

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

Injury No.: 99-178564

Employee: Lawrence Sawyer

Employer: Lawrence Sawyer

Insurer: Clarendon National Insurance Company, administered by
North American Risk Services

Date of Accident: December 10, 1999

Place and County of Accident: Smithville, Clay County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 11, 2006. The award and decision of Administrative Law Judge R. Carl Mueller, issued July 11, 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 18th day of May 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

Secretary

SEPARATE OPINION
CONCURRING IN PART AND DISSENTING IN PART

I join my fellow commissioners in awarding compensation in this claim. However, after a review of the entire record as a whole, I believe the decision of the administrative law judge should be modified to increase the award of permanent partial disability.

The extent and percentage of a disability is a finding of fact within the special province of the Commission. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo.App. W.D. 2000) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.banc 2003)). The Commission may consider all of the evidence, including the employee's testimony, and draw reasonable inferences in arriving at the percentage of disability. *Id.*

I believe the evidence supports that employee is entitled to a greater percentage of disability than awarded by the majority. Employee testified as to his limitations as a result of his back injury as well as to the chronic pain associated with his condition. Additionally, Dr. James Stuckmeyer, an orthopedic surgeon, examined employee and opined that as a result of the compressive injury to his thoracic and lumbar spine with resultant dysfunction and pain, he suffered a permanent partial disability of 25% of the body as a whole. I find his opinion regarding the extent and percentage of disability most persuasive and worthy of belief.

Based upon my review of all the evidence, I find employee sustained a permanent partial disability of 25% of the body as a whole. I respectfully dissent from the portion of the majority's decision awarding employee permanent partial disability of only 16½% of the body as a whole.

John J. Hickey, Member

FINAL AWARD

Employee: Lawrence Sawyer Injury No: 99-178564
Dependents: N/A
Employer: Lawrence Sawyer
Additional Party: N/A
Insurer: Clarendon National Insurance Company, administered by North American Risk Services
Hearing Dates: May 10 and 12, 2006
Briefs Filed: June 5, 2006 Checked by: RCM/rm

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: December 10, 1999
5. State location where accident occurred or occupational disease was contracted: Smithville, Clay County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes

10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee fell from a ladder and suffered injury to his back.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Body as a whole
14. Nature and extent of any permanent disability: Sixteen and one-half percent (16½%) whole body disability
15. Compensation paid to-date for temporary disability: Clarendon paid fifty weeks of Temporary Total Disability Compensation between December 10, 1999 and January 2, 2001 at a rate of \$410.35 for compensation totaling \$20,517.50
16. Value necessary medical aid paid to date by employer/insurer? \$36,057.69
17. Value necessary medical aid not furnished by employer/insurer? \$0.00
18. Employee's average weekly wages: \$394.12
19. Weekly compensation rate: \$262.74
20. Method wages computation: MO. REV. STAT. §287.250.4.
21. Amount of compensation payable:

Medical Expenses

| | |
|--|---------------|
| Medical Already Incurred..... | \$36,057.69 |
| Less credit for expenses already paid..... | (\$36,057.69) |
| Total Medical Owning..... | <u>\$0.00</u> |

Temporary Disability

| | |
|--|---------------------|
| 50 weeks at \$262.75..... | \$13,137.50 |
| Less credit for benefits already paid..... | (\$20,517.50) |
| Total TTD Overpayment..... | <u>(\$7,380.00)</u> |

Permanent Partial Disability

| | |
|--|--------------------|
| 16.5 % whole body disability (.165 x 400 weeks) x \$262.75/week..... | <u>\$17,341.50</u> |
|--|--------------------|

Total Award:..... \$9,961.50

22. Second Injury Fund liability: N/A
23. Future requirements awarded: None

Said payments to begin as of date of this award 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 twenty-five percent (25%) lien totaling \$2,490.38 in favor of David Bony, Attorney, for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Lawrence Sawyer Injury No: 99-178564
Dependents: N/A
Employer: Lawrence Sawyer
Additional Party: N/A
Insurer: Clarendon National Insurance Company, administered by North American Risk Services
Hearing Date: May 10 and 12, 2006
Briefs Filed: June 5, 2006 Checked by: RCM/rm

On March 10 and 12, 2006, the employee and insurance company appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Lawrence Sawyer appeared in person and with counsel, David Bony. The Insurer (hereinafter "Respondent") appeared through Robert J. Wonnell. The Second Injury Fund was not a party to the case. For the reasons noted below, I find that Mr. Sawyer is not permanently and totally disabled; the Respondent timely filed an Answer; Mr. Sawyer earned a \$394.12 average weekly wage; Claimant's benefits are not subject to any reduction under §287.149.3; Mr. Sawyer suffered 16.5% whole body disability; and, no additional treatment is awarded.

