

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

Injury No.: 00-132627

Employee: Leonard Rogers
Employer: Bi-State Development Agency
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: September 27, 2000
Place and County of Accident: St. Louis City, 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 February 9, 2005^[1]. The award and decision of Administrative Law Judge Linda J. Wenman, issued February 9, 2005¹, 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.

This award also is subject to a lien in favor of the Division of Child Support Enforcement.

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

Given at Jefferson City, State of Missouri, this 22nd day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Leonard Rogers

Injury No.: 00-132627

Dependents: N/A
Employer: Bi-State Development Agency
Additional Party: Second Injury Fund (dismissed by award)
Insurer: Self-insured
Hearing Date: November 8, 2004 and November 9, 2004

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

Checked by: LJW: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: September 27, 2000
5. State location where accident occurred or occupational disease was contracted: St. Louis City, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While employed as a bus driver for Employer, a passenger assaulted Claimant.
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: Head and psychological
14. Nature and extent of any permanent disability: 2% BAW referable to psychological injury
15. Compensation paid to-date for temporary disability: \$5,014.56 representing 10 6/7th weeks.
16. Value necessary medical aid paid to date by employer/insurer? \$4,992.35

Employee: Leonard Rogers Injury No.: 00-132627

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$741.50
19. Weekly compensation rate: \$494.33 / \$314.26
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None

13 2/7 th weeks of temporary total disability (or temporary partial disability)	\$6567.66
8 weeks of permanent partial disability from Employer	\$2514.08

22. Second Injury Fund liability: No

TOTAL:	\$9,081.74**
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**** Payment is subject to resolution of an unreleased child support lien.**

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 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Timothy O'Mara

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Leonard Rogers	Injury No.:	00-132627
Dependents:	N/A	Before the	Division of Workers'
Employer:	Bi-State Development Agency	Compensation	
Additional Party:	Second Injury Fund (dismissed by award)	Department of Labor and Industrial	Relations of Missouri
		Jefferson City, Missouri	
Insurer:	Self-insured	Checked by:	LJW:tr

PRELIMINARIES

A hearing was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on November 8, 2004 and November 9, 2004. Attorney Timothy O'Mara represented Leonard Rogers (Claimant). Bi-State Development Agency (Employer), is self-insured, and was represented by Attorney David Reynolds.

Prior to the start of the hearing the parties identified medical causation; liability for past medical expenses in the amount of \$2,256.20; temporary total disability; and nature and extent of permanent partial disability as issues for disposition in this case. Employer seeks a credit up to \$7,105.00 against any temporary total disability awarded Claimant, due to payments made under Employer's short-term disability plan.

Claimant offered Exhibits A-B, and Employer offered Exhibits 1-4. All exhibits were admitted into the record

overruling any objections voiced. Any objections not expressly ruled on in this award are overruled.

SUMMARY OF EVIDENCE

Only testimony necessary to support this award will be reviewed and summarized.

Testimony & Medical Record Review

Claimant: Claimant is 59 years old, and has worked for Employer as a bus driver for approximately sixteen years. On September 27, 2000, Claimant was driving his route when a passenger exiting the bus struck him in the face. Claimant radioed his dispatcher requesting medical assistance, and the police were called. The assailant was never apprehended.

On the date of injury, Claimant was taken to Healthsouth Medical Clinic, and examined by Dr. Byler. Upon examination, Dr. Byler diagnosed a right corneal abrasion, and Claimant was given ophthalmic ointment to treat the abrasion. Claimant returned to Dr. Byler the next day complaining of a scratching sensation in his right eye, and pain around the eye. Claimant also complained of fear associated with a return to bus driving. Orbital x-rays were obtained, interpreted as normal, and funduscope exam revealed a resolved corneal abrasion. Claimant did have bruising around both eyes. Dr. Byler referred Claimant to an ophthalmologist for further eye care, and a psychiatrist due to Claimant's anxiety complaints. The ophthalmologist examined Claimant, confirmed Dr. Byler's optical diagnosis, and had no further treatment recommendations. Dr. Stillings, a psychiatrist, provided treatment that included psychotherapy, medication and light duty (no bus driving). Claimant remained on restricted duty from September 28, 2000 until December 28, 2000.

