

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

Injury No.: 01-071471

Employee: Larry Galkowski
Employer: Bi-State Development Agency
Insurer: Bi-State Development Agency
Date of Accident: July 10, 2001
Place and County of Accident: St. Louis City

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 27, 2006. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued January 27, 2006, 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 9th day of August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Larry Galkowski

Injury No.: 01-071471

Dependents: N/A
Employer: Bi-State Development Agency
Additional Party: N/A
Insurer: Bi-State Development Agency
Hearing Date: October 27, 2005

Before the
Division of Workers'
Compensation
Department of Labor and
Industrial Relations of Missouri
Jefferson City, Missouri

Checked by:

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: July 10, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis City.
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: Claimant was working as a bus mechanic when his right hand was suddenly pulled into the air compressor, amputating digits on the right hand but the thumb and part of the small finger.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Right upper extremity and the body as a whole due to depression and post traumatic stress disorder.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to-date for temporary disability: \$27,307.24
16. Value necessary medical aid paid to date by employer/insurer? \$61,911.88

Employee: Larry Galkowski,

Injury No.: 01-071471

17. Value necessary medical aid not furnished by employer/insurer? \$0
18. Employee's average weekly wages: \$735.20
19. Weekly compensation rate: \$490.13 / \$329.42
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

35 weeks of disfigurement from Employer:

\$ 11, 529.70

Permanent total disability benefits from Employer of \$490.13 per week beginning August 5, 2002 , for Claimant's lifetime:

Indeterminate

Credit of advance paid by Employer:

(\$53,212.00)

22. Second Injury Fund liability: No

TOTAL:

Indeterminate

23. Future requirements awarded: See Award.

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: Jerry Klien, Jerry Klien, P.C., 7777 Bonhomme, Suite 1910, Clayton, MO 63105.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Larry Galkowski

Injury No.: 01-071471

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Bi-State Development Agency

Additional Party:N/A

Insurer: Bi-State Development Agency

Checked by: KOB

PRELIMINARIES

The matter of Larry Galkowski ("Claimant") proceeded to hearing with Attorney Jerry Klein representing Claimant, and Attorney Jay Lory representing Bi-State Development Agency ("Employer"), who is self-insured.

The parties agreed that on July 10, 2001, Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to the Claimant's right hand. At the time, Claimant earned an average weekly wage of \$735.20, which corresponds to rates of compensation of \$490.13 for total disability benefits and \$329.42 for permanent partial disability benefits. Employer paid temporary total disability benefits in the amount of \$27,307.24, from July 11, 2001, to August 4, 2002, or 57 and 5/7ths weeks. Employer also paid medical benefits totaling \$61,911.81. Employer made a lump sum payment in June 2004 of \$53,212.00, which represents a prepayment of its liability after August 4, 2002.

The issues to be determined are:

1. Is Claimant's current psychological condition causally related to his accident;
2. Is Employer liable for providing future medical/psychological treatment;
3. What is the nature and extent of Claimant's permanent partial or total disability;
4. What is Employer's liability for disfigurement suffered by Claimant as a

- result of his work injury; and
5. Is Claimant entitled to temporary total disability benefits after August 4, 2002?

Claimant is seeking permanent total disability benefits.

SUMMARY OF THE EVIDENCE

Live Witnesses

Claimant is a 54-year-old, right-handed, married man who was born and raised in St. Louis. He graduated from high school, attended one year of technical school to earn a certificate in auto/diesel technology, and attended various training seminars focusing on automobile heating and cooling. Upon receipt of his technical degree, Claimant went to work with his father in the family owned automobile cooling systems service business, where he worked until approximately 1982. Thereafter, Claimant ran the business for about ten years before he closed the business because he did not enjoy dealing with the public. For approximately eight years, Claimant owned a truck and got into the hauling business delivering sand, gravel, and asphalt to building sites. In March of 2000, looking for job security, Claimant took a job with Employer.

Claimant was a Class IA bus mechanic responsible for performing general repairs on buses. Approximately six to seven months before his final day of work, Claimant became an air conditioning tech, and was able to perform specialized repair work on the cooling and heating systems of the buses. In his job for Employer, Claimant performed all physical activities, including stooping, bending, and lifting, without restrictions.

On July 10, 2001, Claimant was working at one of Employer's garages in the City of St. Louis. Around 8:30 in the evening, Claimant learned he had a bus to maintain. Because they had been having problems with bad belts, Claimant decided to take a quick look to see if the bus in his charge needed a new belt. At the precise moment he reached to grab the belt, someone started the bus, and the belt pulled his right hand into the air compressor where it became trapped. Claimant's screams brought several people to help, and they had to remove parts and cut the belt to release Claimant from the engine. Claimant received emergency treatment on the job site and was transported to Barnes Jewish Hospital by ambulance. During the course of his approximately one-week stay, Claimant underwent three separate surgeries to address the emergency issues, to debride dead tissue, and reconstruct the hand with two skin grafts. As a result of his accident and reconstructive surgery, Claimant's thumb, which was fractured, remains functional, along with one-third of his pinky finger. However, Claimant completely lost by amputation his index, middle, and ring fingers.

