168. Claimant did not present any curriculum vitae or qualifications for Dr. Rattay; Dr. Frey has no specialty other than “family practice”. *Id.* at 4:12-15, and 48. Dr. Frey opined that Claimant was “unable to work” because he is “unresponsive to physical therapy and pain management, currently on narcotic pain medicine” which is “all in reference to his accident”. *Id.* at 16:2-11. Dr. Rattay concluded that Mr. Eiken has a lumbar herniated disc as “documented on an MRI from 5/12/04”, that “he has not reached maximal medical improvement”, and that “he should receive surgical treatment for his lumbar herniated disc.” *Id.* at 169. I conclude that neither Dr. Frey’s nor Dr. Rattay’s opinions in this case are credible and I completely disregard them in making all of my findings. No evidence

was presented that either doctor possesses any particular spinal or orthopedic expertise that would qualify them to make their causation findings or surgical recommendations.

Claimant saw Gregory E. Walker, MD at his attorney's request. While Dr. Walker formerly practiced medicine as a neurosurgeon, he has not had any hospital privileges for over five years and does not now treat patients; instead, his work consists solely of "performing independent medical evaluations". See, Claimant's Exhibit C at 5:6-9, and 82. I in no way imply that this disqualifies Dr. Walker from rendering credible opinions in a workers' compensation case. In fact, I find Dr. Walker to be a very thoughtful medical expert. However, given the medical causation complexities in this case, I do find that Dr. Ebelke, Dr. Zarr, and Dr. Ciccarelli – all currently hospital credentialed doctors – are more credible on the medical causation questions in this case than Dr. Walker. Dr. Walker evaluated Claimant on February 20, 2006 and September 22, 2006. *Id.* at 6:13 and 30:4. Although Dr. Walker opined that Claimant had a herniated disc with "a pretty significant extrusion or extrusion fragment in the right paracentral area" Dr. Walker "couldn't say exactly if it was [level] 3-4 or 2-3 or 4-5 . . . because of degradation of the [MRI] signal because of the patient's size." *Id.* at 25:1-8. Nonetheless, Dr. Walker concluded that Claimant's disc herniation "was related to his work at Harley Davidson . . ." *Id.* at 25:24. However, Dr. Walker opined that Claimant did not need surgery; instead, he recommended that Mr. Eiken should "lose weight." *Id.* at 28:1-7.

Dr. Walker assigned a thirty percent body as a whole disability rating to Claimant. *Id.* at 35:21-22. However, Dr. Walker noted in his original report that Claimant's weight was "a huge factor in his disability and the extreme weight placed upon his injured disk multiplies the problem several folds." *Id.* at 90. And, under cross examination at his January 19, 2009 deposition Dr. Walker opined regarding Claimant needing to lose weight that "I feel like it's the only true thing that he can do to improve his medical condition." *Id.* at 61:10-11. Dr. Walker opined that "if he were down around 200 pounds, he would probably significantly be improved with regard to pain." *Id.* at 77:24-78:1. In fact, Dr. Walker noted that the pain in Claimant's right leg cannot be definitively linked to the back injury, but may instead be caused by nerve entrapment as a result of his morbid obesity. *Id.* at 34:14-24.

I find Dr. Walker's opinions that Mr. Eiken does not need surgery but, instead, needs to lose weight, credible. I do not find credible Dr. Walker's opinion that Claimant's April 27, 2004 accident caused a herniated disk. Dr. Walker appears to base this on one sentence of the radiologist's report in the second MRI which is taken out of context. The radiologist specified that Claimant's condition must be confirmed by clinical exam. And, Drs. Ebelke, Zarr, and Ciccarelli confirmed that Claimant did not have a herniated disc. In addition, I reject Dr. Walker's disability rating. Given the fact that Dr. Walker was retained as Claimant's rating physician I find Dr. Walker was very forthright about his assessment of the underlying issue in Mr. Eiken's case: his excessive weight. A fair reading of Dr. Walker's testimony points to Claimant's obesity as the most significant factor impacting Claimant's disability and present problems. I also do not find Dr. Walker's opinion of Claimant's disability or limitations resulting from his accident to be credible. Based on Dr. Walker's testimony, it appears Claimant's disability and limitations largely flow from his morbid obesity.

Claimant saw John Pro, MD, a psychiatrist, on August 28, 2007 at the request of his attorney. Dr. Pro found Claimant to suffer from an adjustment disorder with depressed mood.

See, Employer's Exhibit 7 at 14:1-2. Claimant related to Dr. Pro that in addition to his back pain he had been experiencing increased knee pain in the previous six to eight weeks which had resulted in several falls. No doctor linked the Claimant's knee complaints to the April 27, 2004 work related event. Despite opining that the Claimant had not reached maximum medical improvement, Dr. Pro assigned an eighteen percent whole-person psychological impairment rating. *Id.* at 33:9. However, he also noted that his psychological disability is compatible with work. *Id.* at 19:1-4.