STIPULATIONS

The parties stipulated that:

1. On or about December 10, 1999 Lawrence Sawyer was an employer operating subject to Missouri's Workers' Compensation law with its liability fully insured by Clarendon National Insurance Company;
2. Mr. Sawyer was its employee working subject to the law in Smithville, Clay County, Missouri;
3. Mr. Sawyer sustained an accident, arising out of and in the course of employment on December 10, 1999;
4. Mr. Sawyer complied with the notice requirement of §287.420;
5. Mr. Sawyer filed his claim within the time allowed by law;
6. Respondent provided Claimant with medical care costing \$36,057.69; and,
7. Respondent paid Mr. Sawyer fifty weeks of Temporary Total Disability Compensation between December 10, 1999 and January 2, 2001 at a rate of \$410.35 for compensation totaling \$20,517.50

ISSUES

The parties requested the Division to determine:

1. Mr. Sawyer's average weekly wage and compensation rates?
2. Depending on the determination of Mr. Sawyer's average weekly wage, whether Clarendon underpaid, or overpaid, the employee's TTD?
3. Whether Clarendon must provide Mr. Sawyer with additional medical care?
4. Whether Mr. Sawyer suffered any disability and, if so, determining the nature and extent of

his disability and whether he is permanently and totally disabled?

5. Whether the employee's disability benefits should be reduced 50% pursuant to §287.149.3?
6. Whether the Answer was filed within the time required by 8 CSR 50-2.010(8)?

FINDINGS

Claimant, and his wife, testified on his own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- A - Report, James A. Stuckmeyer, M.D., August 30, 2002
- B - Report, Stanley Butts, Ph.D.
- C - Deposition, Stanley Butts, Ph.D., March 3, 2005
- D - Claim for Compensation
- E - Division Acknowledgement of Claim, 8/10/2000
- F - Division Receipt of Answer, 9/26/2000
- G - Answer to Claim, date stamped 9/28/2000
- H - 1999 Form 1099 – Beautiful Homes
- I - 1999 Form 1099 - Premier Siding & Window

The employer called one witness, Christine Schletzbaum, and admitted the following exhibits, which have all been received into the record (Claimant's attorney objected to Exhibit #30, which was overruled):

- 1 - Wylie Chiropractic
- 2 - Neurology Consultants
- 3 - Michael J. Pronko, M.D.
- 4 - Midwest Radiology
- 5 - Vito J. Carabetta, M.D.
- 6 - Eden Wheeler, M.D.
- 7 - Physical Therapy and Rehabilitation
- 8 - Health South
- 9 - H. Andrew Pickett, M.D.
- 10 - St. Luke's Northland Hospital
- 11 - S.C. Jamoulis, M.D.
- 12 - Joseph Galate, M.D.
- 13 - Excelsior Springs Medical Center
- 14 - SurgiCenter of Kansas City
- 15 - Medical Records, Michael J. Poppa, M.D.
- 16 - Deposition, Eden Wheeler, MD
- 17 - Deposition, Vito Carabetta, MD
- 18 - Deposition, Michael J. Pronko, M.D. [\[1\]](#)
- 19 - Deposition, Dick Santner
- 20 - Deposition, Janice Hastert
- 21 - Deposition, Paul Seligman, Jr.
- 22 - Deposition, Rodney Todd
- 23 - Deposition, Michelle Young
- 24 - Deposition, Lawrence Sawyer, December 20, 2001
- 25 - Deposition, Lawrence Sawyer, February 25, 2005
- 26 - Deposition, Stanley V. Butts, Ph.D.
- 27 - Sawyer 1999 Tax Return
- 28 - Division Insurer Request
- 29 - Acknowledgment of Claim
- 30 - AICS Screen Image showing 9/11/2001 Answer
- 31 - Treatment Records, Michael Poppa, D.O.
- 32 - Sawyer 2002 Tax Return

FINDINGS OF FACT

Based on the above exhibits and the testimony of Claimant and his wife, I make the following factual findings. Mr. Sawyer has been involved in the siding business for most of his life. Claimant's work before December of 1999 was sporadic and part-time. The claimant's wife, who also testified at the Hearing, has also been employed full-time. This has allowed the claimant to work some of the year, and stay at home to work on his farm some of the year. This was a commonplace arrangement before the accident of December 10, 1999.

On December 10, 1999, the claimant was doing soffit and siding work on a three-story home in Smithville when he fell approximately twenty two (22) feet from the ladder he was working on. Mr. Sawyer landed on his feet and then fell down and rolled over. Mr. Sawyer refused transportation to the hospital by ambulance and, instead, was transported by co-workers in his truck to St. Luke's Hospital in Kansas City for treatment. The patient reported pain in his lumbar spine and an x-ray of this region was taken. The x-ray did not reveal any acute findings, but only degenerative changes. (Respondent's Exhibit #10, page 9). However, these changes were at L1-2 and L2-3. The claimant also underwent an exam of the pelvic region, which was also normal. (Respondent's Exhibit #10, page 10). Claimant was given instructions on back pain relief and released from the hospital that day.

