

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

Injury No.: 04-050679

Employee: David Harmon  
Employer: Best Buy  
Insurer: Insurance Company of the State of Pennsylvania  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Dismissed)  
Date of Accident: May 11, 2004  
Place and County of Accident: St. Louis 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. 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 July 23, 2008. The award and decision of Administrative Law Judge Linda J. Wenman, issued July 23, 2008, 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 2nd day of September 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_

## AWARD

Employee: David Harmon

Injury No.: 04-050679

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: Best Buy

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

Additional Party: N/A

Insurer: Insurance Co., State of Pennsylvania

Hearing Date: June 30, 2008

Checked by: LJW

### 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: May 11, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
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 developed low back pain after moving a television.
12. Did accident or occupational disease cause death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 7.5% BAW referable to the lumbar spine
15. Compensation paid to-date for temporary disability: \$2,862.93 representing 12 3/7th weeks.
16. Value necessary medical aid paid to date by employer/insurer? \$17,222.00

Employee: David Harmon

Injury No.: 04-050679

17. Value necessary medical aid not furnished by employer/insurer? None

- 18. Employee's average weekly wages: \$345.52
- 19. Weekly compensation rate: \$230.35 / \$230.35
- 20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses:	None
30 weeks of permanent partial disability from Employer	\$6,910.50

22. Second Injury Fund liability: N/A

Total:	\$6,910.50
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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 in favor of the following attorney for necessary legal services rendered to the claimant: Ronald Caimi

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: David Harmon

Injury No.: 04-050679

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: Best Buy

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

Additional Party: N/A

Insurer: Insurance Co., State of Pennsylvania

Checked by: LJW

**PRELIMINARIES**

A hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on June 30, 2008. The case was submitted on the day of hearing. Attorney Ronald Caimi represented David Harmon (Claimant). Best Buy (Employer) is insured by Insurance Company of the State of Pennsylvania, and represented by attorney Peggy Hecht. The Second Injury Fund was dismissed prior to the start of hearing.

Prior to the start of the hearing the parties identified the following issues for disposition in this case: liability of Employer for permanent total disability (PTD) or permanent partial disability (PPD) benefits; unpaid medical; and future medical care. Attorney Caimi acknowledged an unresolved attorney's lien attached to this case, and he will

protect this lien.

Claimant offered Exhibits A-D, Employer offered Exhibits 1-7, and the exhibits were admitted into the record without objection. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

### **FINDINGS OF FACT**

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is 52 years old, a high school graduate, and throughout his adult employment has worked on aircraft assembly, as an air conditioner assembler, in warehouse maintenance, as a chemical miller, and for Employer in its shipping/receiving department.
2. On May 11, 2004, Claimant was lifting a flat screen television when he developed low back pain. Employer initially authorized treatment for Claimant at Barnes Care, and conservative treatment was initiated. When Claimant did not respond to conservative care, an MRI was authorized that demonstrated possible disc protrusions at L2-3 and L3-4, a possible right lateral disc protrusion at L4-5, and a possible foraminal disc herniation at L5-S1. Claimant was referred to orthopedic surgeon, Dr. Raskas, for further treatment.
3. Dr. Raskas initially examined Claimant on June 30, 2004. Claimant's complaints included low back pain, with pain into his right hip, pain that traveled down the front and back of his right leg, and periodic left leg pain. After reviewing Claimant's MRI, Dr. Raskas questioned the existence of disc protrusions at L2-3, L3-4, and L5-S1, noting those protrusions were "barely" seen on an axial image only. Dr. Raskas agreed a protrusion was present at L4-5 that lateralized to the right. Dr. Raskas ordered an epidural steroid injection with a referral to Dr. Feinberg, physical therapy, oral steroids, and Vicodin that was to be used "sparingly." Claimant was taken off work.
4. Dr. Raskas re-examined Claimant on July 23, 2004, after Claimant had received his injection. Claimant reported 3-4 days of pain relief following the injection. Dr. Raskas ordered aquatic therapy.
5. Claimant received a second steroid injection during August 2004, which did not provide any relief. On August 13, 2004, Dr. Raskas placed Claimant on Vioxx and prescribed Percocet to be used "sparingly." Dr. Raskas released Claimant to work sedentary duty. Claimant did not attempt to return to work.
6. On August 31, 2004, a CT/myelogram was obtained of Claimant's low back. Claimant's myelogram was negative for nerve root compression. After reviewing the diagnostic films, Dr. Raskas reported he did not "see any evidence of any significant disk displacement or nerve root compression." Dr. Raskas was unable to correlate the initial MRI findings with the CT/myelogram findings, and noted the initial MRI was not of "high quality."
7. On September 8, 2004, a new MRI of Claimant's lumbar spine was obtained that demonstrated mild degenerative disc disease L2-S1, and a "tiny right sided focal protrusion at L5-S1, also seen in retrospect on the post-myelogram CT. Its clinical significance is uncertain given that there is no significant mass effect upon the thecal sac or exiting S1 nerve root sleeve." Clinical correlation was recommended.
8. On September 24, 2004, Employer referred Claimant to Dr. Doll, a physical medicine and rehabilitation specialist. Following examination, Dr. Doll diagnosed right low back pain, right sacroiliac joint pain, and right leg pain. Dr. Doll ordered additional physical therapy with a strict compliance home exercise program, encouraged Claimant to decrease his narcotic use, and administered a trigger point injection.
9. On October 7, 2004, Dr. Doll noted Claimant requested to be transported from the waiting room to the examining room by wheelchair due to low back pain. During examination Dr. Doll noted Claimant "demonstrated significant panting, moaning and shaking at times though not consistently." Dr. Doll further noted Claimant had significantly increased subjective complaints without any other incident or trauma, and this behavior was also present during

