

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

Injury No.: 02-097507

Employee: Carol Landers

Employer: New Prime, Inc.

Insurer: Self-Insured

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 December 18, 2008. The award and decision of Chief Administrative Law Judge Victorine R. Mahon, issued December 18, 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 10th day of March 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

---

William F. Ringer, Chairman

---

Alice A. Bartlett, Member

DISSENTING OPINION FILED

---

John J. Hickey, Member

Attest:

---

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed and permanent total disability benefits should be awarded.

First, there is no question that employee's September 15, 2002 accident is compensable under Missouri Workers' Compensation law. However, it is my opinion, based on the expert medical and vocational opinions that employee should be awarded permanent total disability benefits instead of the mere permanent partial disability benefits awarded by the administrative law judge.

Permanent and total disability is defined by §287.020.6 RSMo. 2007, as the "inability to return to any employment ...."

The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

*Gordon v. Tri-State Motor Transit Company*, 908 S.W.2d 849, 853 (Mo.App. 1995) (citations omitted).

Dr. Samuel Bernstein, the only vocational expert that saw employee regarding this work-related accident, determined that employee was unemployable in the open labor market. Dr. Bernstein based his determination upon the following information acquired in conjunction with his July 2006 visit with employee: employee's general background information; psychological information, a review of employee's medical records/medical history; a listing of employee's daily activities; and employee's education and work history. Dr. Bernstein gave particularly great weight to Dr. Stanley Barnes' (employee's family physician) medical opinion that employee was 100% disabled.

Dr. Bernstein testified that "because of employee's degree of pain and that she couldn't carry out any exertional activities that met any of the sedentary standards of sedentary light, medium or heavy work, ... [employee] can't carry out any training or work activities." Dr. Bernstein stated that the reason she is unable to do sedentary work is because she is unable to sit for long periods of times. He testified, "[s]edentary work presupposes an ability to be able to sit at least two-thirds of the time in a workday, and she couldn't do it." Dr. Bernstein concluded in his report that employee "does not have the functional capacity to perform any work on a regular and continuing basis." I believe Dr. Bernstein's records and testimony are credible.

Dr. Barnes saw employee on multiple occasions relating to this work-related accident and ultimately concluded in his medical opinion that she was 100% disabled. Dr. Barnes testified that employee "doesn't have any marketable skills" and for that reason there is not any occupation in the physical labor market that she could do. Dr. Barnes based his opinion upon an MRI scan, a physical examination of employee and objective data that was made by the American Medical Association. During cross-examination Dr. Barnes speculated that if employee received additional education, he believed she could probably do sedentary work. The administrative law judge incorrectly gave great weight to this testimony. Dr. Barnes is a medical doctor and not a vocational expert. Therefore, Dr. Barnes' vocational opinions should be disregarded as irrelevant. I believe Dr. Barnes' medical records and medical opinions are credible, but I do not find his vocational opinions credible. The vocational opinions given by the vocational expert, Dr. Bernstein, should be given more weight than Dr. Barnes' speculative vocational opinions.

Dr. Shawn Berkin saw employee for the purpose of performing an independent medical evaluation. Dr. Berkin's IME report included the following ratings: 35% permanently partially disabled of the body as a whole at the level of the cervical spine, 30% permanently partially disabled of the body as a whole at the level of the thoracic spine, and 25% permanently partially disabled of the body as a whole at the level of the lumbosacral spine. Dr. Berkin concluded that "[d]ue to the nature and extent of employee's disabilities coupled with her age and limited job experience, having worked her entire life as a truck driver, [he] does not feel [employee] is capable of competing for or maintaining gainful employment in the open labor market." Dr. Berkin stated he feels employee is permanently and totally disabled to work.

Dr. John Hackman, employee's treating neurologist, is the only physician that provided a rating for employee that did not state employee was totally disabled. Dr. Hackman initially saw employee on October 16, 2002 and performed an anterior cervical discectomy and interbody fusion at the C6-7 level on employee in November of 2002. Dr. Hackman saw employee for two follow-up visits and in a letter dated April 8, 2003 he provided a rating of 7% impairment to the body as a whole. Dr. Hackman testified that he did not remember if employee had any pain complaints at her follow-up visits and his records did not say whether she did or did not.