Claimant was under authorized treatment to cure and relieve the effects of his multiple finger amputations from July 2001 to August 2002. Dr. Tong was the primary reconstructive surgeon, but he also saw other doctors and therapists as reflected in the medical records. Among the treating doctors is Dr. Stacy Smith, a psychiatrist, whom Employer authorized in response to Claimant's request for someone to talk to about his situation.

Claimant has limited use of his right hand; he can touch his thumb to the stub of his pinky, and can grip certain items if they are of the right size and weight. He has diminished sensations and limited feeling in the affected extremity. For example, if he touches a hot object, his skin may burn before he feels the heat. He has phantom pain, and feels his fingers are always in a clutched position. He has shooting pain, and constant cramping in the phantom limbs as well as his remaining hand. His forearm experiences cramps like charley horses. His sleep is disrupted. Claimant is not a "pill person," and does not take medication or do anything else for relief.

As a result of his injury, Claimant is angry and frustrated. He describes himself as a person who does things with his hands. He used to tinker around the house, cut and split firewood, bowl, bow and rifle hunt, work on old racecars, and build model trains. He is unable to perform any of these activities since the accident. Range of motion in Claimant's arm is good, but his remaining hand cannot grip items to lift them very well. Claimant cannot go back to automobile mechanic work, and has had no employment or labor activities since 2001.

Claimant testified that when he received notice of termination of benefits in August 2002, and when Employer issued a termination letter in November 2002, his psychological state rapidly deteriorated. Following his termination by Employer, he felt useless and "bad feelings" developed. He said he felt like he was a piece of trash that had been thrown away.

In February 2003, Claimant and his wife moved from St. Louis to Omaha, Nebraska, for her job. Employer arranged for Claimant to work with Vic Antonelli, a vocational counselor at Concentra. As his case manager, Mr. Antonelli directed treatment, including visits with rehabilitation specialist Dr. Burkman, and physiologists Dr. Kaven and Dr. Wetzel. Concentra provided Claimant with a prosthetic hand to restore the appearance of a normal limb (although it had no function). Claimant's cosmetic "glove" made things worse for him because it hindered the range of motion of his thumb and made him more self-conscious. Claimant saw several doctors and therapists to address other issues, and developed a home exercise program to maintain the health of his other limbs. Claimant met with a vocational specialist to identify his vocational abilities and underwent successful talk therapy to decrease his anxieties with Dr. Kaban. Claimant complained that his sessions with Dr. Stacy Smith in St. Louis were not helpful and that her ideas or suggestions were a waste of time.

Claimant testified that his relationship with his wife is fine, although it is not as intimate as it was before the accident. He has some trouble with hygiene, but for the most part is able to care for himself. He modifies his dress habits to get dressed. For example, he pre-buttons shirts before putting them on. He has trouble eating some foods.

Claimant attended a series of three visits with the Nebraska Department of Vocational Rehabilitation, but felt as if they were going nowhere and did not follow up. Claimant testified he has been working with Vince since June 2005 to look for employment opportunities that he thinks Claimant might be able to handle. Claimant testified that he had one interview which involved working with the mentally handicapped, a job he felt he could not do. He has made numerous applications but has no offers.

As a result of the accident, Claimant feels his mental status is worse. He has a lack of concentration and focus. He thinks about the accident all the time. He has to take breaks while attempting to complete tasks, and buses give him the shivers. Some days are worse than others, depending upon his mood. Claimant feels he could not work a forty-hour workweek because he cannot keep his mind on it. He could not be a truck driver because it is too dangerous to drive a truck with one hand. As for being an appraiser in a body shop, Claimant said he does not have computer or people skill for the job. He admitted to low self-esteem and morale.

On cross-examination, Claimant was surprised he tested at a medium work level when performing his functional capacity exam ordered by Dr. Tong. Although Dr. Smith suggested Claimant could perform some paper-based work, Claimant testified that filling out forms is an impossible task for him since his writing skills are terrible with his left hand. He said he could answer phones, but is not a "keyboard" person. Claimant did not follow up on the exposure therapy recommended by Dr. Smith. Claimant testified that he is hoping that his compensation case would be over so he can go on with the rest of his life. Claimant did not discuss his termination letter with his union or his Employer. He testified his anxiety got worse due to and after the termination, along with his ability to deal with people. He believed he could have gone back to Employer up the time he got the termination letter. The termination changed his life drastically.

