

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

Injury No.: 05-109377

Employee: Oscar Scott
Employer: Nationwide Distribution & Warehousing, Inc.
Insurer: American Home Assurance Company
c/o AIG Domestic Claims, Inc.

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 23, 2009. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued June 23, 2009, 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 27th day of October 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Oscar Scott Injury No.: 05-109377
Dependents: N/A Before the
Employer: Nationwide Distribution & Warehousing, Inc. **Division of Workers'
Compensation**
Additional Party: N/A Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: American Home Assurance Company
c/o AIG Domestic Claims, Inc. Checked by: KOB
Hearing Date: March 18, 2009

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: May 6, 2005.
5. State location where accident occurred or occupational disease was contracted: St. Louis City.
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: Claimant jarred and injured his back while operating a forklift on an uneven surface.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Low back, body as a whole.
14. Nature and extent of any permanent disability: Permanent Total Disability
15. Compensation paid to-date for temporary disability: \$31,921.97
16. Value necessary medical aid paid to date by employer/insurer? \$111,662.39

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Oscar Scott

Injury No.: 05-109377

- 17. Value necessary medical aid not furnished by employer/insurer? N/A.
- 18. Employee's average weekly wages: \$680.26
- 19. Weekly compensation rate: \$453.51 / \$354.05
- 20. Method wages computation: By agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Permanent total disability benefits of \$453.51 per week from Employer beginning 10/13/2006, for Claimant's lifetime

- 22. Second Injury Fund liability: No

TOTAL:

INDETERMINANT

- 23. Future requirements awarded: Medical treatment as specified in the Award.

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: James Hoffmann

Issued by DIVISION OF WORKERS' COMPENSATION

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Oscar Scott	Injury No.: 05-109377
Dependents:	N/A	Before the
Employer:	Nationwide Distribution & Warehousing, Inc.	Division of Workers'
Additional Party:	N/A	Compensation
Insurer:	American Home Assurance Company c/o AIG Domestic Claims, Inc.	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
		Checked by: KOB

PRELIMINARIES

The matter of Oscar Scott (“Claimant”) proceeded to Hearing to determine the benefits due under the Missouri Workers’ Compensation Act (“Act”) as a result of Claimant’s May 6, 2005 work injury. Attorney James Hoffmann represented Claimant. Attorney John D. Dietrick represented Nationwide Distribution & Warehousing, Inc. (“Employer”) and American Home Assurance Company c/o AIG Domestic Claims, Inc. (“Insurer”).

The parties agreed that on or about May 6, 2005, Claimant sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant’s low back and body as a whole. Claimant earned an average weekly wage of \$680.26, which corresponds to compensation rates of \$453.51 for total disability benefits, and \$354.05 for permanent partial disability (“PPD”) benefits. Employer paid temporary total disability (“TTD”) benefits of \$31,921.97 from July 3, 2005 through October 12, 2006. Employer also paid medical benefits totaling \$111,662.39. Employment, venue, notice, timeliness of the claim and coverage of the Act are not at issue.

The parties agreed to administratively close Injury Number: 05-048271 which was a duplicate file set up by the Division of Workers' Compensation with regard to this injury.

The issues to be determined are the nature and extent of Claimant’s permanent disability; and whether Employer is obligated to provide future medical treatment. Claimant is seeking to recover permanent total disability (“PTD”) benefits.

FINDINGS OF FACT

Based on the substantial and competent evidence of record, including Claimant’s testimony, the medical records and the expert opinions, I make the following findings of fact:

Claimant is a divorced, fifty-five year old man who attended two years of college, dropped out, and has since trained for and worked as a material handler, moving material with a forklift. Claimant began working for Employer in 1993, driving a forklift throughout Employer’s three story, 4,000 square foot building. He established a good work history, often

forgoing lunch breaks and vacation, and had no prior workers' compensation claims or disabling conditions. In 2005, his title was warehouse manager.

On May 6, 2005, there was a gap between the truck Claimant was unloading and the dock, with the truck two to three inches higher than the dock. The forklift did not have soft tires or shock absorbers, so Claimant was jarred every trip into or out of the truck. After one such "bump," Claimant felt a jolt to his back and experienced immediate pain. Upon receiving notice of the injury, Employer instructed Claimant to seek medical care.

Dr. Goldstein, Claimant's family doctor, ordered an MRI, which was taken May 18, 2005, and revealed evidence of marked central spinal stenosis at the L3-4 and L4-5 levels. There was also an extruded disc fragment impinging on the thecal sac and left L4 nerve root. A second lumbar MRI from Missouri Baptist Medical Center on May 27, 2005 confirmed the initial findings. Upon learning of the diagnosis, Employer sent Claimant to Dr. Peter Mirkin, who took Claimant off work. Claimant had not returned to work since his injury.

The authorized care provided by Dr. Mirkin consisted of a myelogram, which revealed a large disc extrusion and severe stenosis and spondylolisthesis. Dr. Mirkin noted Claimant was suffering from profound weakness of the left foot dorsiflexor and quadriceps and offered surgery. On August 30, 2005, Dr. Mirkin performed an extensive decompression and stabilization procedure, which included a laminectomy, bilateral decompression of roots at L3-4, L5-S1; segmental instrumentation of Monarch system L3-4, L5-S1; interbody fusion with cage at L4-5 and L5-S1; and posteriolateral fusion at L3-4 and L5-S1. In December 2005, Dr. Mirkin noted, Claimant "is very likely going to have to find a very low level activity job. He can do sedentary work." Claimant remained off work.