A few months later, the claimant was seen by a chiropractor, Dr. James Wylie. (Respondent's Exhibit #1). Dr. Wylie predicted that the patient's pain would be relieved in 3 to 4 weeks and recommended additional treatment. Care was then transferred to Dr. Poppa for an orthopedic evaluation. Claimant treated with Dr. Poppa until his release in June of 2000. At that time, Dr. Poppa opined the claimant was capable of gainful employment with a lifting restriction of 50 pounds and assessed a 5% permanent partial disability to the body as a whole. (Respondent's Exhibit 16). Claimant has also received periodic care with his family doctor, Dr. Andrew Pickett. (Respondent's Exhibit # 9).

Claimant requested additional treatment, and Respondent voluntarily provided additional treatment with Dr. Eden Wheeler, beginning in July of 2000. (Respondent's Exhibit 16, p. 56). Dr. Wheeler diagnosed an exacerbation of degenerative disc disease and SI joint dysfunction. *Id.* Dr. Wheeler ordered an MRI which did not reveal any nerve root impingement. *Id.* Dr. Wheeler supervised a program of physical therapy, work conditioning and injections. In February of 2001, Dr. Wheeler felt there was nothing left to offer the claimant, and he was released with a 50-pound restriction and assessed an 8% disability to the body as a whole. *Id.*

In December of 2001, the claimant was evaluated by a third physician, Dr. Vito Carabetta. Dr. Carabetta opined that the claimant was at maximum medical improvement and assessed a 5% disability. (Respondent Exhibit 17, page 23). Dr. Carabetta testified that he discussed with the claimant the extensive degenerative disc disease that pre-existed the fall and placed lifting restrictions on the claimant. (Respondent Exhibit # 17, p. 11, 15). The claimant also informed Dr. Carabetta that the pain had improved 70% since the original accident. *Id.* at 14.

The claimant was then evaluated by Dr. James Stuckmeyer approximately 9 months later, on August 22, 2002. (Claimant's Exhibit A). Dr. Stuckmeyer diagnosed a chronic lumbar and thoracic strain. Dr. Stuckmeyer indicated that the patient's overall de-conditioning was related to his inactivity. *Id.* at 3. Dr. Stuckmeyer assessed a 25% disability to the body as a whole and did not place any restrictions on the claimant. Additionally, Dr. Stuckmeyer indicated that no additional surgical treatment or pain management would be needed. Dr. Stuckmeyer did recommend additional chiropractic treatment. *Id.* at 4.

It is important to note at this time that none of the five physicians listed above made any mention of any behaviors indicative of depression or psychological problems. Additionally, there is no testimony from any of these five physicians that the claimant is permanently and totally disabled.

Approximately two years passed with no treatment or activity in this case. Then the claimant was evaluated by Dr. Stanley Butts on May 19, 2004 and August 5, 2004. In his only report, Dr. Butts opined that the claimant was permanently and totally disabled. (Claimant's Exhibit B, page 6-8). This opinion was based on the claimant's inability to return to his previous employment, and the diagnosis of "Pain Disorder with Both Psychological Factors and a General Medical Condition and a Major Depressive Disorder". *Id.* Dr. Butts also assessed an impairment rating (not a disability rating) of 60-65 percent. *Id.*

The claimant was also evaluated by Dr. Michael Pronko. Dr. Pronko felt that the claimant had a certain type of negative schizophrenia. (Respondent's Exhibit #18, p. 65). Dr. Pronko opined that the claimant's "psychological dysfunction and the accident at work on December 10, 1999" had "no causal connection". *Id.* Dr. Pronko recommended antipsychotic medication, but indicated that the recommendation was unrelated to his work accident.

In September of 2001, the claimant underwent a vocational assessment with Dick Santner. Mr. Santner was hired by Employment Specialists, Inc. and worked with Paul Seligman to provide vocational rehabilitation for the Claimant. Mr. Santner personally performed the vocational assessment, after receiving official approval from the Missouri Division of Workers Compensation to do so. (Respondent's Exhibit 19, pps. 69, 70). The vocational assessment was one of seven services offered by Employment Rehabilitation Specialists in the vocational rehabilitation program. (Respondent's Exhibit 19, p. 76). These services included: vocational assessment, transferable skills analysis, labor market survey, job search/placement, rehabilitation vendor progress reports, plan amendments, and closure documents, if necessary. *Id.* at 76. Although Mr. Santner only had Dr. Wheeler and Dr. Poppa's reports at the time of his assessment, he had reviewed the reports of Dr. Carabetta, Dr. Butts, Dr. Pronko and Dr. Stuckmeyer by the time of his deposition. He opined that the additional medical reports did not change his position. *Id.* at 20. Mr. Santner opined that the claimant was capable of employment based on his present physical condition. *Id.* at 20-22.