Testifying on Claimant's behalf was his wife of thirty years, Margaret Galkowski, who works as an operation manager in the pulmonary division of a university hospital. Mrs. Galkowski has observed Claimant since the accident, and noted the following: he has become very dependent, where he was once an independent individual; he is very angry and frustrated by the way he was treated, because no one seems to care; he is introverted, isolated, and self-conscious; he displays symptoms of depression like uncharacteristically drinking during the day; and he expresses his anger frequently at her. Relaxation tapes and talking skills developed with Dr. Wetzel help. Mrs. Galkowski testified that she thinks Claimant misses work, but also that he is afraid to work because he is preoccupied with reinjury and therefore is most comfortable in his own home. Mrs. Galkowski testified that although Claimant was coping up until the date of the termination letter, it was the termination letter and end of authorized treatment that caused confusion, panic, and worry. Claimant's moods and emotions fluctuate day to day. Mrs. Galkowski described her husband as being someone who is used to taking and filling

orders, and not one with management experience or skills. She discouraged the use of medication.

Medical Evidence

The medical records reflect treatment that was reasonable and necessary to cure and relieve Claimant from the effects of his multiple right finger amputations and hand injury. A detailed discussion of the treatment is not necessary in this Award. Emergency surgery including the amputation of the middle three fingers of the right hand, and partial amputation of the small finger, debridement, and reconstruction surgeries with skin grafting are well documented. As a result of his multiple surgeries and the skin graft, Claimant experiences a loss of sensation in his right upper extremity that makes him susceptible to injuries such as burns, and makes it difficult to work safely with his remaining hand. At one point, the treating doctors considered a toe transplant, but such radical surgery proved to be unnecessary since Claimant had maintained the ability to transpose his thumb and remaining little finger. Claimant had physical therapy, and underwent a functional capacity examination, but did not have occupational or recreational therapy.

Expert Opinion Depositions/Evidence

Dr. Stuart J. Ozar is a St. Louis-based psychiatrist who performed a complete psychiatric interview of Claimant in three-plus hours, over two days, November 25 & 26, 2004, in addition to conducting a 90-minute interview on August 9, 2005. He saw Claimant at the request of his attorney, and although he offered treatment suggestions, was not a treating physician. Dr. Ozar reviewed the applicable medical records, including Dr. Stacy Smith's report, and considered Claimant's self-reported history. As of the time of the first examination, Dr. Ozar diagnosed major depression, noting numerous symptoms such as sleep disturbance, decreased appetite and sexual urges, consumption of alcohol, and feelings of hopelessness. Dr. Ozar found Claimant "also had post traumatic stress disorder chronic ... with a delayed onset. It did not happen right after the injury, it happened later, which is not infrequent." Claimant displayed all four diagnostic criteria for the PTSD diagnosis, but did not demonstrate a personality disorder in 2004. Dr. Ozar concluded that the traumatic accident of July 10, 2001 "was the factor" causing the diagnoses reached, and suggested medicine, psychotherapy, vocational rehabilitation, and occupational therapy might be of help, although Claimant's prognosis was poor. He rated Claimant with a psychological disability of 75% of the whole person, in addition to the physical disabilities

Following his second visit with Claimant in 2005, and considering the intervening reports he received from Claimant's vocational counselor, Dr. Ozar reaffirmed his prior diagnoses and conclusions, gave the opinion Claimant was permanently and totally disabled from a psychiatric standpoint, and restated the accident was "absolutely" a substantial factor in his psychiatric disability.

In early 2002, Claimant wanted "to talk to someone" about his situation, and Employer authorized Dr. Stacey Smith as Claimant's treating psychiatrist. At the initial evaluation on February 8, 2002, Dr. Smith felt Claimant had a good prognosis, despite having symptoms of anxiety, posttraumatic stress symptoms (without meeting the diagnostic criteria for the syndrome), and symptoms of depression like sleep disturbance, obsessive thoughts of the accident, self-consciousness of the injury, and decreased sex drive. She felt Claimant had not received complete rehabilitation, and recommended four to six visits to educate Claimant on vocational and recreational therapies that could be available to him. At two subsequent visits, Dr. Smith talked to Claimant about "exposure therapy" for his posttraumatic phenomenon and encouraged Claimant to find a way to continue hobbies like hunting. She noted Claimant's prosthetic had looked good even though Claimant complained about it, and was impressed with Claimant's apparent good adjustment to his circumstances. On June 13, 2002, Dr. Smith noted Claimant had no depression or anxiety, and showed no evidence of posttraumatic stress disorder, although she would expect some flare of those phenomena if he were to return to the work site. She felt Claimant could be released from her care at maximum medical improvement.

