

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

Injury No.: 03-103106

Employee: William Hazen

Employer: City of Kirksville

Insurer: Self-Insured through M.I.R.M.A.

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)

Date of Accident: October 15, 2003

Place and County of Accident: Kirksville, Adair 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 January 2, 2008. The award and decision of Administrative Law Judge Robert J. Dierkes, issued January 2, 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 9th day of September 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: William Hazen

Injury No: 03-103106

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: City of Kirksville

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

Additional Party Second Injury Fund (Dismissed as part of this award.)

Insurer: Self-insured through M.I.R.M.A.

Hearing Date: October 11, 2007, and November 1, 2007

Checked by: RJD/cs

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: October 15, 2003.
5. State location where accident occurred or occupational disease was contracted: Kirksville, Adair 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? Employer is self-insured through Missouri Intergovernmental Risk Management Association, a self-insurance trust.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was assisting in moving a 12-foot log when he injured his low 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: Low back.
14. Nature and extent of any permanent disability: 10% permanent partial disability of the body as a whole rated at the low back.
15. Compensation paid to-date for temporary disability: \$5,637.14.

16. Value necessary medical aid paid to date by employer/insurer? \$24,562.00.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$542.98.
19. Weekly compensation rate: \$361.98 ttd, ppd/\$347.05 ppd.
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: 40 weeks of permanent partial disability benefits \$13,882.00.

22. Second Injury Fund liability: The claim against the Second Injury Fund is ordered dismissed without prejudice.

Total: \$13,882.00.

23. Future requirements awarded: None.

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

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

Harry Nichols

FINDINGS OF FACT and RULINGS OF LAW:

Employee: William Hazen

Injury No: 03-103106

Dependents:

Before the
DIVISION OF WORKERS'
COMPENSATION

Employer: City of Kirksville

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

Additional Party Second Injury Fund (Dismissed as part of this award.)

Insurer: Self-insured through M.I.R.M.A.

Checked by: RJD/cs

ISSUES DECIDED

An evidentiary hearing was held in this case on October 11, 2007 in Kirksville. The record was held open for the submission of the transcript of the December 18, 2006 hearing; that transcript was filed on November 1, 2007. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was finally submitted on December 18, 2007. The evidentiary hearing was held to decide the following issues:

- Whether Claimant is entitled to additional temporary total disability (“TTD”) benefits, and, if so, for what period(s) of time;
- Whether Employer shall be ordered to provide Claimant with additional medical care pursuant to Section 287.140, RSMo;
- Whether the work-related accident of October 15, 2003 is the medical and legal cause of the alleged injuries or conditions in Claimant’s neck and upper back;
- Whether Claimant’s claim for injuries to his neck and upper back are barred by the notice requirement of Section 287.420;
- Whether Employee has reached maximum medical improvement, and, if so, whether it is appropriate for a final award to be issued;
- If a final award is issued, the nature and extent of Claimant’s permanent partial disability, if any.

STIPULATIONS

The parties stipulated as follows:

1. The Division of Workers’ Compensation has jurisdiction over this case;
2. Venue is proper in Adair County;
3. Both Employer and Employee were covered under the Missouri Workers’ Compensation Law at all relevant times;
4. The rates of compensation are \$361.98/\$347.05, based on an average weekly wage of \$542.98;
5. Claimant sustained an accident arising out of and in the course of his employment with the City of Kirksville on October 15, 2003;
6. The City of Kirksville was an authorized self-insured employer for Missouri Workers’ Compensation at all relevant times, and such self-insurance was handled by Missouri Intergovernmental Risk Management Association, a self-insurance trust;
7. Employer paid medical benefits of \$24,562.00; and
8. Employer paid temporary total disability benefits of \$5,637.14, representing 15 4/7 weeks of compensation.

EVIDENCE

The evidence consisted of the testimony of Claimant, William L. Hazen, the deposition testimony of Dr. Matthew Gornet, the narrative report of Dr. David Ebelke, claim for compensation, report of injury, and extensive medical records.