Dr. Hackman's rating is severely disproportionate to the other doctors' ratings. It is my opinion that his rating is so disproportionate because he merely evaluated the objective results of the surgery he performed on employee and failed to account for her subjective pain complaints. Dr. Hackman's medical records only refer to the results of x-rays taken of employee's cervical spine. As a result, Dr. Hackman's rating of 7% impairment to the body as a whole is dramatically lower than the other total disability ratings given by the other physicians. In addition, Dr. Hackman completely disregarded employee's problems associated with her thoracic and lumbar spine compression fractures.

It is my opinion that Dr. Berkin's records and testimony are more credible than Dr. Hackman's. For one thing, Dr. Hackman assigned a 7% physical "impairment" rating to employee which is different from the industrial "disability" rating that is used in Missouri Workers' Compensation law cases. The "disability" rating relates to an individual's ability to work and their earning capacity. *Hettenhausen v. Gene Jantzen Chevrolet*, 499 S.W.2d 785, 786 (Mo. 1973). Dr. Hackman's rating relates to something different and is not an appropriate rating when determining whether permanent total disability benefits should be awarded. Dr. Berkin used the appropriate disability ratings and addressed all of Employee's back problems. For these reasons, I find him more credible than Dr. Hackman.

Another issue with regard to this claim concerns employee's preexisting back problems. The administrative law judge did not award any permanent partial disability benefits for employee's lumbar spine due to minor treatments employee received on her back in the 1990s. It appears the last treatment employee received on her back prior to the work-related accident was in 1999, more than three years prior to the 2002 accident. It would seem that employee would have had treatment with regard to her lumbar spine at some point during this three year interval if whatever problems she had with her lumbar spine had not yet resolved. In addition, Dr. Berkin's report specifically stated that the September 2002 motor vehicle accident was the "prevailing factor in causing strains to the cervical and lumbar spines, associated with bulging discs at C6-C7 and L4-L5, and compression fractures of T11 and T12." This coupled with the fact that an MRI of her lumbar spine was ordered by Dr. Hackman just two months after the accident, convinces me that the work-related accident was the substantial factor in causing employee's current lumbar spine condition.

Employee testified that due to her current neck condition she has to sleep on really low surfaces and if she does not, she will have stiffness in her neck when she wakes up and is barely able to turn her head. If she does anything strenuous during the day, she experiences neck pain. Employee stated that due to her problems in the thoracic and lumbar areas of her back, she is unable to do a lot of standing, sitting, laying, lifting or walking. She also complained of a limited range of motion in her mid-back and neck. Employee

stated that she cannot deal with the pain she experiences in her back and neck without medication. Employee appeared to be an accurate historian and her testimony was credible.

The vocational expert, Dr. Bernstein, performed a full evaluation of employee and thoroughly reviewed her medical records. He testified that employee had no transferable skills and was unable to perform her old job based on her current work restrictions. Based on the results of his evaluation, it is his opinion that employee is not employable in the open labor market, and as such, is permanently and totally disabled. In addition, Dr. Berkin's report and testimony also reveal that employee is permanently and totally disabled.

Based on the above, I believe that employee has carried her burden of establishing that she is permanently and totally disabled solely as a result of the September 15, 2002, work accident and injury. Dr. Bernstein provided expert medical and vocational evidence that employee does not have the functional capacity to perform any work on a regular and continuing basis. Drs. Barnes and Berkin provided further competent and substantial evidence that due to employee's physical impairment, restrictions, age, education and training, employee is unemployable in the open labor market. Therefore, employee is permanently and totally disabled. As such, I would reverse the award of the administrative law judge merely awarding employee permanent partial disability benefits and award employee permanent total disability benefits.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

---

John J. Hickey, Member

## FINAL AWARD

Employee: Carol Landers

Injury No. 02-097507

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

Dependents: N/A

Employer: New Prime, Inc.

