

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

Injury No.: 97-025062

Employee: Tracy W. Mayes
Employer: Suntrup Ford, Inc.
Insurer: Missouri Automobile Dealers Association
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: March 28, 1997
Place and County of Accident: St. Louis, 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 April 25, 2006. The award and decision of Administrative Law Judge Joseph E. Denigan, issued April 25, 2006, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 15th day of December 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge found that employee failed to present expert opinions as to two important fact patterns including *de minimis* treatment during the first six months following his reported injury and a treatment gap ranging from September 15, 1997 to September 10, 1999. However, contrary to the administrative law judge's findings, the record clearly shows that employee consistently sought treatment and was evaluated by multiple doctors after his work-related injury on March 28, 1997.

The administrative law judge found that Dr. Gornet's admissions on the diagnosis of degenerative disc disease and his inability to make attribution rendered his opinions on what caused employee's disability unpersuasive and undercut employee's burden to prove causation and attribution. However, I found Dr. Gornet's expert medical opinion to be most persuasive and worthy of belief.

Employee's surgeon, Dr. Gornet, opined that employee's herniated discs at L4-5 and LS-1 were causally related to his work-related accident. Dr. Gornet based his opinion on the analysis of an MRI taken of employee's back as well as his examinations of employee and a thorough medical history. Dr. Gornet stated that employee exhausted conservative measures and that surgery was the only option for improving his quality of life. Dr. Gornet stated that employee did suffer from degenerative disc disease; however, since it was not significantly symptomatic prior to his injury, it would be difficult to quantitate. He further stated that the surgery was performed as a result of employee's back trauma, specifically the herniated discs at L4-5 and LS-1, not degenerative disc disease. Dr. Gornet's testimony constitutes competent and substantial evidence of the medical causal relationship between employee's work accident and back condition. *Silman v. William Montgomery & Associates*, 891 S.W.2d 173, 176 (Mo. App. E.D. 1995).

Employee was not only able to establish causation between his accident and physical injury, but was able to establish a causal link between his physical injury and subsequent psychological impairment. Employee testified that his mental state suffered as a result of his work-related injury which required ongoing psychological treatment. Employee's treating psychologist, Dr. Peaco, was able to establish causation between employee's psychological manifestations and employee's work-related injury as he testified that employee's problems with concentration, anxiety, and depression did not exist prior to employee's work-related injury, but were prevalent thereafter. Having established causation, the discussion may now turn to employee's entitlement to temporary total disability, permanent total disability, and unpaid and future medical benefits.

The administrative law judge found that employee was not entitled to temporary total disability benefits beyond December 1997, when employer ceased paying employee benefits, as employee was found to be at maximum medical improvement in September 1997. Dr. Gornet opined that employee was temporarily and totally disabled prior to his surgeries on December 14 and 19, 1999. Dr. Gornet opined that employee was not at maximum medical improvement until July 27, 2000. In addition, employee is capable of forming an opinion as to whether he is able to work, and his testimony alone is sufficient evidence on which to base an award of temporary total disability. *Patterson v. Engineering Evaluation Inspections, Inc.*, 913 S.W.2d 344, 347-48 (Mo. App. E.D. 1995). An award is further substantiated if employee's testimony is corroborated by medical evidence. *Id.*

Employee testified that he suffered from chronic pain following his work-related injury which prevented him from sustaining work. In this case, most significantly, employee's testimony was corroborated by the expert medical opinion offered by employee's treating surgeon. Therefore, employee is entitled to temporary total disability benefits from the time employer ceased paying benefits, until July 27, 2000, the date his treating physician placed him at maximum medical improvement.

Although the administrative law judge found that employee was not permanently and totally disabled, competent and substantial evidence establishes that employee is entitled to permanent total disability benefits. Under the Missouri Workers' Compensation Law employee is considered totally disabled if he is unable to return to any employment, not merely the employment in which he was engaged at the time of the accident. § 287.020.7, RSMo. The test for permanent-total disability is whether employee is able to competently compete in the open labor market given his condition and situation. *Reiner v. Treasurer of State of Missouri*, 837 S.W.2d 363, 367 (Mo. App. E.D. 1992). Therefore, the ultimate question is whether an employer can reasonably be expected to hire employee, given his present physical condition, and reasonably expect employee to successfully perform the work. *Id.*; *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849, 853 (Mo. App. S.D. 1995).

Multiple experts testified to the fact that employee was unemployable. Dr. Gornet stated that due to employee's pain limitations, it was doubtful that he would ever return to any employment. In addition, employee's treating psychologist, Dr. Peaco, opined that employee was not able to work due to the chronic pain that resulted from his work-related injury. He further testified that problems with concentration, anxiety and depression in addition to chronic pain prevented employee from working. Finally, Dr. Bernstein, a vocational expert and licensed psychologist concluded after considering employee's age, education, work history, and residual functional capacity that employee was unemployable in the open competitive labor market. Given employee's chronic pain and depression, he would not be able to successfully maintain employment and an employer would not be reasonably expected to hire him. The record clearly shows that employee meets the standard for permanent total disability.