PROCEDURAL HISTORY

The original claim for compensation was filed in this case on October 21, 2004 by Employee’s attorney, Harry Nichols. On December 16, 2004, attorney Ellen Morgan entered her appearance on behalf of Employee. On November 9, 2005, the parties appeared for a prehearing conference, at which time Ellen Morgan informed Legal Advisor Robyn that Claimant would be requesting a hardship hearing. On December 23, 2005, Ellen Morgan withdrew as Claimant’s attorney.

On February 15, 2006, Claimant appeared at a prehearing conference with attorney Jay Benson, who entered his appearance on that date. Attorney Benson informed the undersigned administrative law judge on that date that he and Harry Nichols would both be representing Claimant; that Claimant would be requesting a hardship hearing, although no physicians' depositions had yet been scheduled; and that Employer was requesting Claimant to see Dr. Chris Wilson in Kansas City, that Claimant had been refusing to see Dr. Wilson, but that he (attorney Benson) had convinced Claimant to see Dr. Wilson, although there was a question as to whether Dr. Wilson had recently closed his medical practice. The undersigned administrative law judge then requested the parties to agree on another physician for an independent medical evaluation. The parties indicated they could not agree, and requested the undersigned administrative law judge to recommend a physician. At that time I informed the parties that I was very reluctant to recommend a physician for numerous reasons; I further indicated that a case on another docket had recently been concluded after the parties had agreed to allow Dr. David Ebelke to perform an independent medical evaluation. The parties indicated that they would each consider having Dr. Ebelke perform an evaluation. Dr. Ebelke performed such an evaluation on April 11, 2006.

On June 29, 2006, attorney Jeff Slattery, on behalf of Employer, filed a REQUEST FOR HEARING – FINAL AWARD. On July 17, 2006, that request was denied as none of the attorneys had responded to the docket clerk's request for available hearing dates.

At the August 8, 2006 prehearing conference, Claimant appeared by counsel Ellen Morgan, who again entered her appearance as counsel for Claimant. Ms. Morgan indicated that she would shortly be requesting a hardship hearing; Mr. Slattery reiterated his request for a final hearing; it was mutually agreed to set the case for evidentiary on October 10, 2006, and the parties were instructed to have all discovery completed by that date.

On August 10, 2006, Jay Benson was given leave to withdraw as attorney for Claimant.

On September 1, 2006, the deposition of Dr. Matthew Gornet was taken.

On September 22, 2006, a conference call was held with Ms. Morgan, Mr. Slattery, Ms. Kristen Paulsmeyer, Assistant Attorney General (on behalf of the Second Injury Fund) and the undersigned administrative law judge. At that time, Ms. Morgan informed the undersigned administrative law judge that she was filing an amended claim alleging neck injuries and depression, and alleging permanent total disability against the Second Injury Fund. Ms. Morgan also informed the undersigned administrative law judge that Claimant was scheduled to see Dr. Poetz that same day for an evaluation of his permanent total disability claim against the Second Injury Fund, and that Claimant also needed a report from Dr. John Bailey regarding the nature of Claimant's neck condition and a causation opinion thereon. For all of these reasons, Ms. Morgan was requesting a continuance of the October 10, 2006 hearing. I informed the parties that I would continue the October 10, 2006 hearing, that I would set the case for a prehearing conference in Kirksville on November 15, 2006 and that I required the following information at the prehearing conference: (A) Whether Mr. Hazen kept his appointment with Dr. Poetz; (B) The status of Dr. Poetz's report and the scheduling of Dr. Poetz's deposition; (C) The status of the scheduling of Mr. Hazen's deposition by the Second Injury Fund, in light of the amended claim alleging permanent total disability; (D) In light of the amended claim alleging neck injuries, a report from Dr. Bailey addressing (at a minimum) the diagnosis of Mr. Hazen's neck condition, planned course of treatment for the neck, and the cause/effect relationship, if any, between the work accident and the neck condition and need for treatment; and (E) In light of the amended claim alleging depression, documentation of the status of Mr. Hazen's diagnosis and/or treatment of depression and/or other psychiatric problems; particularly if he has already seen a psychiatrist or when he is scheduled to see a psychiatrist.