Nearly two years later, on April 29, 2004, Dr. Smith formed an entirely different opinion when Claimant returned to her for reevaluation. Since the last assessment, Claimant had received a letter from Employer indicating he had exhausted all his time off benefits and that his employment had been terminated. In rambling deposition testimony, Dr. Smith recounted many statements made by Claimant that sharply contrasted with her initial good impression of Claimant's adjustment. She described him as bitter, hurt, insulted and enraged. According to Dr. Smith, Claimant expressed very negative feelings about Employer, how Employer treated him,

the litigation, and the fact Employer had not found a job to accommodate him. Claimant felt his life changed on the day of the injury, "like flipping a switch." Dr. Smith's 2004 diagnosis was that as a result of the termination, Claimant had developed an adjustment disorder with depressed mood, exhibiting symptoms of irritability and obsessional rumination, and demonstrated posttraumatic symptoms that did not meet the criteria for posttraumatic stress disorder. She opined Claimant was capable of working psychiatrically, but felt he needed more treatment with a psychiatrist, a psychologist and medication. Dr. Smith testified that the firing would not have occurred except for the injury, and that it was a legal matter to decide whether it is work related. She assigned an overall permanent partial psychiatric disability of 10%, with half attributable to the accident itself, and half the result of the termination. Although Dr. Wetzel subsequently performed psychological tests, Dr. Smith testified that the results did not change her clinical impressions.

Employer offered the deposition testimony of Dr. Richard Wetzel, a psychologist who supervised and interpreted certain tests taken by Claimant, at the request of Dr. Smith. Dr. Wetzel did not have any significant interaction with Claimant, other than the usual pleasantries at the beginning of the testing. Therefore, he was professionally unable to make a diagnosis. Rather, he just interpreted the test data and suggested clinical areas that the treating psychiatrist, Dr. Smith, might want to consider. According to Dr. Wetzel, the test data indicated that Claimant was likely "quite depressed," and had anxiety, although the scales were not high enough to meet the suggested levels for a posttraumatic stress disorder diagnosis. The data also suggested Dr. Smith should consider somatoform disorder, and a passive/dependent personality disorder. Finally, one scale of the MMPI indicated Claimant was not a good candidate for treatment.

Dr. Eli Shuter testified by deposition on Claimant's behalf. He reviewed the medical records, and conducted a focused examination of Claimant's injured right upper extremity. Dr. Shuter concluded that due to the "extensive destruction of the right hand function, that there was permanent partial disability of eighty percent of the right upper extremity at the level of the elbow...because of the skin grafting." Furthermore, at the time he saw Claimant, Dr. Shuter was able to diagnose posttraumatic stress disorder, with symptoms of frustration, thinking about the accident constantly, and dwelling on his inability to use his right hand as he once did. The PTSD diagnosis carried an additional ten percent (10%) permanent partial disability of the person. Not being a vocational expert, Dr. Shuter stated only that Claimant could not return to work as a mechanic and could benefit from vocational retraining, but otherwise did not give an opinion as to Claimant's ability to work in the open labor market. Dr. Shuter also opined that the work injury of July 10, 2001, was a substantial factor in the permanent disabilities he rated.

Even though he did not testify, the records of Michael G. Kaven, Ph.D., an authorized psychologist in Omaha, support the psychological diagnoses made by Claimant's evidence. Based on multiple sessions in late 2004 through Spring 2005, Dr. Kavan diagnosed Posttraumatic Stress Disorder and Major Depressive Disorder, Single, Moderate.

Dr. Samuel Bernstein acted as Claimant's vocational expert. He examined, tested, and talked with Claimant on May 13, 2004. The history and background information Dr. Bernstein recorded was consistent with the evidence introduced at hearing. The tests revealed Claimant had depression and anxiety, and was not a malingerer. Dr. Bernstein identified the following factors in Claimant inability to work in the open labor market: 1) age, as it limits his ability to adapt; 2) Loss of the dominant right hand coupled with Claimant's vocational history of working on things with his hands, and not with people; and 3) Psychological factors affecting concentration, pace, relationships, and the ability to complete tasks. Dr. Bernstein diagnosed posttraumatic stress and major depression. He opined that no reasonable employer would hire or accommodate Claimant, but even if an employer hired him, Claimant does not have the ability to do the job. Dr. Bernstein opined that the work accident of July 10, 2001 was a substantial factor in Claimant's permanent total disability.