The administrative law judge found that employee was not entitled to unpaid or future medical benefits. However, future medical benefits may be awarded if employee shows by "reasonable probability" that he is in need of additional medical treatment by reason of his work-related accident. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo. App. E.D. 1997). The finding that employee has reached maximum medical improvement is not inconsistent with a need for future medical treatment. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. banc 2003).

Therefore, employer is not excused from continuing to provide medical treatment to employee to relieve his pain after employee reached maximum medical improvement. Consequently, employee is entitled to reimbursement for expenses associated with employee's ongoing treatment including back surgery, pain management and depression.

Dr. Gornet may have opined that employee was at maximum medical improvement; however, he stressed that employee's condition would require ongoing treatment. Employee's surgeon and psychologist are the most persuasive as to the issues of causation and the need for ongoing treatment for depression and pain management. Employee's physicians testified that employee would need both continuing psychological and pain management treatment. Testimony provided by employee's treating physicians constitutes competent and substantial evidence demonstrating the need for future medical care which justifies the award of future medical benefits.

Therefore, employee has met his burden by establishing that he suffered a work-related injury on March 28, 1997, that his back condition is medically causally related to the work-related injury, and that he is permanently totally disabled as a result. Employee has also established entitlement for temporary total disability benefits through July 27, 2000, associated unpaid medical costs, as well as, the need for ongoing treatment justifying an award of future medical benefits. Accordingly, I would reverse the decision of the administrative law judge and award compensation.

Finally, I must express my concern about the state of the record presented to the Commission on review. The exhibits came to the Commission with numerous permanent highlighting marks throughout, including handwritten remarks. I reiterate my previously expressed opinion that the addition of any permanent markings or annotations to documents, records, or depositions after their entry in the official record is highly inappropriate. If this case is appealed to the Missouri Court of Appeals or the Missouri Supreme Court, I want the appellate judges to know that the markings were not made by any member of this Commission.

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

John J. Hickey, Member

AWARD

Claimant: Tracy W. Mayes Injury No.: 97-025062
Dependents: N/A Before the
Employer: Suntrup Ford, Inc. **Division of Workers'**
Additional Party: Second Injury Fund **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Missouri Automobile Dealers Association
Hearing Date: January 17 and 18, 2006 Checked by: JED:tr

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: March 28, 1997
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above Claimant 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 Claimant was doing and how accident occurred or occupational disease contracted:
Claimant was assisting other workers pushing a vehicle into the garage.
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: 15% PPD referable to the low back; 5% PPD of the body for adjustment disorder; 8.5 weeks from SIF
15. Compensation paid to-date for temporary disability: \$18,373.93
16. Value necessary medical aid paid to date by employer/insurer? \$10,668.30

Claimant: Tracy W. Mayes Injury No.: 97-025062

17. Value necessary medical aid not furnished by employer/insurer? \$106,668.30
18. Claimant's average weekly wages: \$728.00
19. Weekly compensation rate: \$485.35/\$268.72
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	None
80 weeks of permanent partial disability	\$21,497.60

22. Second Injury Fund liability: Yes

8.5 weeks from the SIF	2,284.12
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TOTAL:	\$23,781.72
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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 hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Louise Rytterski (one-half)
Paul Hetterman (one-half)

FINDINGS OF FACT and RULINGS OF LAW:

Claimant:	Tracey w. Mayes	Injury No.:	97-025062
Dependents:	N/A	Before the	
Employer:	Suntrup Ford, Inc.	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Missouri Automobile Dealers Association	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JED

This case involves a low back injury resulting to Claimant with the reported accident date of March 28, 1997. Employer admits Claimant was employed on said date and that any liability was fully insured. The Second Injury Fund is a party to this claim. All parties are represented by counsel. The record shows no prior application for hardship hearing.

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At the outset it is observed that the record herein is enormous with numerous expert depositions, including repeat depositions. The parties received wide latitude in the manner and form of exhibits and the presentation of

live testimony.

Issues for Trial

1. liability for unpaid medical expenses;
2. liability for temporary total disability;
3. nature and extent of permanent disability (attribution);
4. future medical expenses;
5. liability of the Second Injury Fund; and,
6. attorney lien.

FINDINGS OF FACT

Stipulations

The parties stipulated that the Claimant's compensation rate was \$485.35 for temporary total disability and \$268.72 for permanent partial disability. Employer paid \$18,373.93 in compensation to date, representing approximately 37 and 6/7ths weeks. Employer paid \$10,668.30 in medical expenses.