Additional Party: N/A

Insurer: Self-Insured

Hearing Date: November 6, 2008

Checked by: VRM/meb

### 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: On or about September 15, 2002.

5. Location where accident occurred or occupational disease was contracted: Moriarty County, New Mexico.

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's husband was driving an over-the-road truck and lost control of the vehicle while employee was sleeping in the back of truck.

12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: Cervical and thoracic spine and ribs.

14. Nature and extent of any permanent disability: 35% Permanent Partial Disability to the body as a whole attributable to the cervical and thoracic spine.

15. Compensation paid to date for temporary disability: \$40,257.84

16. Value necessary medical aid paid to date by employer/insurer? \$37,999.78

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

18. Employee's average weekly wages: \$1381.10.

19. Weekly compensation rate: \$649.32/\$340.12

20. Method wages computation: By stipulation.

#### COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

Weeks of Temporary Total Disability: None.

Weeks of Permanent Partial Disability: 140

Permanent Partial Disability benefits: \$ 47,616.80.

(35% Permanent Partial Disability x 400 weeks x \$340.12 = \$47,616.80

Medical requirements awarded: None.

22. Second Injury Fund liability: No.

TOTAL: \$47,616.80

23. Future requirements awarded: None.

The compensation awarded to Employee 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 Employee: Gary G. Matheny.

#### FINDINGS OF FACT AND RULINGS OF LAW

Employee: Carol Landers

Injury No. 02-097507

Before the  
DIVISION OF WORKERS'  
COMPENSATION

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

Dependents: N/A

Employer: New Prime, Inc.

Additional Party: N/A

Insurer: Self-Insured

Hearing Date: November 6, 2008

Checked by: VRM/meb

### INTRODUCTION

The undersigned Administrative Law Judge conducted a final hearing in this case on November 6, 2008, in Springfield, Missouri. Gary G. Matheny represented Carol Landers (Claimant). William W. Francis, Jr., appeared on behalf of Prime, Inc., a self-insured entity (Employer). The Second Injury Fund is not a party to this proceeding. The parties agree that Claimant sustained an injury that occurred within the course and scope of employment on September 15, 2002, in Moriarty County, New Mexico, and such injury is compensable. The parties have stipulated to all issues except for the nature and extent of disability, medical causation, and attorney's fees. These are the only issues in dispute. Claimant's Permanent Total Disability rate is \$649.32 and her Permanent Partial Disability rate is \$340.12. Claimant seeks Permanent Total Disability.

### EXHIBITS

The following exhibits were admitted on behalf of Claimant:

- Exhibit A Deposition – Stanley Barnes, M.D.
- Exhibit B Report – Shawn L. Berkin, D.O.
- Exhibit C Deposition – Samuel Bernstein, Ph.D.
- Exhibit D Letter – Prime Inc., dated 12/17/03

The following exhibits were admitted on behalf of Employer:

- Exhibit 1 Medical Records – Dr. Hackman
- Exhibit 2 Medical Records – Barnes Family
- Exhibit 3 Records – Social Security Administration
- Exhibit 4 Deposition – John Hackman, M.D.
- Exhibit 5 Deposition – Shawn Berkin, M.D.
- Exhibit 6 Medical Records – Dr. Landon Anderson
- Exhibit 7 Medical Records – Evergreen Medical Center
- Exhibit 8 Medical Records – Gastroenterology Associates
- Exhibit 9 Medical Records – Jackson Hospital
- Exhibit 10 Medical Records – MedNet Ambulance
- Exhibit 11 Medical Records – Montgomery Pulmonary
- Exhibit 12 Medical Records – MRI of Andalusia
- Exhibit 13 Medical Records – Sacred Heart Hospital
- Exhibit 14 Medical Records – Tri-County Medical Center
- Exhibit 15 Medical Records – University of Alabama Health Center
- Exhibit 16 Medical Records – University of New Mexico Medical Center
- Exhibit 17 Pharmacy Records – Progressive Pharmacy
- Exhibit 18 Pharmacy Records – Wal-Mart Pharmacy