Donna Kisslinger Abram served as a vocational expert for Employer, and therefore did not have the benefit of personally evaluating Claimant. Relying on the medically determined capabilities identified by Dr. Shuter and Dr. Smith (but not Dr. Ozar), the work history, and vocational computer programs, Ms. Abram concluded Claimant's profile met or exceeded less than five percent of the job classifications listed by the Dictionary of Occupational Titles. Nevertheless, she concluded Claimant could "easily" get the jobs she identified, even in the Omaha market. She also admitted potential employers may need to make certain accommodations for Claimant to perform the job.

FINDINGS OF FACT AND RULINGS OF LAW

Based on a comprehensive review of the substantial and competent evidence of record, and applying the Workers' Compensation Law of Missouri, I find that Claimant has met his burden of proving his claim for benefits. Specifically, I find:

1. Claimant's current psychological condition is mental injury that resulted from his work accident, a particular traumatic event, not from his subsequent termination of employment, and is therefore causally related to his compensable accident.

While there is no dispute Claimant suffered a catastrophic physical loss as a result of the accident on July 10, 2001, the parties have presented conflicting evidence as to whether Claimant suffered a mental injury that flows from the work accident. Claimant's evidence establishes that he has depression and posttraumatic stress disorder as a result of his work accident, while Employer suggests Claimant's mental injury arose from a subsequent, non-compensable event. An injury is compensable only if it is clearly work related, and an injury is "clearly work related" only if work was a "substantial factor" in the cause of the injury and the resulting medical condition. §287.020.0 RSMo 2000; *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo. App. 1998)(overruled on other grounds). In this case, whether Claimant's mental injury is compensable turns not only on proper application of the applicable law, but also on the credibility of the parties' respective experts.

Missouri has long held that psychological injuries, in addition to physical injuries, can fall under the coverage of the Workers' Compensation Law. In *Thompson v. Railway Express Agency*, 241 Mo.App. 683, 236 S.W.2d 36, 39 (1951), the court stated a neurosis can be compensable if causal connection with an accident sustained in the course of employment is proven by "clear evidence," and that statement is reiterated in other opinions. See, i.e., *Webb v. Norbert Markway Construction Co.*, 522 S.W.2d 611, 614 n. 3 (Mo.App.1975); *Todd v. Goostree*, 493 S.W.2d 411, 417 (Mo.App.1973); and *Boatwright v. ACF Industries*, 463 S.W.2d 549, 551 (Mo.App. 1971)(superceded by statute on other grounds). More recently, the courts have stated that Missouri's Workers' Compensation Law compensates a worker for a mental condition if it is shown to have been directly and proximately caused by the accident. *McCormack v. Carmen Schell Const. Co.* 97 S.W.3d 497, (Mo.App. W.D.2002)(overruled on other grounds). Under such standard, a teacher slammed against the wall by fighting students, *E.W. v. Kansas City Missouri School District*, 89 S.W.2d 527 (Mo.App. W.D. 2002), and a woman who hurt her back in a slip and fall, *Bloss v. Plastic Enterprises*, 32 S.W.2d 666 (Mo.App. W.D. 2000), have successfully established the causal connection between their respective work accident and mental injury.

Claimant has met his burden of establishing that his work accident of July 10, 2001, is the substantial factor in his current psychological condition. I find credible the testimony of Claimant and his wife connecting the accident and Claimant's symptoms of depression, anxiety, and posttraumatic stress. Claimant has obsessive thoughts about the accident that prohibit him from concentrating on any task, is angry and frustrated, has trouble sleeping, is uninterested in marital relations, and has lost the ability to perform his job or engage in his former hobbies. Mrs. Galkowski reported multiple symptoms of depression and negative changes in her husband's personality following the accident. Although these witnesses acknowledged Claimant's mental state worsened once he received the termination letter, both directly and indirectly attribute Claimant's mental injury to the physical loss of the majority of his right hand.

Although the lay testimony suggesting a causal connection between the accident the mental injury is compelling, it alone is insufficient to establish causation. The testimony of a lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 279 (Mo.App. E.D. 1997)(citations omitted)(overruled on other grounds). An injury, however, may be of such a nature that expert opinion is necessary to show that it was caused by the accident to which it is assigned. *Id.* Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. *Id.*, citing *McGrath v. Satellite Sprinkler Systems*, 877 S.W.2d 704, 708 (Mo.App.1994). Identifying the nature, cause, and extent of a mental condition such as Claimant's is undeniably complex, and cannot be accomplished without expert medical

evidence.