Dispositive Evidence

Claimant, age 46, worked as an automobile technician at various dealerships throughout his career. As an "auto tech," Claimant performed tune-ups and heavy repairs. In addition, Claimant knew and performed some electrical specialty work. Claimant injured his low back on the reported accident date while he and co-workers were pushing a vehicle across the garage.

Claimant described it as a "gun going off" and his legs went limp. Claimant apparently finished his shift. Shortly after returning to work on his next shift, Claimant complained of severe low back and buttock pain with some notes of radiation and instability of the right leg. He was referred to Dr. Piper who prescribed swimming therapy, medication and an MRI. According to Claimant, Dr. Piper recommended surgery but the treating physician was subsequently changed and he was no longer authorized to see Dr. Piper.

Claimant was off work for eight months receiving TTD benefits despite few treatment dates. Employer offered no light duty and, accordingly, paid TTD benefits. Claimant saw seven or eight orthopedists but did not treat with all of them. Claimant testified he was unemployable due to symptoms of low back and radicular leg pain.

On cross-examination, Claimant testified he never returned to work after leaving for treatment for his low back symptoms. Employer apparently had no light duty. He stated TTD benefits were stopped at the end of 1997 but he was unable to return to work. ^[1]

[Two years] after release from treatment by Dr. Kennedy, Claimant privately elected to see Dr. Gornet in September 1999 who scheduled fusion surgery thereafter [in December 1999]. In October 2000, Claimant admitted being in a bar fight which resulted in emergency room examination of his low back and neck.

Treatment Record

The first six months of treatment records are found to be that of MedFirst Physician health clinic and Terrence L. Piper, who appears to be an orthopedist with St. Peter's Bone & Joint Surgery, Inc. Combined records total eleven pages found at the back of Joint Exhibit KK/1. Claimant treated with MedFirst on four occasions beginning April 2 1997 and ending May 9, 1997. On May 27, 1997, Claimant began treatment with Dr. Piper who ordered an MRI (for June 11, 1997), which revealed degenerative disc disease at L4-5 and L5-S1 and a possible herniation at L5-S1. On June 20, 1997, Dr. Piper's summary comment was "... but certainly nothing major." He

prescribed swimming exercise. His brief note on July 18, 1997 was "history and physical commensurate with degenerative disc." Dr. Piper saw Claimant three times. On August 5, 1997 the carrier seems to have changed physicians to Dr. Kennedy.

Dr. Kennedy examined Claimant on August 6 and September 25, 1997. Dr. Kennedy prescribed physical therapy. The other entries in the few pages of records are a telephone log of contacts. Dr. Kennedy's findings and recommendations are discussed below with his opinion testimony below. Nevertheless, Employer paid Claimant TTD benefits for eight months until mid-December, 1997. Neither party's brief addresses this basic chronology and the treatment gaps that occur prior to surgery.

* * *

After these nine visits over a six-month period, no other treatment was prescribed until Dr. Gornet's efforts two years later. Back to back surgeries occurred on December 14, 1999 and December 17, 1999 for fusion of the lumbar spine.

Post-Treatment Expert Chronology

Thereafter, Claimant treated with numerous orthopedic surgeons and a neurosurgeon, each of who examined him on one or two occasions. Some were chosen by Employer and some were chosen by Claimant's attorney. As late as eighteen months after the reported injury date, none of these doctors recommended surgery and most had observed anomalous findings on physical examination and other unusual circumstances of patient presentation.

Dr. Lange	October 14, 1997	Claimant's election
Dr. Cantrell	December 23, 1997 (EMG)	
Dr. Robson	January 14, 1998	Claimant's election
Dr. Lange	April 13, 1998	
Dr. Hoffman	June 25, 1998	
Dr. Van Ryn	September 17, 1998	
Dr. Gornet	September 11, 1999	Claimant's election
Dr. Van Ryn	November, 2000 (post surgery)	

Opinion Evidence ^[2]

Dr. Kennedy

Dr. David Kennedy testified by deposition in August 1999, two years after he last saw Claimant. He examined Claimant on August 6, 1997 and September 25, 1997. Dr. Kennedy read the June 1997 MRI as demonstrating an L4-5 disc herniation and thus ordered a myelogram on August 13, 1997 on the basis of persistent complaints. He read the myelogram as a disc bulge at L4-5 without frank herniation because of the absence of nerve root compression. He testified that neither study revealed evidence of root compression or significant canal compromise (p. 9). Dr. Kennedy further testified that surgery in such cases tended to aggravate symptoms.