## WITNESSES

Carol Landers, Claimant

### FINDINGS OF FACT

Claimant is a 49-year-old woman who was injured on September 15, 2002, in the course and scope of her employment. Claimant and her husband were over-the-road truck drivers for Employer Prime, Inc. She was asleep in the sleeping berth of the cab when her husband lost control of the rig. The accident occurred in the state of New Mexico. Claimant was transported to the University of New Mexico Medical Center where cervical spine x-rays and CT scan revealed no evidence of acute injury, no cervical fracture or subluxation, and mild degenerative disc changes at C5-6 and C6-7. Thoracic spine x-rays and CT scan revealed compression fractures of T11 and T12 with only minimal loss of height. Lumbar spine x-rays revealed normal lumbar spine with normal vertebral body height and no disc space narrowing.

When Claimant was released from the hospital three days later on September 18, 2002, she returned to her home in Alabama. She saw her family doctor, Stanley Barnes, M.D., on September 24, 2002. He refilled her prescription for Percocet and requested that she return in the next month or two. Employer then referred Claimant to a neurologist.

Dr. John Hackman

Claimant saw John Hackman, M.D., a neurosurgeon on October 16, 2002. Dr. Hackman prescribed a different brace and scheduled an MRI of the spine, which was performed at Jackson Hospital. After reviewing the MRI, Dr. Hackman concurred that Claimant had compression fractures at T11 and T12, but he also observed a fracture involving T10 with rib fractures. He saw a C6-7 herniation. He observed on the MRI only mild degenerative changes of the facet joints with a broad-based posterior bulge at L4-5, with no herniation. He thought the lumbar spine was normal for Claimant's age. Claimant underwent an anterior cervical discectomy and interbody fusion at the C6-7 level on November 20, 2002. Dr. Hackman indicated that the post-operative x-rays taken on January 16, 2003, looked good.

Claimant's last visit with Dr. Hackman was March 13, 2003, at which time he reported that Claimant could "resume full activity with no limitations." Regarding complaints of thoracic and lumbar pain, Dr. Hackman testified (page 13, lines 3 through page 15, line 10) as follows:

Q. Did she have any complaints of her lumbar spine on January 16, 2003?

A. I don't have it reported.

Q. And is that the type of thing you would record if she had that type of complaint?

A. Normally.

Q. It looks like the surgery relieved her cervical radiculopathy?

A. Yes.

Q. Was her next visit with you then March 13, 2003?

A. Yes.

Q. What was her status as of that visit?

A. X-rayed the neck; it showed a good solid fusion at C6-7. X-rays of the thoracic spine showed that she'd had no progression of her thoracic fractures, and they looked like they were healing up, so I told her she could resume full activity with no limitation.

Q. Was she complaining of any significant pain on that visit, Doctor?

A. I don't have it recorded.

Q. Meaning that she had no complaints that way?

A. Well, I don't remember, and I didn't record any complaints.

Q. Would you typically, in your practice, record those complaints if they were significant?

A. Usually.

Q. She had zero lumbar complaints on that date?

A. She didn't – I don't have any lumbar complaints recorded.

Q. Okay. And no radiculopathy in either arm?

A. That's right.

Q. Why did you feel that she could resume full activity with no limitations at that particular time?

- A. Because all the bones had healed up solid.  
Q. And she was having no significant complaints?  
A. Correct.  
Q. Did you see Ms. Landers any time after March 13, 2003?  
A. No.  
Q. Did you tell her on that last visit that you would continue to see her if she had any other problems?  
A. I told her I would see her back if necessary, all she had to do was call the office.  
Q. And is there any record of her calling the office at any time after March 13, 2003?  
A. No.

As this colloquy reveals, Dr. Hackman recorded no complaints of significant pain at the March 13, 2003 visit, and there are no records of lumbar pain at any visit. Although Dr. Hackman told Claimant he would see her again if she had further problems, she never called or returned to the office.