On December 29, 2000, Dr. Stillings released Claimant to return to unrestricted duty. Claimant attempted to return to bus driving, but became extremely nervous and disoriented when he started driving his assigned route. The dispatcher instructed Claimant to return his bus, and to see Dr. Stillings. Claimant's medication was adjusted, further counseling was provided, and Claimant was re-released January 2001. Claimant testified he told Dr. Stillings at re-release that his symptoms had not improved. Claimant next sought care with Dr. Bond, his private physician, and Dr. Bond referred Claimant to Dr. Hartnett, a psychiatrist.

Claimant began treating with Dr. Hartnett on January 27, 2001. Dr. Hartnett provided additional counseling, medications and kept Claimant off work. On March 27, 2001, Claimant sent a letter to his supervisor, Tony Lafata, "requesting a full-time duty transitional detail assignment" due to his work injury. On March 29, 2001, Dr. Hartnett signed a form indicating Claimant could return to work with restrictions effective April 2, 2001, indicating that she recommended "full time transitional detail assignment desk duty only at this time." Upon receipt of this letter, on March 29, 2001, Mr. Lafata requested clarification regarding Claimant's request. Claimant responded by letter dated April 3, 2001, indicating a request to be a "like the bus drivers that are working as supervisors, station dispatchers, and in the Training and Safety Department". On April 16, 2001, Dr. Hartnett signed a status form indicating Claimant was unable to work since January 22, 2001, but also indicated Claimant could return to unlimited duty remarking "refer to letter about job change". Mr. Lafata replied on May 2, 2001, denying Claimant's request for a transitional detail assignment, as it would place Claimant in a reserve pool, and due to Claimant's prior work performance, he was not eligible for this type of assignment. Mr. Lafata closed his letter by inviting Claimant to provide further clarification of his request.

Further status forms were signed by Dr. Hartnett on 5/14/01, 6/4/01, 6/11/01, 6/25/01, 7/16/01, 7/19/01, and 8/29/01. All of the status forms indicated Claimant could work except as a bus driver. None of the forms indicated receipt by Employer. On January 14, 2002, Dr. Hartnett completed a medical leave of absence form, requesting leave for Claimant beginning 1/14/02 and ending April 2002. During his course of treatment with Dr. Hartnett, Claimant made several unsuccessful attempts to resume bus driving. Claimant applied for, and received short-term disability leave from Employer from 7/1/01 to 10/6/02. On 10/3/02, Dr. Hartnett indicated Claimant could resume unrestricted work duties effective 10/3/02.

From July 2002 until September 2002, Claimant applied and accepted full-time employment with the City of St. Louis as a correctional officer at the St. Louis City Workhouse. Claimant testified he experienced no anxiety episodes during this employment because the corrections officers always moved in groups. Claimant returned to employment with Employer during November 2002.

Today, Claimant has returned to bus driving, but has changed his driving route. Claimant no longer takes medication, and is no longer receiving psychiatric care. Claimant believes the treatment provided by Dr. Hartnett was beneficial.

Upon cross-examination, Claimant acknowledged Employer provided light duty, when requested as light duty, and temporary partial disability differential while on light duty. Claimant conceded that a request for a transitional detail assignment could be used as a stepping-stone to promotion, and prior to the assault his personnel record contained numerous customer complaints and attendance problems. Claimant also acknowledged termination as a corrections officer after failing his probationary period.

Anthony Lafata: Mr. Lafata has been employed for Employer for 28 years. He is currently a Service Area Director, and was Claimant's supervisor at the DeBaliviere Facility. Mr. Lafata denied Claimant's request for transitional detail assignment because it would be a promotion, and a stepping-stone to become a supervisor. Mr. Lafata testified Claimant was not entitled to promotion due to his disciplinary record. Mr. Lafata testified he did not receive verbal or written requests from Claimant regarding light duty, other than the transitional detail assignment request.