After the assessment with Mr. Santner, Respondent attempted to place the claimant in various jobs within a 40-mile radius of his home in the open labor market. Paul Seligman scheduled various interviews for the claimant to attend in an attempt to help the claimant re-enter the work force. The first step in this process was to forward transferable skill analysis sheets to Dr. Wheeler and Dr. Carabetta. Both doctors reviewed four job analysis forms. Dr. Carabetta opined that the claimant could perform 3 of the 4 potential jobs and Dr. Wheeler opined that the claimant could perform all 4 of the potential jobs. (Respondent Exhibit 17, pps. 55-58, Exhibit 16, pps. 51-54). After receiving physician approval, Mr. Seligman proceeded with the attempts to find employment for the claimant.

After reviewing the vocational rehabilitation plan, counsel for the Claimant submitted a letter to Paul Seligman, dated November 21, 2001, indicating that the employer and attorney were not in agreement with the plan. (Respondent Exhibit 21, p. 96). Counsel specifically stated "...it seems more could be done to make him more marketable in the job market rather than simply helping him look for a job". *Id.* Mr. Seligman responded to this letter on December 1, 2001 asking for authority to work with the claimant to implement the rehabilitation plan. (Respondent Exhibit 21, p. 98). More specifically, the letter stated, "If you authorized us to work with Mr. Sawyer, we will prepare a resume, solicit his input and make recommendations based on the knowledge learned from the LMS. We don't just simply find a job. We work to find a position that falls within the injured workers restrictions, ability and needs". *Id.* On the same day, the plan was submitted to the Missouri Division of Workers Compensation for approval. *Id.* at 99.

Mr. Sawyer attended the first scheduled appointment with the James Company in January of 2002. *Id.* at 119. The owner of the company stated that "he was very interested in working" with the claimant. *Id.* The response form from the James Company noted that the claimant was to return for a second interview with a job description and salary request. *Id.* at 121. The claimant did not return for a second interview with the James Company. *Id.* at 44. On March 4, 2002, counsel for the claimant forwarded another letter to Mr. Seligman, stating, "until the plan is approved, Mr. Sawyer has no obligation to attend the interviews that you may schedule". *Id.* at 123. As a result, the claimant did not attend the scheduled interviews with the City of Overland Park, Andreas Home Improvement Company, or American Catastrophe Services. (Respondent's Exhibit 21, p. 124, Exhibit 23, p. 16, Exhibit 22, p. 19). Mr. Seligman testified that the claimant's lack of cooperation led to the termination of the attempts of vocational rehabilitation for the Claimant. *Id.* at 53. Mr. Seligman felt in 2001 and 2002 that the claimant was capable of employment, and testified in April of 2006, that after reviewing various additional information and depositions that occurred after his attempts to find employment for the claimant, that the claimant was still capable of employment. (Respondent's Exhibit 21, p. 51-52). Janice Hastert, another rehabilitation specialist, who also served as the case manager in this case, testified that the claimant was currently capable of employment. (Respondent's Exhibit 20, p. 6, 46).

The record contains a variety of testimony regarding the claimant's wage. The claimant testified at his first deposition that he earned \$900 per week. (Respondent's Exhibit #24, p. 52). The claimant testified at trial that he

earned \$1000 per week, but sometimes earned up to \$2,000 in a single day. The claimant told Janice Hastert that he earned \$10,246 over a six-month period. (Respondent's Exhibit #20, p. 56). The claimant reported income of \$10,247 for the entire year of employment on his 1999 tax returns. (Respondent's Exhibit 27, p. 3). The claimant also testified at trial that he never had any employees or contract labor. However, the 1999 tax return lists contract labor paid as an expense in the amount of \$475. Additionally, the claimant's 2002 tax return contains evidence that the claimant was still in the siding occupation and his wife was an accounting clerk. The siding business generated in excess of \$10,500 in 2002. (Respondent's exhibit 32). Further complicating the wage issue are two Form 1099's indicating the claimant worked from 8-1-99 to 10-8-99 for Premier Siding and Window Company, earning \$4,311.50 and for Beautiful Homes and Siding, earning \$5,935.64 from sometime in October until sometime in December.

RULINGS OF LAW

Claimant's average weekly wage is \$394.12

Claimant alleges the Respondent has filed a late answer and the average weekly wage in this case should be sufficient for a maximum permanent total disability rate of \$578.48. Claimant likely advances this position under the rationale of Lammert v. Vess Beverages, Inc., 968 S.W.2d 723 (1998). In Lammert, the Court held that an answer filed outside of the required time permitted, placed an admission of the facts contained in the Claim on the Respondent. Claimant's argument fails on two points.