#### Treatment Subsequent to Dr. Hackman

Claimant next saw Dr. Barnes, her family practitioner, with back pain on April 7, 2003. Claimant told Dr. Barnes she had been busy taking care of her mother. Claimant, together with her sisters, administers 24-hour care to her invalid mother. This requires shopping, cleaning, bathing, cooking, and acting as a companion. Dr. Barnes testified in his deposition that Claimant's mother was "total care," but it is performed intermittently since it is a shared responsibility with other relatives. Dr. Barnes referred Claimant to physical therapy at Evergreen Medical Center, administered an injection, and prescribed Oxycontin. Claimant told the physical therapist that her lumbar pain started in September 2002 and she had no prior back injury.

On June 30, 2003, Claimant reported to Dr. Barnes that her mother was bedridden and she has to "see about her" on a regular basis and spends a lot of time doing this. On July 29, 2003, Claimant reported to Dr. Barnes that her mother has been really sick and she has been looking after her. On October 27, 2003, the physical therapy staff noted that they had received a new order for Claimant to continue with PT but she had been unable to do so because of family needs.

On January 22, 2004, Claimant again saw Dr. Barnes, complaining of neck and back pain and stiffness. She received injections and again was prescribed Oxycontin. She was referred to the clinic for further treatment in one month. There is no record of a return visit for eight months.

On February 2, 2004, Claimant saw Dr. Ikram Hussain at Tri-County Medical Center. Dr. Hussain noted that Claimant "seems to tolerate her pain very well" and her pain medication requirements had not increased over the last six to eight months. Claimant was to have another MRI of the cervical and lumbar spine, but there is no record that she underwent this test.

On May 21, 2004, Claimant returned to Tri-County Medical Center and was seen by Dr. Amrita Yearwood. Office records indicate that Claimant wanted Oxycontin due to constant back pain since a motor vehicle accident. The doctor refused to write the prescription, noting: "because I am not sure how much she is really in pain. I gave her Lortab 10 one tablet BID."

When Dr. Landon B. Anderson at Orthopedics of South Alabama saw Claimant on March 3, 2005, as a referral from the Social Security Administration, he opined that any job of prolonged confined sitting would give Claimant problems. He also said bending or lifting would be problematic. But he reported that Claimant moved about without undue difficulty, walked without a limp, and had full range of motion in her neck with no significant discomfort. Claimant could also fully flex to touch her fingertips to the floor by bending her knees slightly. She could squat and got up and down from a lying position without any significant difficulty. With respect to medication needs, Dr. Anderson noted:

Although she has been prescribed significant narcotic pain medication, she is not taking any of it at the moment, mainly because she can't afford to buy it, but doesn't seem to function necessarily any differently.

(Er's Ex. 6).

At this visit, x-rays of the lumbar spine showed vertebral heights and disc spaces to be maintained.

X-rays showed a fusion at C6-7, but no loss of disc space at C5-6. There was evidence of a mild compression fracture of the T11, T12, and possibly a "minimal one" at T10.

On June 16, 2005, Claimant received a favorable award from the Social Security Administration for disability benefits. The impairments considered to be severe chronic conditions included preexisting conditions such as hypertension and osteoarthritis.

Claimant saw Sandeep Bhadkamkar, M.D., at the Tri-County Medical Center, Evergreen Clinic, on May 31, 2005. Claimant complained to the doctor of pain and tingling in her hands and arms. Dr. Bhadkamkar reported under the cervical spine examination: "There is no tenderness."

On October 11, 2005, Dr. Barnes' records relate that Claimant was on some Lortab but had not needed much lately. Records of Claimant's visit with Dr. Barnes on October 31, 2007, reveal that Claimant had been moving her mother and developed some pain in her back. Likewise, when Claimant returned to Dr. Barnes on November 2, 2007, Dr. Barnes' notes indicate her mother was bedridden and "she has to lift her and move her around." Claimant saw Dr. Barnes on multiple times from March 10, 2003, through October 2, 2008, but on 32 of those visits there is no record of complaints of back pain.