Upon cross-examination, Mr. Lafata confirmed the DeBaliviere Facility did not have light duty work available, but the Employer had a light duty program for injured workers. Mr. Lafata was aware Claimant had a work related injury, but felt Claimant's specific request was for a promotion.

Deposition Testimony

Dr. Wayne Stillings: Dr. Stillings first evaluated Claimant on October 26, 2000. The initial evaluation was felt to be essentially normal, except that Claimant exhibited slight anxiety when discussing a return to work. As a part of the evaluation, Claimant was administered a 15 items test that demonstrated an element of exaggeration in test response and behavior. Claimant also completed MMPI testing that demonstrated a histrionic personality, a person likely to over-report symptoms, an elevated deviancy scale, a limited ability to deal with normal stress and anxiety, somatization, some fear and anxiety, and some psychological distress. The MMPI did not demonstrate a mood disorder or post-traumatic stress disorder.

Dr. Stillings diagnosed an unspecified mild adjustment disorder due to the assault, which usually develops as a response to a specific stressful situation, and normally will resolve within six months or sooner. Dr. Stillings placed Claimant on light duty, no bus driving, and started Claimant on medications and psychotherapy. At Claimant's next two visits, Dr. Stillings noted improvement and adjusted Claimant's medication dosage. Claimant remained on light duty until December 20, 2000, when he was returned to regular duties.

Dr. Stillings next evaluated Claimant on January 17, 2001. Claimant informed Dr. Stillings that he had not returned to work, and had seen his personal physician who took him off work. Dr. Stillings confirmed with Employer that Claimant's physician had taken Claimant off work on December 28, 2000. At the January 17, 2001 visit, Dr. Stillings found Claimant to be inappropriate, manipulative and threatening to his case manager. Claimant agreed with Dr. Stillings that he no longer needed medication, and Dr. Stillings felt he needed no further counseling. Claimant was found to be at maximum medical improvement (MMI) and discharged from care.

Dr. Stillings did not see Claimant again until November 26, 2003. Claimant reported his treatment with Dr. Hartnett, and told Dr. Stillings he had worked light duty from September 2000 until November 2002, checking bus cleanliness. Claimant reported a persistent fear of being assaulted. Claimant's mental examination was normal. Dr. Stillings administered a second MMPI that demonstrated Claimant's histrionic personality, and a strong need to exaggerate complaints. Dr. Stillings found Claimant's MMPI to be inconsistent with post-traumatic stress disorder. Dr. Stillings final diagnosis was mild adjustment disorder. In light of further treatment provided Claimant, Dr. Stillings reassessed Claimant's date of MMI, and found Claimant to be at MMI on March 31, 2001. Dr. Stillings found Claimant's work as a correction officer to be inconsistent with Claimant's expressed fear of assault, and that during treatment Claimant had indicated he wanted a different job with Employer. As a result of Claimant's September 27, 2000 work injury, Dr. Stillings found 2% permanent partial disability (PPD).

Upon cross-examination, Dr. Stillings acknowledged assault patients can experience continued anxiety upon return to regular duties, and he extends transitional treatment to combat the anxiety. Claimant was seen in transition until January 17, 2001. Dr. Stillings clarified that Claimant's inappropriate behavior is associated with his personality profile, and not the effect of the work injury. Dr. Stillings conceded that Claimant may have sought another job with Employer to avoid further assault, but he cannot say for certain what motivated Claimant. Finally, Dr. Stillings does not believe Claimant was released from treatment too early, but adjusted his MMI date to give Claimant the benefit of the doubt.