The experts generally agree that Claimant has a mental condition. Drs. Ozar, Kavan, Shuter, and Bernstein all diagnosed depression and Posttraumatic Stress Disorder (“PTSD”), and Dr. Wetzel’s test data suggested likely depression and anxiety. Dr. Smith diagnosed adjustment disorder and PTSD-like symptoms that did not meet the clinical standards for PTSD. However, only Dr. Ozar and Dr. Smith offered a critical analysis on causation of the mental condition, and, not surprisingly, the conclusions differed. The decision to accept one of two conflicting medical opinions is a question of fact for the finder of fact. See *Chatmon v. St. Charles County Ambulance Dist.* 55 S.W.3d 451, 457 (Mo.App. E.D. 2001)(overruled on other grounds). Of the two explanations, Dr. Ozar’s is more credible, comprehensible, and consistent with the evidence than Dr. Smith’s, and I find that Dr. Ozar has established with medical evidence the cause and effect relationship between Claimant’s psychological condition and his work-related hand injury.

From a psychiatric perspective, Dr. Ozar credibly explained how and why Claimant’s mental injury is causally connected to his physical injury, despite an apparent delayed onset of several of the more serious psychiatric symptoms. Even though he had particular social limitations, Claimant discovered an acceptable niche in life as a mechanic, provider, and husband, who had hobbies and enjoyed his life. With the loss of his dominant hand, Claimant lost his identity and sense of purpose, and had no skills or traits with which he could compensate. Because Claimant was a compliant patient who initially accepted the challenges posed by his recovery, Claimant was able to cope reasonably well with his condition for about a year after his accident. Thereafter, Claimant’s symptoms and level of functioning steadily deteriorated. When he learned Employer terminated him, Claimant experienced a radical shift in the sense of himself, and lost the goal that had fueled his motivation, hope and drive. The symptoms of depression became apparent. Even without the meaningful event of the termination, in Dr. Ozar’s opinion, Claimant’s mental state would have still deteriorated. Furthermore, Dr. Ozar identified the presence of all four diagnostic criteria for PTSD, and explained that a delayed onset of such symptoms, as with Claimant, is not infrequent. In sum, Dr. Ozar’s diagnoses of major depression, single episode, and chronic PTSD with delayed onset are fully supported by the evidence, as is his conclusion that the mental diagnoses are causally related to the work injury of July 10, 2001.

By comparison, Dr. Smith’s analysis is not entirely realistic, potentially biased, and less insightful. Her initial glowing reports of Claimant’s excellent mental status are not convincing, and seem to discount or ignore the seriousness of the physical loss, Claimant’s introverted personality, and the symptoms of anxiety and PTSD that she recorded as of the first visit. Her “treatment” suggestions (i.e. go hunting with a left handed rifle) are unrealistic. She admitted that her role is to “be an advocate for what (she) thinks will help” Claimant, and did not purport to be impartial. Her patient history and analysis was less comprehensive than Dr. Ozar’s. Her ultimate diagnosis recognizes depressive symptoms and anxiety that, in her opinion, do not rise to the level of a clinical PTSD diagnosis. Nevertheless, Dr. Smith acknowledged that half of Claimant’s permanent psychiatric disability is attributable directly to the accident and half is a result of the termination. Dr. Smith’s opinions do not prevail over the overwhelming weight of credible evidence that establishes the work accident was the direct and substantial cause of the mental injury, depression and PTSD.

Employer’s argument that Claimant’s mental injury is not compensable due to a specific statutory requirement is not only inconsistent with the evidence, but is also not legally sound under these circumstances. It is true that §287.120, subsections 8 and 9, provide:

8. Mental injury resulting from work-related stress does not arise out of and in the course of the employment, unless it is demonstrated that the stress is work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events.

9. A mental injury is not considered to arise out of and in the course of the employment if it resulted from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action taken in good faith by the employer.

Arguably, if Employer had succeeded in advancing its causation argument, and had established that the good faith act of terminating Claimant from employment alone had caused Claimant’s mental injury, Employer might be able to use the exception in §287.120.9 to avoid liability for the mental injury. However, subsections 8

and 9^[1] deal with mental injury from work-related stress, or so-called "non-traumatic mental-mental" cases, and do not apply in cases such as this where there is a physical injury ("physical-mental"). The distinction was set forth in *E.W. v. Kansas City Missouri School Dist.*, 89 S.W.3d 527 (Mo.App. W.D. 2002)(overruled on other grounds), wherein a defense such as Employer's was defeated because E.W.'s claim was for mental injury resulting from a particular traumatic event, not from work-related stress. *Id.* at 537. The need to distinguish extraordinary mental stress from ordinary day-to-day stress is not applicable to a mental injury arising from a traumatic event, so it is understandable why the legislature did not require proof of extraordinary and unusual stress for compensation of a claim for mental injury resulting from a traumatic incident. *Id.* at 536.