On October 11, 2006, Claimant, by Harry Nichols, filed a voluntary dismissal of the Second Injury Fund claim, and on October 18, 2006, the undersigned administrative law judge signed an Order of Dismissal of that claim.

On November 3, 2006, Ellen Morgan was again given leave to withdraw as attorney for Claimant.

On November 17, 2006, Harry Nichols and Jeff Slattery appeared before the undersigned administrative law judge in Jefferson City for prehearing conference. At that time, Jeff Slattery filed a REQUEST FOR HEARING – FINAL

AWARD. Both Mr. Slattery and Mr. Nichols agreed that the case was ready for evidentiary hearing, and the case was set for hearing on December 1, 2006 in Kirksville. Mr. Nichols indicated that Claimant would not be pursuing the depression claim at the hearing, and that all other discovery was complete. Because of a widespread record snowfall on November 30 – December 1, the hearing was rescheduled for December 18, 2006. The parties appeared for the hearing on December 18, 2006 and the hearing was held. A TEMPORARY OR PARTIAL AWARD was issued on January 12, 2007. On January 31, 2007, Claimant, acting *pro se*, filed an Application for Review with the Labor and Industrial Relations Commission. On February 16, 2007, the Labor and Industrial Relations Commission dismissed the Application for Review. On February 23, 2007, Harry Nichols requested leave to withdraw as attorney for Claimant at Claimant's direction. On May 25, 2007, Harry Nichols filed an entry of appearance on Claimant's behalf.

The case again proceeded to evidentiary hearing on Employer's REQUEST FOR HEARING – FINAL AWARD on October 11, 2007 in Kirksville. The evidentiary hearing was held on that date, but the record was left open for the filing of the transcript of the December 18, 2006 evidentiary hearing, which transcript was filed on November 1, 2007. The record was closed on November 1, 2007.

DISMISSAL OF SECOND INJURY FUND CLAIM

As noted above, on October 11, 2006, Claimant filed a voluntary dismissal of the Second Injury Fund claim, and on October 18, 2006, the undersigned administrative law judge signed an Order of Dismissal of that claim. However, due to a clerical error, the Second Injury Fund claim was reactivated. At the commencement of the October 11, 2007 hearing, Claimant, by counsel Harry Nichols, orally moved (again) to dismiss the Second Injury Fund claim. That motion was sustained. **The claim against the Second Injury Fund is ordered dismissed without prejudice.**

FINDINGS OF FACT AND RULINGS OF LAW

Based upon the evidence, I find the facts as follows.

Claimant, William L. Hazen, was born on April 16, 1958, graduated from high school in 1976, and received a vocational certificate for auto body repair after two years of study and training. Claimant worked in the auto body repair business for approximately twenty years, and owned and operated his own auto body repair business from 1990 to 1997. Claimant considers the work he performed as an auto body repairman to be "heavy work" at times.

In April 1997, Claimant went to work for the City of Kirksville ("Employer"). Claimant began work for Employer as a sludge truck driver. His next job for Employer was an operator position in the water treatment facility, which Claimant characterized as "heavy work". During his last year with Employer, Claimant worked with the street department, which was also "heavy work".

Claimant sustained a work-related accident on October 15, 2003. Prior to October 15, 2003, Claimant had some occasional problems with his low back which would cause him to visit a chiropractor. Claimant could not recall how often he had visited a chiropractor, or even the name(s) of the chiropractor(s), but Claimant believes he had not seen a chiropractor for several years prior to October 15, 2003. Claimant denied any problems with his neck or upper back prior to October 15, 2003.

The work-related accident of October 15, 2003 occurred as Claimant, with the help of a co-worker, was assisting a homeowner in carrying a 12' long log from the yard to the curb. In the process, the homeowner dropped his end of the load and Claimant, still holding the log, felt immediate significant pain in the right side of his low back, as well as some pain in his right leg and mid-back. Employer sent Claimant to see Dr. Robert Sparks the same day. Dr. Sparks gave an initial diagnosis of "acute thoracic/lumbar/sacral strain" and "possible ruptured disc", and prescribed Percocet, Flexeril and Prednisone. An MRI was done on October 21, 2003 which demonstrated degenerative disc disease, a very small central disc herniation at L2-3 without significant narrowing of the canal, and a small left-sided disc herniation at L5-S1. Claimant continued to see Dr. Sparks at very regular intervals until December 4, 2003. Dr. Sparks gradually increased the amount that Claimant was allowed to lift. On December 4, 2003, the lifting restriction was 30 lbs.