#### Current Complaints

Claimant contends that she is unable to lay, sit, or stand for a full eight hours. She has no hobbies or recreation. She can no longer garden because she cannot bend or lift. Claimant has a high-school diploma and vocational training in cosmetology. She believes she is unable to work as a cosmetologist as she would be unable to stand or hold things for long periods of time. She states that she no longer can work as an over-the-road driver because she is unable to climb into the truck. She has no training in office work. She contends that there is no job that she can perform.

On cross-examination, Claimant said she "could try" to work answering phones if she was allowed to vary her position as needed, but she has not attempted to obtain work.

#### Preexisting Back Problems

Claimant said her health was excellent prior to going to work for Employer, and then good until the accident in 2002. Claimant testified that she had no problems with her neck or low back prior to the work accident on September 15, 2002. She then admitted that she had gone to a chiropractor for realignments of her back from time to time prior to the work accident. Dr. Barnes' had recorded a medical history indicating that Claimant was treated for osteoarthritis in 1997. And a November 22, 1996, notation indicates that Claimant had received workers' compensation for pulled muscles. A medical record of March 2, 1999, indicates that Claimant complained to Dr. Barnes of left leg pain that started in the middle of the buttocks and continued to the back of her leg. The medical record, which is difficult to read, appears to state that Claimant had a positive straight leg raising test and was injected with Toradol.

#### The Ratings

##### Dr. John Hackman

In an April 8, 2003, letter to Employer, the treating neurologist, Dr. Hackman, provided an impairment rating of seven percent body as a whole attributable to the cervical spine. When questioned about the thoracic level injury, because that was not included in his rating, Dr. Hackman testified that in his experience once compression fractures at the thoracic level are healed, they typically do not cause long-term problems. Dr. Hackman gave no rating to the lumbar pain as Claimant made no complaints to him of pain at that level, and he believed the spine was normal of Claimant's age.

##### Dr. Stanley Barnes

Although Dr. Barnes initially opined that Claimant was 100 percent disabled, he modified that opinion on cross-examination during deposition. Dr. Barnes said Claimant could perform sedentary work as long as she did not have to strain her arms and back. Dr. Barnes testified that he has maintained from the beginning that Claimant could do sedentary or light employment.

##### Dr. Shawn Berkin

Claimant's rating doctor, Shawn Berkin, D.O., initially reported that Claimant had sustained injuries to the cervical, thoracic, and lumbar levels of the spine in the work accident of September 2002. He imposed lifting restrictions of 10 pounds repetitively and 20 pounds in a single event. He gave Permanent Partial Disability ratings of 35 percent to the body as a whole attributable to the cervical spine, 30 percent

attributable to the thoracic spine for the compression fractures at T11 and T12, and 25 percent attributable to the lumbosacral spine due to the strain and bulge at L4-5. Based on these ratings, Claimant's age and limited job experience, Dr. Berkin did not believe Claimant was capable of gainful employment in the open labor market. He also recommended the use of non-steroidal anti-inflammatory medication, but he believed Claimant should be weaned off of narcotic analgesics. In deposition, Dr. Berkin testified that in the 20 years of his practice he had never written a prescription for Oxycontin.

As his deposition reveals, Dr. Berkin gave his opinion being unaware that Claimant had any back problems prior to the injury of September 15, 2002. Dr. Berkin did not review the deposition of Dr. Barnes and was unaware that Dr. Barnes had testified that Claimant had a back injury in 1996. Claimant also did not tell him about the prior back problems. Dr. Berkin did not know that Claimant had a positive straight leg raising test in March 1999. He admitted that such fact would raise a question in his mind whether Claimant was being truthful and accurate with him. Dr. Berkin testified that he could not say if Claimant's L4-5 disc bulge was or was not caused by the injury of September 15, 2002.