Mr. Terry Cordray, a vocational expert, evaluated Claimant on September 24, 2007 also at his attorney's request. *See*, Employer's Exhibit 6 at 10:14. Mr. Cordray performed a vocational assessment of Claimant and opined that Claimant was not capable of performing previous work duties or of obtaining, maintaining, or sustaining work in the open labor market. *Id.* at 57:18-58:14. Mr. Cordray conceded that Dr. Zarr's opinion that Claimant could lift up to 25 pounds and perform light duty work would qualify him for employment as "a cashier, [in a] convenience store, [and] might include some retail sales jobs that do not require stocking", "light local deliver" and as a "hotel desk clerk". *Id.* at 27:15-22. However, Mr. Cordray testified that because Mr. Eiken takes narcotic pain medications and now would have "a history of work comp injury" he would not be employable. *Id.* at 64:15-22. Mr. Cordray based his opinion in part upon restrictions Dr. Walker placed on Mr. Eiken in his September 22, 2006 report (found at pages 91-92 of Claimant's Exhibit C). *Id.* at 34:22-35:13. Because I previously found Dr. Walker's opinions regarding Claimant's disability and restrictions lacking in credibility, I also reject Mr. Cordray's employability opinions as they were based on Dr. Walker's conclusions.

Claimant underwent a psychological evaluation on February 28 and March 24, 2008 by George Harris, Ph.D., at the request of Harley Davidson. *See*, Employer's Exhibit 5 at 6:19-7:2. Dr. Harris reported that from a psychological standpoint, he did not believe that Claimant's depression was a disabling condition. *Id.* at 18:1-8. However, Dr. Harris believed that considering Claimant's "excessive use of pain medications" and obesity, "No employer is going to interview" him "and say, let's try him out." *Id.* at 28:20-29:1. Dr. Harris believed that Claimant was approved for Social Security disability based upon pre-existing health problems and problems resulting from his April 27, 2004 accident. *Id.* at 20:9-15. Dr. Harris noted that Claimant's presentation in his office was of an individual "in significant pain." *Id.* at 21:6. Dr. Harris testified that Claimant's appearance in the surveillance video (Employer's Exhibit 1) was noticeably different in that Claimant "didn't appear to be in any great pain." *Id.* at 23:6-10. As with Drs. Ebelke, Zarr, Ciccarelli, Walker, and Mr. Cordray, Dr. Harris recommended Claimant lose weight, and recommended he undergo a medically supervised weight control program with an exercise component. *Id.* at 61:20-24. Dr. Harris reported that Claimant should be reevaluated after he has lost a substantial amount of weight to reassess his ability to work. *Id.* at 63:12-17. Following a subsequent psychological examination on November 24, 2008, Dr. Harris noted that Claimant's inability to work was not due to a psychological disorder, and that the medical problems Claimant had prior to his workplace injury are a factor in Claimant's emotional state. *Id.* at 68-69.

Vocational consultant, Michael Dreiling, evaluated Claimant on December 16, 2008, at the request of Harley Davidson. *See*, Employer's Exhibit 4 at 39. Mr. Dreiling's report indicated that the medical evidence differs regarding Claimant's employability. Depending on the evidence considered, Claimant is either capable of working at a sedentary level with the option to sit or stand, or not employable at all in the open labor market. *Id.* at 37. Mr. Dreiling

also reported that, even if Claimant is unemployable at this time, due to his younger age, it would be appropriate for Claimant to pursue formal vocational rehabilitation services. *Id.* at 38. Further, Mr. Dreiling testified during his deposition that Claimant is limited in the open labor market due to his large size, regardless of his work-related accident. *Id.* at 6:17-7:17.

Throughout his treatment with the above doctors, Claimant continued to see his family physician, Dr. Timothy Frey, for pain control in the form of Oxycodone, Hydrocodone, Neurontin, and antidepressants, Lexapro and Cymbalta. Dr. Frey has treated Claimant since 1996 for irritable bowel syndrome, gastroesophageal reflux disease, erectile dysfunction, thoracic muscle strain, knee pain, sleep apnea and counseled him regarding his morbid obesity. During that time Claimant was also diagnosed with hypertension, kidney stones, and fatty infiltration of the liver.

A surveillance video of the Claimant was taken on March 24, 2008 which showed the Claimant being active from 9:41 a.m. to 2:49 p.m. *See*, Employer's Exhibit 1, at deposition exhibit 4. The video showed the Claimant driving for fifty minutes without stopping. The Claimant also was seen driving his children around, bending at the waist on several occasions, and inspecting a vehicle. Although the footage was only sixteen minutes in duration, it was filmed over the course of five hours. At all times it showed Claimant active and not in any pain or discomfort. The video surveillance was played in its entirety during the hearing and Mr. Eiken was given the opportunity to give an ongoing commentary, all of which was on the record. Both he and his attorney described his ambulation as "limping". However, Dr. Harris, also who viewed the video, described Mr. Eiken's walking "as kind of a waddle. And I don't mean to be condescending or dismissive of Mr. Eiken. What it looked like to me was a very obese person walking." *See*, Employer's Exhibit 5 at 72:17-21. I agree with Dr. Harris' observation. As noted previously, after viewing this video, Dr. Zarr amended his work restrictions for the Claimant, opining that the Claimant could work in a light work capacity.