Claimant was referred by Dr. Sparks to Dr. Dennis Abernathie of Columbia Orthopaedic Group. Claimant first saw Dr. Abernathie on December 16, 2003. Dr. Abernathie initially thought that Claimant would be “substantially better in four to six weeks” with physical therapy. When seen by Dr. Abernathie on January 12, 2004 and on January 27, 2004, Claimant appeared to be making good progress.

Claimant saw Dr. Abernathie again on March 29, 2004. Claimant had had a flare-up of his symptoms while doing some shoveling at work. Dr. Abernathie felt that a left sacroiliac joint injection and a few days off work would make him better. Claimant was also complaining of left arm pain at this visit. When seen by Dr. Abernathie on April 7, 2004, Claimant’s left side was better, but was now complaining of some right sacroiliac joint pain, and therefore, Dr. Abernathie had a right S-1 facet joint injection done. On April 16, 2004, Dr. Abernathie felt that Claimant was “pretty uncomfortable” and recommended a discogram, which was done on April 22, 2004. According to Dr. Abernathie’s note of April 23, 2004, the L5-S1 disc space was causing the most problem, but L4-5 and L3-4 were also problematical. Dr. Abernathie expressed concerns about fusing just L5-S1, but also had concerns about fusing all three levels, and suggested a second opinion. Claimant saw Dr. Abernathie again on April 30, 2004, and a second opinion referral was made to Dr. Joel Jeffries.

Claimant saw Dr. Joel Jeffries of Progressive Spine Care and Rehabilitation on May 5, 2004. Dr. Jeffries diagnosed lumbar degenerative disc disease and mechanical low back pain, and prescribed additional physical rehabilitation. The rehabilitation started on May 7, 2004, and continued on a twice weekly basis through June 25, 2004. Dr. Abernathie’s records have a hand-written note of 6-2-04 which reads:

Talked with Mr. Hazen and his concerns about his condition and conservative care vs. surgery. Mr. Hazen had second opinion with Dr. Jeffries who recommended Med-x program and said surgery would be of no benefit at this time. We agree with Dr. Jeffries. If conservative care fails then discectomy would be our choice vs. fusion. On the discogram L5-S1 cause (sic) him pain. He was agreeable to our explanation and we will see him back if surgery is indicated.

When Dr. Jeffries saw Claimant on July 2, 2004, he felt Claimant was ready for a functional capacity evaluation. This was done on July 13, 2004 at The Work Center in Columbia. The evaluator concluded that Claimant could function in the “Light/Medium” work demand level. On July 16, 2004, Dr. Jeffries released Claimant to work with a 20 pound limit. On August 13, 2004, Dr. Jeffries gave a permanent partial impairment rating of 10%.

Beginning in December 2003, Claimant began seeing Dr. Joseph Hanaway, a St. Louis neurologist, at the suggestion of his (Claimant’s) attorney, Harry Nichols. Dr. Hanaway referred Claimant to Dr. Matthew Gornet.

Dr. Matthew Gornet first saw Claimant on February 21, 2005. As will be discussed in greater detail later, Dr. Gornet is a St. Louis orthopedic surgeon with significant interest and experience in disc replacement surgery. Dr. Gornet’s recommendation on February 21, 2005 was a two-level disc replacement at L5-S1 and L4-5.

As noted above, Claimant saw Dr. David Ebelke on April 11, 2006. Dr. Ebelke’s report of that date was in evidence. Dr. Ebelke is an orthopedic surgeon who practices spine surgery. As will be discussed in more detail below, Dr. Ebelke does not believe that any spinal surgery of any kind (included, but not limited to, disc replacement surgery) would benefit Claimant; Dr. Ebelke suggested that a behavioral pain management program run by a psychologist or psychiatrist might be helpful.