First, this Court holds that the Respondent did not file an untimely answer in this case, as discussed in Section F. Second, there is no factual statement of wage in the Claim for Compensation. The document, in the box for wage, simply states "Maximum". (Claimant's Exhibit D). There is no additional factual information regarding wage from this word alone. Webster's dictionary defines "maximum" as "the greatest quantity or value attainable or attained: the period of highest, greatest, or utmost development" See, Merriam-Webster's Dictionary. There is no additional information contained in the Claim for Compensation that would define what the greatest quantity attainable is. The statement was not "wage sufficient for maximum compensation rate". Even if that was the statement contained in the document, this Court could still not distinguish, on the face of the document alone, whether such a statement meant a wage sufficient for a maximum permanent partial disability rate, a permanent total disability rate, or a temporary partial disability rate. Therefore, this Court finds that the Respondent has not admitted any fact on wage, and this Court will resort to the evidence presented to determine the claimant's average weekly wage.

The conflicting nature of the testimony regarding the Claimant's wage, as well as evidence of wages earned before and after the thirteen weeks preceding the date of accident, (which is not distinguishable which wages were earned before and after the thirteen week period from the Form 1099 from Premier Siding and Window) provide exceptional and contradictory information. See, Ash v. Ahal Contracting Co., 916 S.W.2d 439 (1996). In Ash, the part-time and sporadic nature of the Claimant's employment allowed the Administrative Law Judge to invoke the provisions of R.S.Mo § 287.250(4), which reads:

If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

R.S.Mo. § 287.250(4).

This Court finds that similar exceptional factors exist in this case that would warrant the usage of R.S.Mo. § 287.250(4).

The claimant testified at trial that he worked half of the year, or twenty-six weeks, in 1999. The official tax

return for the year 1999 listed his contract labor income as \$10,247. (Respondent's Exhibit 27). This is also the amount the claimant informed Janice Hastert he earned in the six months he worked in 1999. (Respondent's Exhibit #20, p. 56). Therefore, the Claimant's average weekly wage shall be determined by the total wages earned in the twenty-six weeks actually worked in 1999. \$10,247 divided by 26 weeks equates to an average weekly wage of \$394.12.

Respondent is entitled to a credit for temporary total disability overpayments.

As previously stipulated, the Respondent paid 50 weeks of temporary total disability at a rate of \$410.35. As stated above, this Court finds that the claimant's average weekly wage is \$394.12 which results in a compensation rate for both temporary total disability ("TTD") and permanent partial disability ("PPD") of \$262.75. Thus, Respondent overpaid TTD totaling \$147.60 per week for a cumulative TTD overpayment totaling \$7,380.00. Therefore, Respondent is entitled to a credit of \$7,380 against the PPD award.

Claimant is not entitled to any further medical treatment.

A claimant is entitled to benefits for future medical treatment if he or she shows by a reasonable probability that future medical treatment is needed "to cure and relieve ... the effects of the injury." Section 287.140.1, RSMo 2000; Dean v. Saint Luke's Hospital, 936 S.W.2d 601, 603 (Mo.App.1997). Dr. Carabetta, Dr. Wheeler, and Dr. Poppa opined that the claimant is at maximum medical improvement. Dr. Stuckmeyer indicated that pain management and surgery are not necessary, but that chiropractic treatment might help. Dr. Butts included in his report recommendations for additional psychiatric treatment.

The claimant testified in his second deposition that, when asked if wanted additional psychiatric testing, that "They're not going to fix me. I want to talk to a doctor that can fix me." (Respondent Exhibit 25, p. 42). When Dr. Butts examined this testimony, he stated that additional psychiatric treatment "probably would not be helpful". (Respondent's Exhibit #26, p. 70).

The question before this court is what treatment, if any, is needed to cure and relieve the effects from the original injury. Based on reasons listed below, this Court does not find that the Claimant's psychological problems are related to the original injury. As a result, the Respondent does not have any further obligation to provide any psychiatric care. Additionally, the Claimant has testified he doesn't want it, and Dr. Butts testified it would not be helpful. *Id.*

Thus, the only remaining question regarding this issue is whether the Claimant is in need of ongoing physical care for treatment of the 1999 injury. Dr. Stuckmeyer has opined surgery and pain management are not necessary. Dr. Poppa, Dr. Carabetta, and Dr. Wheeler have all opined that the claimant is at maximum medical improvement. The only remaining issue is Dr. Stuckmeyer's discussion of possible chiropractic treatment. The record does not contain any evidence regarding the need for additional chiropractic treatment from an actual chiropractor.

Furthermore, Dr. Wylie believed that his chiropractic treatment would relieve the majority of the pain in 3 to 4 weeks. (Respondent's Exhibit #1) This opinion was rendered in February of 2000. The discussions regarding the claimant's condition from Dr. Butts and Dr. Pronko seem to indicate the claimant will believe he has pain no matter what. The Claimant has failed to meet his burden to prove any additional chiropractic treatment will provide a cure. Therefore, this Court finds that the claimant has failed to meet his burden to prove that any additional treatment would be necessary to cure and relieve the effects of the original injury, and future medical care is denied.