The case of *Bloss v. Plastic Enterprises*, 32 S.W.3d 666 (Mo.App. W.D. 2000)(overruled on other grounds) is particularly instructive. In *Bloss*, like here, the employer asserted § 287.120.9 mandates that a mental injury resulting from a good faith job action is not compensable. The employer contended employee's mental disorder began after a job demotion. Despite discussion of both §287.120.8 and .9, the *Bloss* court determined there was competent and substantial evidence to uphold the award of disability benefits to employee. *Id.* at 674. In other words, the court did not apply the §287.120 standards in determining whether employee's mental injury arose out of and in the course of employment, but rather looked at whether the slip and fall accident caused the mental injury. *Id.*; See also *E.W. v. Kansas City Missouri School Dist.*, 89 S.W.3d at 536, note 5. As in *Bloss*, the outcome of this case is determined by causation, an issue on which Claimant prevails.

2. Employer shall provide Claimant with psychological treatment.

Claimant seeks future psychiatric treatment. The right to medical aid is a component of the compensation due an injured worker. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. S.D. 1996). In order to merit an award for future medical care, there must be evidence of a "subsistent condition of injury and a need of treatment proven beyond speculation by competent and substantial evidence ... and a causal flow between the original and compensable injury and the subsistent condition." *Williams v. A.B. Chance Company*, 676 S.W.2d 1, 4 (Mo.App. 1984). It is not necessary that the claimant seeking future medical benefits produce conclusive evidence to support that claim. *Mathia* at 277. A worker is entitled to medical treatment as may reasonably be required to *cure and relieve from the effects of the injury*. *Id.* Such future care to "relieve" should not be denied simply because a claimant may have achieved maximum medical improvement. *Id.* at 278; See also *Williams v. City of Ava*, 982 S.W.2d 307, 311-12 (Mo.App. S.D. 1998)(overruled on other grounds).

I find that Claimant's depression and PTSD constitute a subsistent condition of injury that causally flow from the original accidental injury, and reasonably require ongoing medical care to cure and relieve. Claimant has reached a point where no significant improvement can reasonably be expected. Maximum medical improvement, however, is not inconsistent with the need for future medical treatment. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 890 (Mo.App. S.D. 2001)(citations omitted)(overruled on other grounds). Most recently, Claimant treated with psychologist Michael G. Kavan, who suggested the need for visits with a psychologist on an as needed basis. Dr. Ozar feels supportive psychological treatment is needed. Dr. Smith feels Claimant's negative attitude makes treatment pointless. Claimant has shown the initiative to seek psychological help in the past, and I find it reasonable to expect he will continue to need such treatment on an as needed basis in the future. Employer shall provide Claimant with psychological treatment as is needed to provide Claimant with relief from his depression and PTSD.

Several doctors recommended medication for both the physical and mental injuries, but for personal reasons, Claimant declined all prescription medication. While medication could improve his well-being, I do not think Claimant's position is unreasonable. See *Boatwright v. ACF Industries*, 463 S.W.2d 549, 554 (Mo.App. 1971)(whether the refusal of treatment is unreasonable is issue of fact). Should he change his position, and desire prescription medication to treat his physical or mental conditions, Employer shall provide such treatment.

3. Claimant is permanently and totally disabled due to his July 10, 2001 accident.

Claimant seeks lifetime weekly benefits due to his alleged permanent and total disability. Under the Missouri Workers' Compensation Act, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. §287.020.7. The test for permanent total disability is whether the employee is "competent to compete in

the open labor market," i.e., unable to return to any "reasonable or normal employment." *Higgins v. The Quaker Oats Co.*, 2005 WL 3157742, 6 (Mo.App. W.D. 2005). It does not require that the claimant be completely inactive or inert. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 234 (Mo.App. S.D.2003). Specifically, the pivotal question is whether an employer can reasonably be expected to hire this employee, given his present physical condition, and reasonably expect him to successfully perform the work. Thus, the inquiry into permanent-total disability is a factual one: whether Claimant is employable. *Messex v. Sachs Elec. Co.* 989 S.W.2d 206, 210 (Mo.App. E.D. 1999)(citations omitted)(overruled on other grounds). The fact finder does not have to make her decision only upon testimony from physicians, but can make her findings from the entire evidence. See *Julian v. Consumers Markets, Inc.*, 882 S.W.2d 274, 275 (Mo.App. 1994).

Despite some conflict in the evidence, I find that the record as a whole, especially the testimony of Claimant, his wife, and Dr. Ozar, supports a finding that Claimant is not employable, and is therefore permanently and totally disabled, due to his permanent and disabling physical and mental injuries. With the loss to his right hand, Claimant is clearly not able to engage in his past profession, or any job that is hand intensive. He has phantom pain, minimal functional use, and a loss of sensation through his forearm. He is essentially limited to the use of his non-dominant arm only. He has no ability to focus due to obsessive thoughts of his accident, sleep disturbances, and depression. A shy, introverted person before the accident, Claimant is now even less suited to interact with the public because he is self-conscious, anxious, short-tempered, and frustrated. Claimant and his wife both credibly described the many physical and psychological obstacles to Claimant's return to the workforce.