It is clear from the medical records that Claimant has expressed his desire to avoid surgery on multiple occasions. Nevertheless, Claimant testified at the December 18, 2006 hearing that he would “probably” undergo the surgery offered by Dr. Gornet if Employer was ordered to provide same.

Claimant testified that, in addition to his low back and lower extremity pain, he has had neck and upper back pain ever since the 10-15-03 accident, and that he so informed the health care providers whenever possible. Claimant testified that he has not sought work since late August 2004, when he last worked for Employer. Claimant testified that he has not been capable of working during this time, and is not currently capable of working.

At the October 11, 2007 hearing, Claimant testified that he has been in contact with surgeons in Europe regarding possible disc replacement surgery, and that he is now anxious to have such surgery.

ISSUES

NECK AND UPPER BACK

There is no medical opinion in evidence linking any of Claimant's neck or upper back complaints to the work accident of October 15, 2003. Dr. Ebelke found that the neck and upper back complaints were not related to the October 15, 2003 work accident. "In a workers' compensation case, the claimant must prove all of the essential elements of his claim, including a causal connection between the accident and the injury, by a reasonable probability. In cases involving medical causation, which is not within the common knowledge or experience, he must present medical or scientific evidence showing the cause and effect relationship between the complained-of condition and the asserted cause." *Davis v. General Electric Co.*, 991 S.W.2d 699, 706 (Mo.App.S.D. 1999). Claimant has not presented the requisite medical causation evidence in this case in regards to his alleged neck and upper back injuries. **I find, therefore, that the work accident of October 15, 2003 was not the cause of Claimant's neck and upper back complaints.**

As it is clear that Claimant has failed in his burden of proving that the neck and upper back complaints are related to the work accident, the notice issue is moot.

ADDITIONAL MEDICAL CARE AND MAXIMUM MEDICAL IMPROVEMENT

Dr. Matthew Gornet has testified that he is the only surgeon in the St. Louis area who has participated in test studies for disc replacement therapy. Dr. Gornet has participated in test studies for several types of replacement discs, including the Charité disc and the Pro-Disc. Dr. Gornet recently completed training in Germany for the use of Pro-Disc for multiple levels.

When Claimant initially consulted with Dr. Gornet in February 2005, Dr. Gornet's recommendation was a two-level disc replacement at L5-S1 and L4-5, using the Charité disc product. Because of the changes in technology in the interim period, Dr. Gornet's current recommendation (current, that is, at the time his deposition was taken on September 1, 2006) is to perform a one-level fusion with a one-level disc replacement using the Pro-Disc product, although Dr. Gornet indicated that this recommendation could change depending upon the pre-operative work-up and could include multiple-level disc replacements with the Pro-Disc product.

At the October 11, 2007 hearing, Claimant testified that he felt he had seen enough doctors. He stated that the only surgery he wanted was the disc replacement surgery available in Europe. Claimant testified that he did not yet know if he was a candidate for such surgery. Claimant testified that he did not believe such surgery was approved for use in the United States.

As noted above, Dr. Ebelke advised strongly against any surgeries. In his report of April 11, 2006, Dr. Ebelke stated:

With respect to what else can be done for this, I see no surgical indications of any kind. Microdiscectomy certainly wouldn't help; his predominant complaints are mid to low back pain, and discectomies are notoriously ineffective for low back pain. Virtually every major text and experienced spinal surgeon will say the same thing; discectomies are best, and fairly predictable, for radicular leg pain, when there is clear nerve root compression. ... I agree that fusion in a case like this would be inappropriate, and would not help him. He does not have an instability. He has diffuse degenerative disc disease, which, although worse at the bottom two levels, is also present at the next three levels up, and neither a limited fusion nor an entire lumbar spine fusion is likely to provide significant improvement in his symptoms. If anything, it's probably more likely to make him worse. With respect to total disc replacement, I strongly advise against it. These are relatively new and still considered investigational by many insurance companies. ... It has been FDA approved for very limited usage, basically one level disease only, so a two level disc replacement would be

off-label use. ... With three level disc disease immediately above the bottom two levels, it would be highly unlikely that disc replacement would provide significant pain relief. Additionally, there is no good salvage procedure for disc replacement. It's not likely to restore a significant amount of motion in this case, and I would under no circumstances recommend it. There are significant psycho/social issues present, a poor work ethic, symptom magnification signs, and unrealistic expectations, and I think any type of surgery would be a predictable failure.