On September 25, 1997 physical findings were grossly normal including negative straight leg raising; right leg complaints were no longer significant. Medical records reflect physical therapy communication that Claimant was no show ("NS") twice during the last two weeks while same notes indicate Claimant's telephone inquiry about whether surgery was indicated. Dr. Kennedy found Claimant to be at MMI and assigned substantial permanent restrictions of no lifting in excess of thirty pounds (written notes say forty) and only occasional bending twisting and stooping (pp. 12-13). ^[3]

Dr. Lange

On referral by Claimant's first attorney, Dr. Lange evaluated Claimant on October 14, 1997, immediately following Dr. Kennedy's determination of MMI. Physical examination was normal including anomalous negative straight leg but limited forward flexion. Some discomfort was noted with deep palpation. On the second evaluation in April 13, 1998 with a recent history of increased back pain including what he called collapsing and paralysis associated with his legs. Notes of complaints including dizziness, headache and nausea accompanying his back pain. The physical examination was notable for complaint of tenderness with very light touch to the midline of the low back. Supine and seated positions for straight leg raising were Claimant demonstrated apparent weakness in the right leg below the level of the knee yet without atrophy or neurologic explanation (Exhibit 3, pp. 10-13). Rotation of the torso without back movement produced complaints of pain.

Complaints in other organ systems typically unrelated to the back, symptom magnification and pain behavior prevented Claimant in Dr. Lange's opinion from candidacy for surgery or any invasive procedure, i.e. discogram (Exhibit 3, pp. 14-17). No treatment was undertaken. Dr. Lange equivocates somewhat in his second deposition regarding the import of anomalous findings although he maintained that the primary focus was on Claimant's non-candidacy for surgery.

Dr. Cantrell

Dr. Cantrell saw Claimant on one occasion on December 23, 1997. His physical examination was essentially negative. In addition, he ordered EMG testing which was read as normal. He found Claimant at maximum medical improvement and suggested he return to work without restrictions. Consistent with expressed observations of Dr. Lange and Dr. Hoffman, Dr. Cantrell noted inexplicable intermittent subjective complaints of pain.

Dr. Robson

Dr. Robson examined Claimant on January 14, 1998 on behalf of Claimant's first attorney and noted a negative examination. He further noted few physical complaints. He diagnosed degenerative disc disease. Dr. Robson expressly recommended against surgery. He recommended permanent moderate restrictions consistent with the degenerative diagnosis. He assigned a fifty-pound lifting restriction and no bending, stooping or twisting or working in awkward positions. Dr. Robson had no treatment recommendations that he felt would alter Claimant's status. Another in his office reported observing Claimant walking freely into the office with a golf club in hand.

Dr. Hoffman

Dr. Hoffman examined Claimant on June 25, 1998. Dr. Hoffman thought Claimant's chiropractor, Dr. Girard, had referred him for evaluation. Patient history included pain so severe that he feels he is paralyzed and that three prior doctors recommended surgery but none of them wanted to perform surgery because he was involved in workers' compensation. On physical examination, Claimant walked with a limp and "cocked over" about fifteen degrees forward. Marked weakness was further described as collapsing-type weakness in character which Dr. Hoffman described as non-anatomic. Dr. Hoffman's findings did not suggest the kind of incapacitation and pain expressed by Claimant.

Dr. Van Ryn

Dr. Van Ryn examined Claimant on September 17, 1998. Claimant's history included the pushing incident and his ability to finish his shift that day. Claimant reported some prior examiners recommended surgery and

some did not. No surgery recommendations were gleaned from his records review. Complaints included radicular pain but no numbness that was identifiable with any dermatome. Highlights of physical examination included oddities of posture and that reflexes were symmetric. Neurologic examination was normal. Sacroiliac stress appeared positive. Dr. Van Ryn testified that Claimant's history of altered gait was not consistent with some findings of the physical exam.

His review of the June 1997 MRI revealed, "not extruded discs, but herniated discs" at L4-5 and L5-S1. He explained this conclusion in terms of disc desiccation, which, those familiar with medical evidence realize, is a sign of chronic degenerative disc disease. Review of the August 1997 myelogram was similar. Among others, he reviewed prior medical records of Dr. Cantrell, which included a negative EMG study. Dr. Van Ryn explained this test is diagnostic of nerve root irritation where other studies might not reveal subtle irritation. His final diagnosis was sacroiliac strain with somatization. Restriction included no lifting over thirty pounds and no repetitive bending or lifting on the basis of which he assigned ten percent PPD of the spine.

He evaluated Claimant a second time in November 2000, which was post surgery with Dr. Gornet. That exam revealed only reduced lumbar range of motion. His other opinions remained unchanged. He stated the surgery was for chronic degenerative disc disease, which pre-existed the reported injury. He, nevertheless, assigned further restriction against lifting and an additional twenty percent PPD per the degenerative disc disease and fusion.