In a case such as this, however, the critical issue of employability cannot rest on lay testimony alone – expert testimony is required. Medical and vocational experts weighed in on both sides of the issue. As with the issue of causation, and for many of the same reasons, I find Dr. Ozar's opinion that Claimant is not employable to be more credible and consistent with the evidence than Dr. Smith's opinion that Claimant can secure and maintain employment. Vocationally, Dr. Bernstein explains how Claimant's physical and psychological impairments, resulting lack of concentration, introverted personality, and age combine to render him unemployable in the open labor market. Ms. Abram found Claimant was qualified to perform a very small percentage of jobs in the open labor market (less than 5%). However, the foundation for that opinion is flawed because she did not interview Claimant, accurately consider his physical limitations, or consider all the relevant evidence, including the mental injury.

There is overwhelming evidence Claimant can not realistically find and keep a job. Claimant's case manager, Vincent Antonelli, was well acquainted with Claimant's overall situation because he coordinated services for a year, and worked with Claimant to find him a job. While Mr. Antonelli remained optimistic that Claimant was employable "in some capacity," he warned that finding appropriate opportunities would take considerable time and effort. In a letter to Employer's counsel, Mr. Antonelli wrote, "I would expect that the average employer will have to 'think outside the box' when considering him for employment. It's not everyday that one is asked to consider hiring a new employee who presents with essentially one good hand." Even Employer's vocational expert indicates no employer can reasonably be expected to hire this employee, given his present physical condition, and reasonably expect him to successfully perform the work.

Claimant has demonstrated a dedicated work ethic over his life, which he applied to his recovery after his accident. For a long time, he maintained the hope of returning to the work force. However, his situation is now such that it is unrealistic to expect him to find employment given his physical limitations and psychological disabilities. Claimant has met his burden of establishing he is unable to compete for and maintain employment in the open labor market, and is, therefore, permanently and totally disabled.

4. Employer shall provide compensation for disfigurement.

In addition to permanent disability, the work accident caused Claimant disfigurement. Section 287.190.4 provides:

If an employee is seriously and permanently disfigured about the head, neck, hands or arms, the division or commission may allow such additional sum for the compensation on account thereof as it may deem just, but the sum shall not exceed forty weeks of compensation

Claimant sustained a complete amputation of his right index, middle and ring fingers, along with two-thirds of his small finger. He also has extensive soft tissue injury to the remaining hand. Doctors took skin grafts from his forearm and right thigh. See color photographs, Exhibit N (1-5). The appearance of his hand makes Claimant self-conscious. Efforts to fit Claimant with a cosmetic prosthetic hand proved unsuccessful because the "glove" adversely affected the functioning of Claimant's remaining hand. I find Claimant is entitled to receive 35 additional weeks of permanent partial disability compensation for disfigurement.

5. Claimant is not entitled to temporary total disability

One of the issues identified by Claimant at the start of the hearing was whether he was entitled to any additional temporary total disability benefits ("TTD") for any time period after August 4, 2002, the date through which Employer makes temporary payments. Temporary total disability compensation is paid until the employee can return to work, his condition stabilizes, or he has reached a point where further progress is not expected. *Lane v. G & M Statuary, Inc.* 156 S.W.3d 498, 506 (Mo.App. S.D. 2005). The purpose of temporary, total disability benefits is to cover the cost for a worker's healing period. *Id.* The test is whether an employee is able to compete in the open labor market given the employee's present physical condition. *Id.* I find that Claimant was not able to compete in the open labor market at any time after his work accident. He is not entitled to additional TTD. However, Claimant has established Employer's liability for permanent total disability benefits, which are the weekly equivalent of TTD benefits, and which shall commence as of August 5, 2002.

CONCLUSION

The overwhelming weight of the credible evidence establishes Claimant's July 10, 2001 not only caused a disabling and disfiguring physical injury, but also was the substantial factor in causing a permanently disabling mental injury. As a consequence of his injuries, Claimant shall receive permanent total disability benefits, medical treatment, and compensation for disfigurement as provided in this Award. Employer shall have a credit for the advance previously paid.

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secretst
Director
Division of Workers' Compensation

[1] Unlike subsection 8, subsection 9 does not contain the specific language limiting its application only to "mental injury resulting from work stress." However, a good faith termination or similar job action could only result in a stress-type injury as the claim could only arise based on the employee's subjective perception of the event, and since the employer is acting in good faith, there could be no physical component of the mental injury.