In his deposition, Dr. Gornet agreed that in February 2005, the Charité disc was the only disc-replacement product approved by the FDA, and it was not approved for two-level use. (Pages 31-32 Gornet deposition.) He also testified that the Charité disc has still not been approved for use at two levels in the low back. (Page 33, Gornet deposition.) The use of the Charité disc at two levels would be an "off-label use". Dr. Gornet testified generally as to what is meant by "off-label usage". (Pages 34-35, Gornet deposition.) Dr. Gornet testified that the use of an artificial disc at the same time a fusion is being proposed for the low back would be considered an "off-label use". (Page 40, Gornet deposition.) He also testified that ProDisc is currently FDA approved for single level use only. (Page 47, Gornet deposition.) Therefore, it is clear that any surgery currently contemplated by Dr. Gornet would be an off-label use of the disc-replacement product. As Dr. Gornet explained, using the example of the "off-label usage" of aspirin for treatment of acute heart attacks, simply because a use is "off-label" does not mean that it is illegal, dangerous, or ineffective. I have no doubt that multi-level use of disc-replacement products can be effective for certain patients, and I have no doubt such will be approved by the FDA in the future. I have no doubt that the use of a replacement disc in conjunction with a lumbar fusion can be effective for certain patients, and will also be approved by the FDA in the future. As Dr. Gornet is an excellent surgeon with an excellent reputation, I have no doubt that he wants to do what is best for Claimant's health and recovery, and in that regard he has proposed what is currently an off-label usage for the disc replacement product.

As framed by the evidence, the issue as to whether to order Employer to provide Claimant with the surgery proposed by Dr. Gornet is a close question. The fact that such procedure is "off-label" does not require its rejection if the greater weight of the evidence indicates a significant likelihood that it would yield a significant benefit to Claimant. However, Dr. Ebelke has, I believe, logically explained why disc replacement surgery would likely be of limited benefit, no benefit or of negative benefit to Claimant. I find Dr. Ebelke's opinions to be clearly supported by substantial evidence. While I applaud Dr. Gornet's desire to help Claimant, I am convinced by the evidence that any surgery, included that contemplated by Dr. Gornet, would not benefit him.

While the only direct medical evidence indicating that Claimant suffers from psychological problems comes from Dr. Ebelke's report ("[t]here are significant psycho/social issues present, a poor work ethic, symptom magnification signs, and unrealistic expectations"), my observation of Claimant after observing his lengthy testimony during two hearings, Claimant's frequent hirings and firings of attorneys, and his general dissatisfaction with the medical profession, lead me to agree strongly with two of Dr. Ebelke's observations, i.e., that Claimant has significant psycho/social issues, and that he has unrealistic expectations. Even if there were strong *medical* indications for Claimant to have surgery (and there are not), I believe Claimant's significant psycho/social issues and unrealistic expectations alone would disqualify him from being a surgical candidate.

In the TEMPORARY OR PARTIAL AWARD issued in this case on January 12, 2007, it was ordered as follows: "In the event Claimant is willing to participate therein, Employer shall provide Claimant with a behavioral pain management program run by a psychologist or psychiatrist." I find that, immediately after the issuance of the temporary award, Employer notified Claimant's attorney of Employer's willingness to provide such treatment. I find that Employer made arrangement for such treatment to take place with an appropriate program in Columbia, Missouri, and that Claimant refused to participate.

I will note here that the medical evidence presented at the evidentiary hearing of October 11, 2007 was almost identical to that presented at the December 18, 2006 hearing. In fact, for all intents and purposes, the only new evidence was Claimant's testimony confirming his refusal to participate in a behavioral pain management program run by a psychologist or psychiatrist, and Claimant's testimony concerning his flirtation with European surgical procedures. Thus, based on the evidence presented, I again find that the only additional medical treatment that would be of any benefit to Claimant would be a behavioral pain management program. As Claimant has categorically refused to participate in such a program, I find that Claimant's condition has reached maximum medical improvement.