During the hearing, the Claimant appeared to be in physical pain. He leaned up against the table when standing and moved about the chair throughout his testimony. Throughout the hearing, Mr. Eiken almost constantly displayed facial contortions communicating that he was in severe pain; in addition, he audibly moaned and changed position from sitting to standing innumerable times. This behavior was in direct contrast to the behavior shown on the surveillance video which showed him moving with apparent ease without any displays of discomfort.

The Claimant alleges he suffers permanent and total disability due to ongoing pain and attendant physical limitations. However, the Claimant's behavior on the March 24, 2008 surveillance video demonstrates he has few limitations from his injury. During the trial, the Claimant had to lean on the table and on the chair to maintain his balance. In the surveillance video, the Claimant was able to sit, in his allegedly uncomfortable van, for fifty minutes without stopping. The Claimant also was viewed bending at the waist on several occasions while putting his children in the car. Claimant advised Terry Cordray that he was unable to bend at the waist. Claimant also was able to walk around a vehicle during his inspection of it without appearing to be in pain and without the need to lean on anything for comfort. As the Claimant was unaware that he was being videotaped, I find the activity of the Claimant in the surveillance video to be a more accurate representation of his physical capabilities than those he described – and

demonstrated – at the hearing. I find that the Claimant's testimony regarding the effects of his injury to lack credibility.

RULINGS OF LAW

Every doctor who examined Mr. Eiken noted that his morbid obesity prevents him from healing or improving. In addition, Claimant suffers from symptoms that he attributes to his work injury, but instead are more likely to be a result of his obesity. For example, Claimant has complained of pain in his right leg, but Dr. Walker – Claimant's own rating physician – testified that there is no physiological connection between the back injury and the leg pain. Further, Dr. Walker indicated that obese people often experience nerve entrapment in their legs due to their weight. Claimant also alleges that he is now depressed as a result of his work injury. However, both Dr. Pro and Dr. Harris opined that Claimant's depression is the result of a combination of other stressors and conditions in his life, and that the depressive symptoms do not prevent Claimant from working.

I find that Claimant did in fact suffer some permanent disability as a result of his work accident, but that the reason he has difficulty returning to work is due to his morbid obesity and long term use of narcotic pain medication, not his back injury. In making my disability finding, I rely on Dr. Zarr's testimony which I find to be very credible. Thus, I adopt his opinion that Claimant suffered three percent (3%) permanent partial disability to his body as a whole for compensation totaling \$4,164.60⁵. Dr. Zarr last examined and assessed Claimant's disability on November 3, 2004. I find this to be the date Claimant reached maximum medical improvement.

On the issue of whether Harley Davidson must reimburse Claimant for medical expenses totaling \$644.49, I find that Claimant is not entitled to reimbursement. Claimant did not produce evidence substantiating his claim other than Claimant's Exhibit G which simply is a print-out of prescription charges; no expert medical testimony was presented regarding this exhibit. Further, as previously noted, I find that Claimant reached maximum medical improvement on November 3, 2004, and Exhibit G covers medications received from August 7, 2007 through March 27, 2008 – well beyond the date his injury became permanent. Therefore, Claimant's request for reimbursement of medical expenses is denied.

With regard to the issue of Claimant's request for additional medical care, I find that he is not entitled to any further medical care. Claimant reached maximum medical improvement on November 3, 2004; and as a result, Harley Davidson no longer is required to provide medical care. I find that Claimant's ongoing medical problems relate not to his lumbar strain but due to his many health problems that long pre-existed his April 27, 2004 accident at Harley Davidson which largely are related to his marked obesity including sleep apnea, hypertension, fatty infiltration of the liver, gastroesophageal reflux disease and irritable bowel syndrome.

Finally, I find that Mr. Eiken was temporarily and totally disabled only from April 28, 2004 through November 2, 2004 and that Harley Davidson is entitled to reimbursement for any temporary total disability benefits that were paid in excess of the amount due for that period.

⁵ (400 weeks x .03) x \$347.05/week

Employee: Scott L. Eiken

Injury No: 04-039816

The compensation liability for this one hundred eighty eight day (or, twenty six and six-sevenths week) period totals \$11,652.51. Harley Davidson paid Mr. Eiken \$15,806.25 in TTD benefits. Therefore, I grant Harley Davidson a credit for \$4,153.74 in overpaid TTD benefits against the permanent partial disability awarded. Thus, the net amount due Mr. Eiken totals ten dollars and eighty-six cents (\$10.86).

Claimant's attorney requested a fee equal to twenty five percent (25%) of all amounts awarded. I find that such request is fair and reasonable and order a lien attach to this award for \$2.72 until paid in full.

Date: _____

Made by: _____

Carl Mueller
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Peter Lyskowski
Acting Director
Division of Workers' Compensation