Dr. Samuel Bernstein

Samuel Bernstein, PhD., gave a vocational opinion that Claimant was unable to work in the open labor market. Dr. Bernstein said he made his opinion based on "the totality of her condition, as opposed to what may have just come from this truck accident...." One component that Dr. Bernstein considered was the medication that Claimant was taking.

In making his assessment, Dr. Bernstein assumed that Claimant's statements to him were truthful. But he admitted that the more inconsistencies in a patient's medical history, the more he would tend to conclude a patient may not be truthful or accurate.

Dr. Bernstein interviewed Carol Landers and reviewed her medical records, but he did not read Claimant's deposition. He was not provided with the depositions of any of the treating or rating physicians. He performed no vocational or psychological testing on Claimant.

#### CONCLUSIONS OF LAW

Permanent Total Disability means "the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." *Gordon v. Tri State Motor Transit Co.*, 908 S.W.2d 849 (Mo. App. S.D. 1995) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)). "The pivotal question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired." 908 S.W.2d at 853 (citing *Reiner v. Treasurer of State of Missouri*, 837 S.W.2d 363, 367 (Mo. App. E.D. 1992); *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo. App. E.D. 1993)). Based on the whole record, particularly the opinions of the treating physicians Dr. Barnes and Dr. Hackman, I conclude that Claimant is able to perform sedentary work. She is not permanently and totally disabled.

The treating neurosurgeon, Dr. Hackman, testified that Claimant never complained of lumbar pain while she was under his care and that the findings on the lumbar MRI were normal in relation to Claimant's age. Claimant never returned to Dr. Hackman with any problems.

Dr. Hackman and Dr. Barnes indicated that Claimant can perform work. While Dr. Bernstein and Dr. Berkin rendered opinions of Permanent Total Disability, they assumed Claimant was being truthful and accurate with them. But, these experts were not provided with all information regarding Claimant's prior back treatment. Moreover, Dr. Bernstein's opinion is based, in some part, on the fact that Claimant is on medication. Dr. Berkin, however, noted that Claimant should be weaned off the narcotics.

While I do not find Claimant permanently and totally disabled, I believe Claimant has had some residual back and neck pain and disability at both the thoracic and neck area. I do not believe the percentage ratings of either Dr. Berkin or Dr. Hackman are appropriate, but the true extent of disability falls somewhere in between. Based on the whole record, I award Claimant a 25 percent Permanent Partial Disability to the body as a whole attributable to the cervical spine. I award another 10 percent Permanent Partial Disability to the body as a whole attributable to the fractures at the level of the thoracic spine. I further conclude based on the testimony of the experts, particularly Dr. Hackman, and the evidence of

preexisting treatment, that Claimant failed to prove the work accident was a substantial factor in the alleged injury or disability to the lumbar spine. Nothing is awarded for the lumbar spine.

In summary, Claimant is entitled to 120 weeks of Permanent Partial Disability to the body as a whole, attributable to the cervical and thoracic spine, at the weekly benefit rate of \$340.12 for a total of \$47,616.80.

#### Attorneys' Fee

A settlement offer had been made to Claimant prior to the hearing in the amount of \$9,600. Section 287.390 RSMo Cum Supp. 2006, states that when an offer of settlement is made in writing and filed with the Division, the employee is entitled to one hundred percent of the amount initially offered. The provision further reads, however, that "Legal counsel representing the employee shall receive reasonable fees for services rendered." § 287.390.5 RSMo Cum. Supp. 2006. This statute was amended subsequent to Claimant's work accident. Absent case precedent indicating that this statutory amendment is procedural rather than substantive, I find no basis to reduce the attorney fee to Claimant's counsel. Moreover, the amount of this Award is substantially more than that originally offered. Claimant's attorney, Gary W. Matheny, is awarded a fee of 25 percent of the entire Award as a reasonable fee for necessary legal services rendered. This fee shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Dated: December 18, 2008

Made by:

/s/ Victorine R. Mahon  
Victorine R. Mahon  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy:    Attest:

/s/ Jeffrey W. Buker  
Jeffrey W. Buker  
*Director*  
*Division of Workers' Compensation*