Thus, it is appropriate to issue a final award herein.

CLAIM FOR ADDITIONAL TTD BENEFITS

The only physician who has opined that Claimant is temporarily totally disabled due to his low back is Dr. Gornet. On May 25, 2005, Dr. Hanaway stated that Claimant “really cannot work under the circumstances of his neck, mid back and low back.” As I have already found that Claimant’s neck and mid-back complaints are not a component of this case, and Dr. Hanaway did not state that Claimant cannot work due to his low back only, Dr. Hanaway’s finding is of no particular help in deciding this issue.

The functional capacity evaluation performed in July 2004 indicated that Claimant could work at a light/medium level. Dr. Jeffries agreed that such was the case. Dr. Ebelke also found that Claimant could work at a light/medium level. Claimant certainly has the experience and the intelligence to obtain and maintain employment at the light/medium level, assuming he is currently psychologically able to do so. In this regard, the only medical evidence admitted at the hearing questioning Claimant’s psychological soundness comes from Dr. Ebelke, who nevertheless has opined that Claimant is able to work. I again note that Claimant adduced no evidence at the hearing of his psychological inability to work.

I find insufficient evidence of Claimant’s current inability to compete in the open labor market for employment, and, therefore, no additional TTD benefits are awarded.

PERMANENT DISABILITY

Claimant has made some vague suggestions that he is permanently and totally disabled. However, as pointed out immediately above, there is no credible evidence that Claimant is unable to compete in the open labor market as a result of the October 15, 2003 accident.

Again, I raise my concerns regarding Claimant’s probably-precarious psychological condition. I have serious concerns as to whether Claimant can compete in the open market for employment in his current status. However, that current status includes neck and upper back complaints, which Claimant clearly has NOT proven to be related to the work accident of October 15, 2003, and it also includes the psychological issues, which have not been clearly defined and which clearly have NOT been proven to be related to the work accident. It is certainly possible that Claimant’s psychological issues are long-standing and pre-existing; Claimant, however, has dismissed his claim against the Second Injury Fund.

The only credible medical evidence is that Claimant has sustained a permanent partial disability to his low back. On August 13, 2004, Dr. Joel Jeffries opined that Claimant sustained a permanent partial *impairment* of 10% of the body as a whole related to the low back, as a result of the October 5, 2003 work accident. On April 11, 2006, Dr. David Ebelke opined that Claimant sustained a permanent partial disability of 5% of the body as a whole due to the October 5, 2003 work accident. Considering the fact that Dr. Jeffries was one of Claimant’s treating doctors, also considering the fact that Claimant worked without physical restrictions prior to October 5, 2003, and further considering the fact that, based upon the functional capacity evaluation performed on July 16, 2004 (seven months after the injury), Dr. Jeffries released Claimant to work with a permanent 20 pound lifting restriction, I find Dr. Jeffries’ disability (impairment) rating to be the more accurate.

I find, therefore, that Claimant has sustained a permanent partial disability of 10% of the body as a whole. This results in 40 weeks of permanent partial disability benefits at the stipulated weekly rate of \$347.05, totaling \$13,882.00.

Claimant’s attorney, Harry Nichols, is awarded 25% of the permanent partial disability benefits awarded herein as and for necessary attorney’s fees, and the amount of such fees shall constitute a lien thereon, until paid.

Interest shall accrue as per applicable law.

Date: January 2, 2008

Made by: /s/Robert J. Dierkes
ROBERT J. DIERKES
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Jeffrey Buker
Jeffrey Buker
Director

Division of Workers' Compensation

The date and place of the prehearing conference was later changed to November 17, 2006 in Jefferson City, as Ms. Morgan had a conflict with the November 15 date.

I also sent an e-mail to counsel on September 22, 2006 summarizing the results of the conference call.

The note of Claimant's first visit to Dr. Matthew Gornet on February 1, 2005, states, in part: "To the best of his recollection, his last visit (to a chiropractor) prior to his injury was five years earlier."

Equally important, there was no evidence that any psychological problem was caused by the work related accident of October 15, 2003.