physical therapy. Dr. Doll recommended Claimant attend a work hardening program. Claimant was authorized to take the medications Skelaxin, Celebrex, Tramadol, and Vicodin.

10. Claimant was re-examined by Dr. Doll on October 21, 2004. Dr. Doll reviewed Claimant's work conditioning report and noted Claimant had been unable to lift an egg carton. During examination Dr. Doll noted Claimant walked with a very slow, guarded gait, and preferred to lie supine while his history was taken. Dr. Doll found Claimant's responses to specific questions were vague, and "considerable groaning and moaning took place throughout the examination." Dr. Doll noted Claimant continued to demonstrate significant inconsistencies between his subjective complaints and objective examination or radiographic findings. Dr. Doll further noted Claimant had obtained a prescription for Percocet from another physician, and was taking the Percocet in addition to his other prescribed medications. Dr. Doll concluded there was a significant possibility Claimant had a "non-organic basis for his current complaints." Further, Dr. Doll opined, that having attempted multiple conservative measures to treat Claimant's symptoms, and due to the lack of objective physical and diagnostic findings, Claimant was at maximum medical improvement (MMI), and could return to work without restrictions. Dr. Doll found Claimant had not sustained any permanent partial disability associated with the May 11, 2004 injury. Claimant did not attempt to return to work.

11. On November 9, 2004, Claimant sought treatment at his own expense with Dr. Kennedy, a neurosurgeon. After reviewing Claimant's CT/myelogram, Dr. Kennedy agreed the studies showed no evidence of nerve root compromise or bony abnormality. On December 2, 2004, Dr. Kennedy noted on physical examination Claimant's straight leg raising was negative, and his motor and sensory exams were normal. Dr. Kennedy found "at this point I do not see any clear cut abnormality to account for his symptoms." Dr. Kennedy ordered an EMG.

12. On December 22, 2004, following review of Claimant's EMG study, Dr. Kennedy noted the EMG did not demonstrate "any obvious evidence of nerve root impingement." Dr. Kennedy had no additional medical treatment to offer, and opined Claimant's "problems are primarily arising from muscle and ligamentous injury." Dr. Kennedy suggested continued treatment with Dr. Feinberg, and that Claimant attend aggressive rehabilitation.

13. Claimant returned to the care of Dr. Feinberg during January 2005, and was placed back into physical therapy with a home exercise program. During January and February 2005, Claimant received a selective nerve root block at L5, and trigger point injections without relief of his pain. During March 2005, Dr. Feinberg contacted Dr. Kennedy regarding Claimant's lack of progress, and a thoracic MRI was ordered along with cervical x-rays. The cervical x-rays revealed significant degenerative changes. [1]

14. During an October 10, 2005 appointment, Dr. Feinberg diagnosed lumbar radiculopathy with chronic discogenic disease that was exacerbated by Claimant's work injury, which caused a significant amount of inhibition of paravertebral muscle function. Dr. Feinberg opined if Claimant is unable to regain lumbar paravertebral muscle strength, he would have a very poor prognosis for returning to gainful employment.

15. In late October 2005, Dr. Feinberg continued to administer injections without relief, and suggested Claimant seek chiropractic manipulation. Between October 31, 2005, and January 16, 2006 Claimant received electric muscle stimulation with chiropractic manipulation. Claimant's low back symptoms did not improve. Claimant did not inform Employer he had sought chiropractic care.