Claimant is not permanently and totally disabled.

The central issue in this case is whether or not the Claimant is permanently and totally disabled. A finding of permanent and total disability requires a claimant to be "unable to return to any employment, not just unable to return to the employment he was engaged in when he was injured". See, Muller v. Treasurer of Missouri, 87 S.W.3d 36 (2002). The test is the claimant's ability to compete in the open labor market. *Id.* The "crucial question is whether or not an employer can reasonably be expected to hire the claimant in his present physical condition

and can reasonably expect him to perform the work successfully.” *Id.*

Medical evidence from Dr. Stuckmeyer, Dr. Poppa, Dr. Wheeler, Dr. Pickett, and Dr. Carabetta is void of any evidence of permanent and total disability. In addition, Mr. Seligman and Mr. Santner both opined the claimant is capable of work in the open labor market within his restrictions. Claimant has offered no vocational testimony that he is unable to compete in the open labor market. The only evidence of permanent and total disability is the opinion of Stanley Butts, PhD rendered almost four years after the original date of injury. (Respondent’s Exhibit #26, p. 22). As such, it is this testimony that will be discussed at this point.

Dr. Butts bases his opinion of permanent and total disability largely on the fact that the Claimant was unable to return to his previous employment. (Respondent’s Exhibit #26, p. 44, 45) However, earlier in his deposition, Dr. Butts testified that he couldn’t recall discussing with the claimant his attempts to return to work and he didn’t “see anything in his notes”. *Id.* at 8-9. Additionally, Dr. Butts testified that having vocational rehabilitation reports would be beneficial in rendering an opinion on permanent and total disability. *Id.* at 26-27. Dr. Butts then testifies that he did not have any vocational expert reports to review. *Id.*, line 15. Dr. Butts admitted he was not a vocational expert. *Id.* at 41. Dr. Butts even testified that he did not believe it was important to know what is going on in the open labor market to render a decision on permanent and total disability. *Id.* at 42.

Dr. Butts testified that he did not have a copy of the claimant’s 2005 deposition to review, nor did he have Dr. Carabetta’s report, nor did he have any reports from any of the vocational experts in this case. When discussing the additional information that existed regarding the claimant’s activities, and whether it would be beneficial to review, Dr. Butts responded, “I have no reason to reconsider my opinion”. *Id.* at 50-51.

Dr. Butts’ opinion falls short of the burden of proving permanent and total disability for the following reasons: 1) he did not have all of the reports and depositions for review, 2) his opinion is largely based on the claimant’s inability to return to his former employment, 3) there was virtually no discussion of psychiatric problems before the claimant was evaluated by Dr. Butts approximately 4.5 years after the original injury and 4) he testified he was not a vocational expert. Additionally, the qualifications of Dr. Butts are called into question based on his deposition. More specifically, Dr. Butts indicated that the claimant was suicidal in May of 2004, yet Dr. Butts waited to generate any report until after a second visit three months later. *Id.* at 3. Additionally, Dr. Butts only generated 2 pages of notes from the first visit. *Id.* at 4. If Dr. Butts truly felt the claimant was suicidal, this Court would expect some sort of recommendation for immediate care, or at the very least, the generation of a report. Additionally, Dr. Pronko testified that the claimant was capable of employment, even with his psychological problems. (Respondent’s Exhibit #18, p. 48). Furthermore, this Court agrees with Dr. Pronko’s opinion that any existing psychiatric condition was of a longstanding duration and not related to the injury of December 10, 1999.

The testimony of Dr. Carabetta and Dr. Wheeler involves examination of actual jobs available in the open labor market. Dr. Carabetta testified that the Claimant could perform 75% of the jobs and Dr. Wheeler opined the Claimant could perform 100% of the jobs available in the open labor market, of jobs that were presented for their review. (Respondent’s Exhibit #17, pps. 55-58; Exhibit #16, pps. 51-54). Dr. Butts’ refusal to consider this information leads this Court to believe Dr. Wheeler and Dr. Carabetta, that the claimant is capable of employment in the open labor market. Furthermore, Dr. Carabetta and Dr. Wheeler testified in their depositions that the claimant was not permanently and totally disabled.

The fact that a claimant cannot return to his original employment is not dispositive in finding permanent total disability. See, Muller v. Treasurer of Missouri, 87 S.W.3d 36 (2002). In Muller, the Court denied permanent and total disability benefits when the claimant was unable to return to her original employment. In this case, the Claimant was afforded multiple opportunities to obtain employment after his treatment. Letters contained in the record indicate that the Claimant refused to attend these appointments because the Claimant wanted job training and not job-placement. (Respondent’s Exhibit #21, p. 96). The Claimant’s refusal to attend scheduled job interviews precludes any request he may have for permanent and total disability.