Dr. Van Ryn provided a third report based on reviews of a December 1999 CAT scan which was consistent with his earlier diagnosis of degenerative disc disease pre-existing the sacroiliac strain diagnosis assigned to the reported injury. He did not feel the reported injury exacerbated the degenerative disc disease.

On cross examination he further explained his experience with collapsing or falling down, or feeling like one's legs will not hold one, is specific to sacroiliac strain. Dr. Van Ryn disagreed with the necessity of the surgery provided and explained that showing "significant improvement" on examination was consistent with Claimant's somatization disorder. Opposite of this, he was next asked if the complaint of "severe mobility problems" was observed in his review of the records (pp. 37-38).

Dr. Gornet

Dr. Gornet's first deposition largely concerned with bill documentation and payments. Dr. Gornet testified, in response to whether surgery was necessary was that it was Claimant's decision that living with his symptoms was not a good option for him and that Dr. Gornet proceeded with surgery "to try to help him with his pain and disability." He stated he believed patients make the surgery decision. He acknowledged seven other surgeons did not recommend surgery. He also acknowledged an eighteen-month treatment gap preceding his first visit with Claimant. He declared Claimant had exhausted conservative measures but did not reconcile this with the eighteen-month treatment gap or the many contrary opinions that Claimant had reached MMI in autumn 1997. He also equivocated that Claimant was disabled, "at least by his own testimony."

Dr. Gornet performed two surgeries for complete lumbar fusion on December 14, 1999 and December 17, 1999. Dr. Gornet testified Claimant initially showed improvement but then later deteriorated. After the fusion in December 1999, Dr. Gornet testified that Claimant initially showed improvement. His notes of July 27, 2000 indicate Claimant "continues to do well" and "[h]e is quite pleased with his progress." By 2001 he is noted to have low back burning pain diagnosed as related to hardware irritation from fusion hardware. Significant events between include the bar fight in October 2000 after which he sought treatment. Nothing in the record indicates Dr. Gornet was aware of this incident. Dr. Gornet rated Claimant at forty percent PPD of the body in June 2000 but purported to increase that amount by declaration at deposition to fifty percent.

Dr. Gornet was unsure if he was able to make attribution between the pre-existing pathology of degenerative disc disease and any disability that arose from the reported injury (Exhibit D, p. 21). Attribution by Dr. Gornet is not possible without at least a *de minimis* review of the emergency room record from October 2000.

Dr. Meyerson

Dr. Meyerson is a family practitioner who first examined Claimant in January 2002. Dr. Meyerson practices in Troy, Missouri. Patient history reflects prior lumbar fusion from December 1999 and that he was not getting any relief from "his current treatment." He apparently immediately prescribed a CT scan of his right hip and prescribed neuropathic pain medication and steroids. He continues to treat Claimant and last saw him on April 13, 2005 (deposition date of May 5, 2005). He stated the \$150 per month cost of his drug regimen.

On cross-examination he was provided a copy of notes of his referral to Dr. Rummel which reflected adequate strength, negative straight leg raising and normal reflexes. Dr. Meyerson had no records of the surgeon or any of the other orthopedists. He was unaware of prescription drug gaps prior to his first treatment of claimant. His own notes reflected normal reflexes and normal muscle tone in both legs. He recalled Claimant fell on his right hip in September 2001. Dr. Meyerson did not recall the referral source.

RULINGS OF LAW

Nature & Extent of Permanent Partial Disability

Of the many experts at hand, only a few enunciated restrictions and only one made attribution and assigned ratings. Most experts opined on the work relatedness of the degenerative disc disease and whether further treatment was warranted. This dialogue persisted for one year following Dr. Kennedy's release of Claimant from treatment. The challenge here is to consider and discern uniform findings from a group of experts who use similar, but sometimes various, factors in evaluation. A determination of compensable PPD compels review and analysis of the facts and opinions in order to understand what aspect of Claimant's low back condition resulted from the 1997 incident alone.

Claimant underwent *de minimis* treatment during the first two months following the reported injury. Three visits with Dr. Piper during June and July included an MRI which was "neurologically okay" and the orthopedist ordered swimming therapy. Claimant next treated with Dr. Kennedy, who also diagnosed degenerative disc disease, had notes of Claimant's non-compliance with physical therapy; other notes show Claimant's telephone inquiry of whether surgery was indicated. Claimant was off work during this period. Thus, after six months of minimal treatment highlighted by poor physical therapy compliance and negative physical examinations punctuated, with "intermittent discomfort in the leg," Claimant was placed at MMI and given restrictions. Dr. Kennedy's restrictions (detailed above) may be fairly characterized as precluding Claimant from further heavy work. The lifting restriction alone suggests a PPD in the range of fifteen to twenty percent. However, as the whole record seems to reveal, these restrictions cannot be justified in terms of Dr. Kennedy's clinical findings which were essentially negative.