FINDINGS OF FACT & RULINGS OF LAW

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

Issues relating to medical causation

Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled in part). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled in part). There does not appear to be a dispute between the parties or treating physicians that the physical and psychiatric reaction of Claimant was caused by the

work related assault. The true dispute appears to lie in the correct psychiatric diagnosis to be applied.

As a consequence of the assault, Dr. Stillings concluded that Claimant suffered from a mild adjustment disorder. Dr. Hartnett concluded that Claimant suffered from post-traumatic stress syndrome. While Dr. Hartnett's "records" are properly admissible as they were certified treatment records, they are incomplete and can be accorded limited weight. The "records" consist of a four page itemized bill, showing treatment dates from 1/29/01 through 2/5/03; twelve pages of restricted work forms; and a two page synopsis letter identifying Claimant's diagnosis as post-traumatic stress. In comparison, Dr. Stillings records are complete, and provide a thorough analysis of how he formed his psychiatric diagnosis and treatment protocol.

When medical theories conflict, deciding which to accept is an issue reserved for determination of the finder of fact. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872 (Mo.App. 1984). I find the psychiatric opinion of Dr. Stillings to be persuasive, and accept his stated diagnosis.

Issues relating to liability for unpaid medical expenses

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

Employer has paid \$4,992.35 in medical benefits to date. Claimant alleges liability of Employer for medical expenses in the amount of \$2,256.20, for care received by Claimant in treatment with Dr. Hartnett. A copy of an itemized medical bill totaling this amount was presented (Exhibit A), but has not been supported by appropriate treatment records. Additionally, Claimant may have been found to be at MMI by Dr. Stillings on January 17, 2001, but no evidence was presented to demonstrate any demand made by Claimant for additional treatment. From the date of MMI until November 26, 2003, Dr. Stillings did not hear from Claimant. I find Claimant has not met his burden to establish Employer's liability for payment of Dr. Hartnett's bill, and that Employer did not waive their right to select Claimant's treating physician.

Issues relating to temporary total disability

Temporary total disability (TTD) benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled in part). In his post-hearing brief, Claimant clarified his TTD demand, and seeks additional TTD benefits from 12/29/00 to 7/14/02. Employer paid temporary benefits from 9/28/00 to 12/28/00. To support his entitlement to additional TTD benefits Claimant provided multiple restricted duty forms as discussed in the summary of evidence. I do not find Claimant's assertion that he was unable to work during the alleged time frame, or that he sought light duty work from Employer credible. Claimant was provided multiple opportunities by Employer to explain if his request for "transitional detail assignment" was in fact a request for light duty, but failed to do so. It should be noted that Claimant had been provided duty within doctor's restrictions while under the care of Dr. Stillings, and it was not termed "transitional detail assignment".

Dr. Stillings returned Claimant to full duty effective 12/20/00. However, Dr. Bond did take Claimant off work on 12/28/00, and Dr. Stillings conceded that it is reasonable to accept that Claimant may have not reached MMI until 3/31/01. Between 12/28/00 and 3/31/01, there is no evidence that a physician returned Claimant to any work activity restricted or otherwise. I find Dr. Stillings re-calculated date of MMI, 3/31/01, to be persuasive, and find Claimant is entitled to receive 13 3/7th weeks of additional TTD benefits.

Employer seeks a credit if any additional TTD benefits are awarded, as Claimant received short-term disability from Employer. This period of short-term disability included the period of time Claimant worked for another employer as a corrections officer. Employer identified the period of short-term disability paid to be 7/1/01 to 10/6/02. As the period of short-term disability is outside the time period for additional TTD awarded, I have no jurisdiction to order a credit. Employer's remedy will lie outside the Workers' Compensation law.

Issues relating to permanent partial disability

A permanent partial disability award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App.1991) (overruled in part). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App.1983) (overruled in part). Dr. Stillings provided the only disability rating, and found Claimant's disability to be 2% BAW referable to his mild adjustment disorder. I accept Dr. Stillings finding, and award Claimant 2% BAW PPD due to his September 27, 2000 work related injury.