Although Mr. Seligman’s deposition contains multiple documents proving the claimant’s unwillingness to attend job interviews, this is not the only evidence in the record of the claimant’s attitude towards employment. Claimant testified that he wanted to “find something that I can do that I’m not going to be bringing home \$100 a month”. (Respondent’s Exhibit #24, p. 52). The Claimant also testified that “Sutherlands is paying not much

better than minimum wage” and “There’s a lot of jobs out there if I want to make minimum wage”. (Respondent’s Exhibit #24, p. 45, 55). It would be inconsistent to allow a claimant to refuse job interviews and then claim permanent and total disability. Furthermore, the jobs solicited by Employment Specialists, Inc. were not just basic minimum wage jobs, they were jobs within the claimant’s abilities and experience and actually paid more money than the Claimant previously earned. The Claimant simply chose not to work.

Respondent was under no obligation to offer any vocational rehabilitation for the Claimant. However, Respondent did offer various job interviews that were researched and found to be specifically within the Claimant’s restrictions. However, the Claimant chose not to attend these appointments. Additionally the record contains testimony from Dick Santner (who testified a majority of his vocational rehabilitation work is performed at the request of claimant’s attorneys) regarding the claimant’s transferable job skills and of various types of employment the Claimant could engage in. (Respondent’s Exhibit #19, p. 26). The Claimant’s credibility is also questioned based on the fact that he denied working after 2000, yet reported over \$10,000 in income in siding in 2002. Additionally, the Claimant’s testimony of earning \$1000 a week, and sometimes \$2000 in one day is not supported by the income tax records. Therefore, the Claimant’s credibility is questionable once again.

The claimant’s injury is not the type of catastrophic injury that normally warrants a finding of permanent and total disability. The diagnostic tests performed in July of 2003, December of 2002, May of 2001, June of 2003, and most importantly two days after the accident in December of 1999, were essentially normal with small or minor bulges. (Respondent’s Exhibit #2, #4, #9, pps. 15, 18, #10, p. 9, #11, p. 1). The Claimant’s family doctor, Dr. Andrew Pickett notes a back strain and some low back pain periodically over a six-year period. (Respondent’s Exhibit # 9). However, in this treatment, there is a break from August of 2003 until September of 2005. *Id.* at 3-4. The claimant apparently went to see Dr. Pickett when he was having problems with his back. Dr. Pickett’s note of September of 2005 indicates that the Claimant “had been doing well until 4 days ago when it acutely became much worse”. *Id.* at 3. This period of over two years without treatment, and testimony that he was doing well during that period, is further evidence that any current problems the Claimant may be experiencing are not related to an injury that occurred over six years ago. Furthermore, even the Claimant’s family doctor testified the Claimant would return to work within restrictions. *Id.* at 11.

Mr. Santner, Mr. Seligman, Dr. Pickett, Dr. Poppa, Dr. Stuckmeyer, Dr. Carabetta and Dr. Wheeler all opined, either through deposition or a report, either specifically or indicatively, that the claimant was capable of employment within the open labor market within restrictions. Furthermore, this Court cannot overlook the fact that no evidence of permanent and total disability arose in this case until more than four years after the accident and two years after the last doctor opined on permanent partial disability. The lack of objective evidence of injury also supports this Court’s finding. Mr. Sawyer asks this Court to award permanent and total disability based almost wholly on the his subjective pain complaints, not objective medical findings. This the Court is reluctant to do, especially since the Claimant’s own expert, Dr. Butts, testified that Mr. Sawyer exaggerates in his mind how painful his condition is. (Respondent’s Exhibit #26, p. 34). Instead, this Court finds that the overwhelming weight of the evidences proves the claimant has suffered partial - not total - disability.

As previously noted, Dr. Wheeler opined that Mr. Sawyer suffered eight percent (8%) whole body disability from his December 10, 1999 injury. See, Respondent’s Exhibit 6 at 18:1-8 and Respondent’s Exhibit 6 at 1. Dr. Carabetta opined that Mr. Sawyer suffered five percent (5%) whole body disability from his December 10, 1999 injury. See, Respondent’s Exhibit 17 at 23:13-15 and Respondent’s Exhibit 5 at 3. The Claimant’s rating doctor, Dr. Stuckmeyer, opined that Mr. Sawyer suffered twenty five percent (25%) whole body disability. See, Claimant’s Exhibit A at 3. I find that Mr. Sawyer suffered sixteen and one-half percent (16½%) whole body disability for PPD compensation totaling \$17,341.50.