Thereafter, Claimant undergoes an examination with each of the above surgeons none of whom suggest a treatment plan, all of whom find anomalous physical findings and some of whom note directly Claimant's aberrant patient complaints and presentation as contrasted with physical findings. Of particular interest are Claimant's own election of Dr. Lange and Dr. Robson. Both suggest negative physical findings, MMI and each recorded exaggerated or incredulous behaviors. Occurring in the four months following Dr. Kennedy's release, these private examiners seem to explain what Dr. Kennedy appears to have perceived and dismissed early on in this litany of evaluations that occur two and one-half years prior to the first visit with Dr. Gornet. Like Dr. Kennedy, however, Dr. Robson imposed lifting restrictions and restriction against bending, stooping or working in awkward positions and had no further treatment recommendations.

Between these two examinations was that of Dr. Cantrell who is not a surgeon but ordered an EMG test of the lower extremities which was negative (and was never interpreted by any other physician as positive). Dr. Van Ryn later discussed the EMG test as dispositive of those few cases wherein MRI and myelogram CT fails to reveal disc pathology. Again, further diagnostic corroboration of the negative clinical findings found by all of the doctors during the first eighteen months following the reported injury.

These last three examinations seem to create considerable doubt for the injury related restrictions imposed by Dr. Kennedy. Dr. Lange and Dr. Van Ryn each saw Claimant again in 1998 without any equivocation of their earlier findings and opinions. Thus, by September 1998, eighteen months after the reported accident periodic examination demonstrated no objective evidence of a lumbar pathology, other than degenerative disc disease.

Treatment Gap

Claimant entered a treatment gap after release by Dr. Kennedy on September 25, 1997 that continued until September 10, 1999 when Dr. Gornet first saw him. Two years without treatment is a substantial gap that can signal a significant break in causation. Separately, Dr. Gornet's admissions on the diagnosis of degenerative disc disease and his inability to make attribution render his opinions on what caused Claimant's disability unpersuasive, generally.

Thus, in view of consistent negative physical findings from all physicians during the eighteen months following the reported injury together with the disproportionate, and non-anatomic patient complaints, the medical record suggests Claimant had advanced degenerative disc disease which was made symptomatic by the reported injury. Presumably on the basis of his radiological studies, several orthopedists suggested serious restrictions which were not criticized elsewhere in the record. Only Dr. Van Ryn identified a separate sacroiliac strain diagnosis to which he assigned a ten percent PPD of the spine.

Claimant is in the position of proving that pushing the vehicle, presumably on pavement along with other workers, was an event that worsened his advanced degenerative condition which is, per se, longstanding in terms of many years. On the other hand, Dr. Van Ryn presents an alternate diagnosis which he admits was complicated by anomalous findings. Dr. Van Ryn, evaluating later in time, had benefit of multiple examinations records, the EMG, and his own examinations one year before the fusion and almost one year after the fusion. Dr. Van Ryn is the only orthopedist to make attribution between pre-existing PPD and PPD resulting from the reported injury. Identifying two pathologies, he found twenty percent PPD due to the pre-existing degenerative disc disease (with fusion).^[4] This attribution model divides thirty percent PPD into a one-third work related disability to two-thirds pre-existing disability. He clearly testifies that the fusion was treatment for the degenerative disc disease. Even Dr. Gornet held his PPD assignment to forty percent PPD.

Based on the evidence of lifting restrictions (ranging from thirty to fifty pounds from three different orthopedists) and attribution evidence suggesting most permanent disability was due to pre-existing degenerative disc disease, Claimant sustained a fifteen percent PPD of the low back as a result of the reported injury. This is an amount greater than the stated ten percent PPD rating inasmuch as the accompanying lifting restrictions suggest greater PPD.

The final percentage of PPD is a legal, not medical, finding that is based primarily on medical evidence. To the extent Claimant was precluded from heavy labor so was his earning capacity is further diminished as anticipated by the legislature. Section 287.190.2 RSMo (2000). Claimant sustained degenerative disc disease measured at twenty percent PPD. Combined pre-existing and current *low back* PPD total thirty-two and one-half percent. This total correlates with the orthopedists' lifting restrictions which are given for Claimant's overall medical condition. Attribution is ultimately a legal analysis.

* * *

The vocational and psychiatric evidence offered by Claimant was dominated with Claimant's current

condition rather than reconciling the period of more than a year immediately following the reported injury with ultimate opinions. Dr. Peaco seems to have assumed severe *injury* when a fair reading of the medical requires an assumption of anomalous findings and a consensus opinion against surgery. Similarly Dr. Bernstein's medical history is devoid of the above orthopedists' anomalous findings. In contrast, Dr. Stillings discussed the medical facts related to post accident treatment and assigned a low PPD for adjustment disorder which he believed Claimant was managing well. Mr. England clearly enunciated Claimant's education and experience and found him employable.