16. Prior to his deposition, Dr. Feinberg had last examined Claimant on January 9, 2006. At that examination, Dr. Feinberg diagnosed lumbar radiculopathy, lumbar musculoskeletal pain syndrome with very significant and advanced deconditioning due to Claimant's May 11, 2004 work injury. Claimant's current pain medications included a Duragesic Patch 75 mg every 72 hours, and Percocet for break through pain. Dr. Feinberg testified he does not believe Claimant is malingering, and Claimant will require medication management and a strengthening program in the future. Dr. Feinberg acknowledged all of Claimant's diagnostic studies are negative, and all of Claimant's treatment is based on Claimant's subjective complaints.

17. Currently, Claimant is in constant pain, and spends his day lying on his side in bed watching television. Claimant is able to: sit on a hard surface for "less than a minute"; sit in a recliner for approximately 6-7 minutes; walk approximately 1 block; lift 100 pounds briefly; and complained of sleep interruption due to pain.

18. Dr. Berkin, a family practice physician, examined Claimant at his request on September 19, 2005. Upon examination, abnormal findings included: reversal of lordotic curve on forward flexion; midline lumbar column tenderness extending laterally into the paraspinal muscles with palpable paraspinal spasms; a positive right Patrick-Fabere test; and decreased lumbar range of motion. Dr. Berkin diagnosed a lumbosacral strain and degenerative lumbar facet disease. Dr. Berkin rated Claimant's injury at 25% BAW PPD referable to the lumbar spine. Dr. Berkin's treatment recommendations included: continued use of nonsteroidal anti-inflammatory and muscle relaxant medication, a home exercise program; weaning of narcotic medications; a 20 pound floor to waist and 10 pound waist to shoulder lifting restriction; frequent breaks during periods of exertion; use of proper body mechanics; avoidance of excessive squatting, kneeling, stooping, turning, twisting, climbing and lifting. Dr. Berkin also recommended a functional capacity evaluation be performed to assess Claimant's ability to work.

19. Dr. George, an orthopedic surgeon, examined Claimant at the request of Employer on December 27, 2005. Upon examination, abnormal findings included: marked limitation of lumbar flexion and extension; marked limitation of straight leg raising in the sitting position, but negative straight leg raising in the supine position; and diminished sensation to light touch below the knee in the right leg. Dr. George diagnosed lumbar spondylosis, a condition that preexisted the May 11, 2004 injury based on radiology review; and a lumbosacral sprain due to the May 11, 2004 injury. Dr. George recommended Claimant undergo a functional capacity evaluation, and be returned to work based on the evaluation. Dr. George did not find Claimant had sustained any PPD related to the May 2004 injury, as Claimant's current symptoms are related to his preexisting degenerative condition.

20. Vocational rehabilitation counselor, Mr. Timothy Lalk, interviewed Claimant on November 1, 2006. Mr. Lalk found Claimant to be a younger worker, and a high school graduate. During his evaluation Mr. Lalk had Claimant complete the Wide Range Achievement Test., and the Adult Basic Learning Examination. Claimant scored at the 6th grade level in reading and math on the Wide Range Achievement Test, and in the 10th grade in the Adult Basic Learning Examination. After considering Claimant's age and interest level, Mr. Lalk concluded Claimant would be unlikely to successfully complete a secondary training program. Applying the conclusions reached by Dr. Doll or Dr. Raskas, Mr. Lalk opined Claimant could return to work in his former employment or an alternative job. However, Mr. Lalk further opined if Claimant's complaints of pain along with his need to lie down during the day are considered, and considering the opinions of Drs. Poetz,<sup>[2]</sup> Berkin, and Feinberg, and Claimant's presentation, it would be reasonable to conclude Claimant is PTD, and unable to secure or maintain employment in the open labor market.

21. Vocational rehabilitation consultant, Ms. Donna Abram, interviewed Claimant on April 26, 2007. Following her interview and review of Claimant's medical and vocational records, Ms. Abram concluded Claimant's background and abilities would allow him access to a wide range of job classifications. Ms. Abram questioned Claimant's ability to obtain or maintain employment given Claimant's description of the accommodations he would require. However, Ms. Abram also questioned Claimant's credibility, noting inconsistencies in his behavior during her interview. Ms. Abram concluded Claimant is employable in the open labor market.