The employee’s disability benefits should not be reduced 50% pursuant to §287.149.3

Claimant alleged during Respondent’s counsel’s cross-examination that this issue was not plead as an affirmative defense, and has therefore been waived. However, the Claimant was aware of this issue at the Mediation with Judge Siedlik, during the Pre-Trial Stipulations, and was asked at the beginning of the trial if the issues listed were the only issues for determination, to which the Claimant’s attorney responded “Yes” and made no mention of this failure to plead a possible affirmative defense. Furthermore, applying the same rationale to the

Claimant's Claim for Compensation would require a bar any request for permanent total disability, as the only box checked was permanent partial disability, and no amended Claim was filed. As such, this Court finds that this issue is ripe for discussion, as the Claimant's attorney surrendered any right to make such an objection by waiting until well into cross-examination of his client.

Even if the Claimant had properly raised this objection, this Court would still hear this issue. The Commission has held that even though a particular issue "may be an affirmative defense, the issue can be raised subsequent to the answer and litigated in the proceedings before the administrative law judge and Commission". See, Lucas v. Taylor, Morley & Simon, Inc., 1988 WL 384791 (Mo.Lab.Ind.Rel.Com.) (1988) (Issue was notice). More specifically, the Court of Appeals has held that affirmative defenses are not required to be contained in a Respondent's answer when the issue is raised by Respondent's counsel at the hearing. See, Jacobs v. Ryder System, 789 S.W.2d 233 (1990) (issue was unreasonable refusal to submit to medical treatment). Additionally, refusal to submit to vocational rehabilitation is not an affirmative defense as outlined by the Commission in DiMaggio v. Johnston Audio, 1999 WL 33320987 (1999) (listing affirmative defenses in workers compensation proceedings, page 8). Additionally, the issue, when raised prior to taking evidence, as is the case at bar, is a "de facto amendment of the Answer". *Id.* Finally, the Claimant's attorney's letters outlining the Claimant's refusal to attend additional job interviews prove that there is no prejudice to the Claimant by hearing this issue. The Claimant cannot create a situation and then argue it is not appropriate for adjudication.

Missouri law states, in pertinent part, that:

Refusal of the employee to accept rehabilitation services or submit to a vocational rehabilitation assessment as deemed necessary by the employer shall result in a fifty percent reduction in all disability payments to an employee, including temporary partial disability benefits paid pursuant to section 287.180, for each week of the period of refusal.

R.S.Mo. § 287.149(3).

Mr. Sawyer submitted to a vocational assessment with Employment Specialists Inc. See, Respondent's Exhibit 19 at 71. He attended the interview with Mr. Santner and attended the first scheduled appointment. Ultimately, Mr. Sawyer's attorney advised Mr. Seligman by letter dated November 21, 2001 that he was "not in agreement with the proposed plan". See, Respondent's Exhibit 21 at 96. However, this objection came ten months *after* TTD benefits already had been terminated. And, such objection came after Mr. Sawyer already had submitted to a vocational rehabilitation assessment. And, he already had complied with some aspects of the Respondent's rehabilitation services. Therefore, I find that Claimant is not subject to the requested reduction.

Respondent has filed a timely answer.

In reviewing the exhibits presented to this Court, Respondent has filed a timely answer. The documentation from the official records of the Division indicates that the Claim for Compensation mailed to the Respondent was dated August 22, 2000 (Respondent's Exhibit #29). Therefore, the Respondent had until September 20, 2000 to file an answer. Although the time-stamp on the Answer shows a date of filing of September 28, 2000, this is clearly in error. (Claimant's Exhibit G). The Division of Workers Compensation routinely forwards acknowledgments of Answers after they are received. This fact was affirmed by the testimony of Respondent's only witness, Christine Schletzbaum. In this case, the Division generated an acknowledgment, on September 26, 2000, that an Answer had been previously received. (Claimant's Exhibit F). Therefore, the Respondent must have filed an answer prior to September 26, 2000, or the Division would not have generated an acknowledgment of that answer. Furthermore, Respondent's only witness testified that it is possible for date stamps to be incorrect if the machine is not loaded properly.

By the language contained on the official September 26, 2000 acknowledgment of the Answer, the Division had received an answer prior to this date. Furthermore, the internal docketing system, AICS, from the Division of Worker's Compensation, State of Missouri revealed that the Answer was received on September 11, 2000. (Respondent's Exhibit #30). As such, this Court deems the Respondent to have filed a timely Answer.

SUMMARY

Mr. Sawyer is awarded PPD benefits totaling \$17,341.50. Respondent overpaid TTD totaling \$7,380.00 which is credited against the awarded PPD. Respondent's request that Mr. Sawyer's disability benefits be reduced 50% pursuant to §287.149.3 is denied. Therefore, the amount due Mr. Sawyer totals \$9,961.50. Mr. Sawyer's attorney requested a fee equal to 25 percent of all amounts awarded. I find that such request is fair and reasonable and order a lien attach to this award for \$2,490.38 in favor of Mr. Bony until paid in full.

Date: _____

Made by: _____

Carl Mueller
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[\[1\]](#) Wonnell's objection at page 47:19-23 is withdrawn.