Unpaid Temporary Total Disability

Claimant seeks additional TTD benefits beyond those amounts stipulated, i.e. eight months. The record reveals Claimant was placed at maximum medical improvement in September 1997. Employer nevertheless paid TTD benefits until mid December 1997. No other off-work slips are in evidence suggesting liability for additional TTD benefits.

TTD benefits are not warranted once an employee's medical condition has reached the point where further progress or healing is not expected. Strate v. Al Baker's Restaurant, 864 S.W.2d 417 (App.1993). This is commonly referred to as being at "maximum medical improvement." Workers' Compensation Law and Practice, 29 Mo. Prac. §5.20, 1997. It is recognized that an employee may be able to return to less demanding employment and, yet, not be medically found to have attained MMI. MMI is but one factor in the determination of entitlement to TTD benefits. See Cooper v. Medical Center of Independence, 955 S.W.2d 570, 576-577 (Mo.App. 1997). Here, Claimant was placed at MMI and, arguably, Claimant was medically restricted out of his prior employment. In addition the lack of light duty from Employer further explains the payment of TTD beyond Claimant's MMI date.

This analysis, like the medical benefits analysis above, must follow principles of medical causation. The lack of objective, treatable symptoms together with the treatment gap precludes a finding of entitlement of to additional TTD benefits.

Unpaid Medical Expenses

and Future Medical Expense

Claimant requested payment of Dr. Gornet's charges and future medical treatment. Claimant bears the burden of establishing that any further treatment is causally related to the 1997 accident date. It is axiomatic that an employer is only required to provide treatment for the injuries attributable to the last accident. Section 287.140.1 RSMo (2000). See O'Donnell v. Guarantee Electrical Co., 690 S.W.2d 190 (Mo. App. 1985). The record contains insufficient evidence to overcome the break in causation demonstrated by the admitted eighteen month (arguably two year) treatment gap, intervening trauma and years past in which any number of causes may have come to pass, ranging from idiopathic to traumatic (i.e. bar fights), or valsalvic, and the surgical findings of only degenerative disc disease.

Future expense awards may be indefinite but the underlying theory of medical causation may not. See Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997), Williams v. A.B. Chance Co., 676 S.W. 2d 1 (Mo. App. 1984), and Griggs v. A.B. Chance Co., 503 S.W.2d 697, 703 (Mo.App. 1973). A similar analysis applies on this aspect of medical benefits. Therefore, Claimant's request for either Dr. Gornet's charges or future treatment is denied.

Liability of the Second Injury Fund

The record contains little evidence of the allegations against the SIF. Claimant offered the Reports of Injury (Form 1) on each as Exhibits II and HH, respectively. Claimant testified that he underwent epidural steroid injection as the result of right elbow symptoms related to mechanic work while working for a Mercury dealer in 1991. Although no medical evidence was offered thereon and no settlement evidence is available, it may be reasonably inferred that Claimant sustained moderate epicondylitis of his right elbow requiring injection therapy which usually equates to ten or fifteen percent PPD. Epicondylitis is an inflammatory process and, as such is recognized among routine conditions seen at the Division, is insidious and episodic.

The other incident involved a neck strain with eye injury but, without medical evidence or other evidence within the scope of lay opinion, insufficient basis exists to measure pre-existing PPD.

Claimant is, as a result of the 2000 fusion surgery limitations, and subsequent deterioration, including sustained unemployment during the five years following surgery, and preceding trial, possibly unemployable. However, since it has been found that a break occurred in the causal chain (most easily identified by the two year treatment gap), months after the 1997 accident, a *threshold* analysis must obtain in order for Claimant to recover against the SIF. Section 287.220.1 RSMo (2000).

The current disability is determined to be fifteen percent low back PPD plus five percent psychiatric PPD (or 80 weeks) referable to the body as a whole. An additional twenty percent PPD of the low back (or 80 weeks) was found to pre-exist the reported injury. The pre-existing PPD was inferred at fifteen percent PPD. Claimant's pre-existing elbow PPD, uncontradicted and essentially undisputed in the record, is fifteen percent (or 31.5 weeks). These findings satisfy the statutory thresholds.

Synergy is the concept in which the current PPD and the pre-existing PPD are found, in combination, to create an increased overall disability for which the employer should not be held liable. Here, the analysis must focus on Claimant's condition pre-surgery or when he attained MMI on the reported low back injury. The elbow injury was unchanged as a result of the reported injury and is evaluated as of that date. The evidence suggests Claimant's increased overall PPD at the time he reached MMI, i.e. September 1997 to September 1998, was approximately fifty percent of a body, or 200 weeks. Thus, under the statute, the synergistic effect results in an additional 8.5 weeks of PPD from the SIF.