### **FINDINGS OF FACT & RULINGS OF LAW**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

#### **Liability of the Employer for Permanent Total Disability**

Claimant seeks permanent total disability benefits from Employer. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. See *Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled on other ground). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled on other grounds). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44

(Mo.App. 2003)(overruled on other grounds). Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995).

Claimant asserts he is PTD due to the work injury he suffered on May 11, 2004. All physicians who examined Claimant diagnosed the injury as producing a low back sprain/strain. Only Dr. Feinberg believes Claimant's injury has a radicular component caused by the injury. However, even Dr. Feinberg agrees no diagnostic study performed demonstrates any pathology that would produce radiculopathy. Dr. Feinberg further concedes he is relying on Claimant's subjective complaints when prescribing treatment for Claimant. To find the opinion of Dr. Feinberg to be persuasive, requires the belief Claimant is credibly reporting his symptoms. The medical records are replete with inconsistencies displayed by Claimant. As an example, at hearing, Claimant testified he can lift 100 pounds briefly while experiencing pain, yet at work hardening Claimant could not even lift an egg carton. I do not find Claimant credible.

Mr. Lalk, Claimant's vocational expert, relies heavily on the opinion of Dr. Feinberg and Claimant's presentation and subjective complaints when reaching his opinion Claimant is PTD and unable to compete in the open labor market. For the reasons stated above, Mr. Lalk's reliance is misplaced. Mr. Lalk also relied on the opinions of Dr. Poetz and Dr. Berkin. Dr. Poetz's opinion was not placed in evidence, and can not be given weight. Dr. Berkin did not render an opinion regarding PTD, and recommended Claimant undergo a functional capacity evaluation to determine Claimant's "true level of work capability." Mr. Lalk did opine if one believed the opinions rendered by Dr. Doll and Dr. Raskas, Claimant was employable. I find the opinions of Dr. Doll and Dr. Raskas to be persuasive, and find Claimant to be employable in the open labor market. Claimant is not PTD.

#### **Issues related to PPD benefits**

A permanent partial disability award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App. 1991). Due to the May 11, 2004 injury, Claimant suffered a lumbar sprain/strain. Dr. Berkin rated Claimant's injury at 25% BAW PPD. Dr. Doll found Claimant had suffered no permanent disability due to the injury. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). Based on the testimony and evidence presented, I find Claimant's disability to be 7.5% PPD BAW referable to his lumbar spine. Employer is liable for 30 weeks, or \$6,910.50 in PPD benefits.

#### **Issues related to past medical expenses**

Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989).

Claimant seeks reimbursement of medical expenses for his chiropractic care incurred in late 2005 in the amount of \$455.00. Claimant did provide a copy of his chiropractic records, and an itemized bill, however, Claimant testified he sought this treatment on his own and without notifying Employer of this treatment. Claimant further testified the treatment did not help. Dr. Doll found Claimant to be at MMI on October 21, 2004. After this date, Claimant continued to treat with Dr. Feinberg on his own. Claimant's chiropractic treatment began on October 31, 2005. I find Dr. Doll's date of MMI to be persuasive, and find Employer is not liable for additional medical expenses incurred by Claimant past October 21, 2004.

#### **Issues related to future medical care**

Claimant requests future medical care from Employer. Claimant is not required to present evidence concerning the specific future medical treatment that will be necessary in order to receive an award of future medical care. *Landers v. Chrysler Corp.*, 963 S.W2d 275 (Mo.App. 1997) (overruled in part). Future medical benefits may be awarded if a claimant shows by reasonable probability that there will be a need for additional medical care due to the work-related injury. *Id.* When future medical benefits are awarded, the medical care must flow from the accident in order to hold an employer liable. *Id.* Reasonable probability is based on reason and experience that inclines the mind to believe, but leaves room for doubt. *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 320 (Mo.App. 1986).

I do not find Claimant's need for future medical care to be related to his work injury. The physicians who have indicated future medical needs have relied on Claimant's subjective reporting, which I do not find credible, when forming their opinions. Employer is not liable for future medical benefits due to the May 11, 2004 injury.

### CONCLUSION

Claimant is not found to be permanently and totally disabled. Employer will pay 30 weeks of permanent partial disability. Payment of past medical expenses and future medical care are denied. Claimant's attorney is entitled to a 25% lien.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

LINDA J. WENMAN  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffrey W. Buker  
*Director*  
*Division of Workers' Compensation*

[\[1\]](#) The thoracic MRI result was not placed in evidence.

[\[2\]](#) Dr. Poetz's medical report and/or deposition was not placed in evidence.