Insufficient evidence was presented that the other SIF allegations manifested as hindrances or obstacles to employment. Section 287.220.1 RSMo (2000).

Attorney Fees and Liens

The number of attorneys successively retained by Claimant herein is unexpected. The first attorney was Ann Dalton who asserts no lien and none is allowed. The second attorney is Gary Lange/Paul Hetterman who asserted a lien and offered substantial evidence best described by the voluminous deposition work. That evidence warrants allowance of a lien herein. The third attorney, Louise Ryterski, presented Claimant's evidence at trial and concluded the case. She requests her fee in the conventional amount of a twenty-five percent contingent fee contract.

Mr. Hetterman testified that although assigned to trial in November 2005, counsel for both parties announced settlement but delayed formal conclusion pending preparation of social security benefits language (See Section 287.250.9 RSMo (2000)). During the pendency of this process Claimant revoked settlement authority and, subsequently, proceeded to trial with current counsel. The file is a 1997 injury with only two plausible plateaus during which conclusion of the claim was reasonable: the period following the cessation of benefits in December 1997 (or perhaps the last *second opinion* offered in September 1998) or the period following Dr. Gornet's rating in June 2000. The case was not concluded until this hearing in 2006.

Section 287.260 RSMo (1990) states in relevant part:

All attorney's fees for services in connection with this chapter shall be subject to regulation . . . and shall be limited to such charges as are fair and reasonable . . . [.]

Additionally, the appellate courts have provided guidance for evaluation of the value of legal services in the context of workers' compensation cases. The grant or denial of an attorney lien, and the amount of any such lien, are discretionary on the part of the Division and the commission. Dillard v. City of St. Louis, 685 S.W. 3d. 918 (Mo. Ct. App. E.D. 1984). A claimant's attorney fee must be proven to be necessary and limited to such charges as are fair and reasonable, which involves a balancing of many interests. Kuczvara v. Continental Baking Co., 24 S.W.3d

712 (Mo. Ct. App. E.D. 1999). The courts have also noted the factors to be balanced:

The factors to be considered in determining reasonable value of attorney's fees in Missouri are time, nature, character and amount of services rendered, nature and importance of the litigation, degree of responsibility imposed on or incurred by the attorney, the amount of money or property involved, the degree of professional ability, skill and experience called for and used, and the result achieved. Cervantes v. Ryan, 799 S.W.2d 111, 115 (Mo.App. 1990).

The instant situation presents a complicated and costly explanation of bringing Claimant's case to conclusion. The court infers Claimant undertook the foregoing attorney relationships freely and elected to survey the skills of several law offices. These choices bear reasonable cost assessment by the court. Both Ms. Ryterski and Mr. Hetterman are entitled to reasonable attorney fees.

Straight hourly valuation of legal services herein would likely exceed the value of the case. The number of depositions, both medical and vocational, is inordinate. Costs of litigation are a risk of a party's inability to settle its claim. Separately, it is observed that awards cannot be fashioned to preserve attorney fees; the contingent fee was the popular convention embraced here by both attorneys. Each accepted risk in compensation for services rendered. Here, the pre-trial preparation balances equally against the assumed responsibility and conduct of the trial.

Conclusion

Claimant did not present expert opinion that incorporated two important fact patterns. First, *de minimis* treatment that occurred during the first six months following the reported injury and, second, the long treatment gap following the last of numerous *second opinions* tendered by Employer after release from treatment. Separately, Dr. Gornet's admissions undercut Claimant's burden to prove causation and attribution herein.

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained a fifteen percent PPD of the low back for sacroiliac strain and five percent PPD of the body for adjustment disorder. In addition Claimant is entitled to 8.5 weeks of PPD as a result of the combination of the primary injury with the pre-existing elbow condition. No other benefits are awarded.

Attorney fees in the amount of twenty-five percent shall be awarded to Louise Ryterski and Paul Hetterman which shall be shared equally.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

Claimant: Tracy W. Mayes

Injury No.:

97-025062

[1] Claimant first received permanent restrictions in Autumn 1997 and again in September 1998 from orthopedic surgeons that, presumably, precluded work in heavy or even moderate-heavy positions.

[2] The vocational and psychiatric evidence is not discussed here due to the findings on attribution.

[3] This assessment and determination of MMI, six months post-accident, is the earliest imposition of serious restrictions which is probably the most

perceptive and medically prudent report to be found in the whole record. Employer periodically offered *second opinions* over the next year. The unanimity of the orthopedists' recommendations against surgery together with the post surgical evidence suggest the prudence of Dr. Kennedy's opinions.

[\[4\]](#) Those unfamiliar with the routine treatments seen by the Division will note fusions are not usually the procedure for acute herniations. Rather, laminectomy is the typical procedure for acute herniations.