On March 6, 2006, x-rays revealed Claimant developed a pseudoarthrosis in the upper part of his spine. Dr. Mirkin noted that the options were to either live with this or undergo surgery. Claimant elected to have it fixed, and on April 20, 2006, underwent a second surgery performed by Dr. Mirkin, who removed and replaced the significant hardware in and around Claimant's spine. Dr. Mirkin ordered a brace, which Claimant continues to use. Results were better this time as demonstrated by diagnostic tests and physical exam. On July 3, 2006, Dr. Mirkin's records note Claimant cannot return to his previous job, may need to find an extremely light type of work, and "cannot do anything physical due to type of fusion." A September 29, 2006 functional capacity evaluation revealed that the Employee could function in the medium work demand level. Claimant passed 11 out of 13 validity criteria. On October 4, 2006, Dr. Mirkin stated that x-rays showed that the fusion looked good and solid. Neurologically he was grossly intact. Dr. Mirkin placed Claimant at maximum medical improvement, and said it was safe for him to work in the medium duty capacity as noted in the functional capacity evaluation. An October 30, 2006 report from Dr. Mirkin states, "Certainly, he is at risk for having further problems in his back." Claimant requested a pain physician for continued pain complaints. Employer authorized Dr. John Graham.

The physical exam performed by **Dr. Graham**¹ on November 13, 2006 was unremarkable, and psychological test showed significant elevations in the somatization and depression scales, indicating, according to Dr. Graham, an element of functional overlay may be present. He prescribed Ultram and Naprosyn, but as of November 27, 2006, from a pain

¹ Dr. Graham testified by deposition, one of eight experts to do so in this case.

management standpoint, Dr. Graham saw no indication for medications or further invasive treatment. He placed Claimant at maximum medical improvement and released Claimant from his care to work at a medium demand level within the restrictions Dr. Mirkin placed upon him.

Currently, Claimant has numerous problems he relates to his back injury. He has daily back pain, uses a cane, and wears a large brace with a hard plastic core and adjustable Velcro straps for a feeling of security. The pain increases with movement. Although the numbness has resolved, he still has weakness in the left leg and upper thigh. He only gets six hours sleep and he has crying spells with depression and frustration. He has difficulty dressing himself, and can no longer able to perform activities he once enjoyed, like fishing, softball and jogging. He takes Vicodin and Tramadol for pain, must lie down frequently every day, and has concentration problems. Claimant is capable of reading, writing, and basic math, and he has a valid driver's license. Claimant does not think he can work due to pain, the effects of pain medication, his need to lie down, his limited motion, and his depression. I find Claimant's testimony as a whole, including but not limited to his complaints and limitations, to be credible.

Dr. Peter Mirkin, the treating orthopedic surgeon, testified Claimant had several problems including degenerative disc disease, spondylolisthesis as well as a large disc protrusion compressing nerves at several levels. He thought Claimant reached maximum medical improvement as of October 4, 2006. He did not believe that he was in need of any further medical treatment, and based on the FCE, felt he could work at medium duty capacity. He provided Claimant with a PPD rating of 35% of the body as a whole, and noted that about 10% was due to pre-existing degenerative changes and spondylolisthesis, with the rest due to the injury and subsequent treatment. Dr. Mirkin testified that "statistically people who have fusion surgery are more at risk than people who don't to develop problems above or below the fusion," and conceded Claimant is suffering from increased pressure on L2-3 as a result of the fusion.

Dr. Robert Poetz performed an IME on behalf of Claimant. He found neurological deficits in the left Achilles' tendon and toe extensor, which indicates motor loss in the sciatic nerve. Dr. Poetz's diagnosis included lumbar degenerative disc disease, spondylolisthesis and severe stenosis, pre-existing along with herniated discs at L3-4, L4-5 and L5-S1 and exacerbation of degenerative disc disease, spondylolisthesis and severe stenosis, status post surgical procedures. His diagnosis also included depression. He testified that the diagnosis of lumbar degenerative disc disease, spondylolisthesis and severe stenosis all pre-existed his accident of May 6, 2005. He provided Claimant with a preexisting permanent partial disability of 10% of the body as a whole. With respect to the May 6, 2005 injury, he gave a rating of 55% of the body as a whole based in part of subjective complaints, and 20% of the body as a whole for depression. Dr. Poetz's restrictions included avoiding heaving lifting, strenuous activity, prolonged sitting, standing, walking, stooping, bending, squatting, twisting, climbing or any activities that exacerbate the symptoms. Dr. Poetz opposed Dr. Mirkin's conclusion Claimant could work at the medium level because of his significant pathology and risk of complications. Claimant could do sedentary activities so long as they do not require focus, concentration, self-transportation, and so on. Rather, Dr. Poetz testified Claimant is permanently and totally disabled, and is unable to compete in the open labor market as a direct result of his May 6, 2005 injury.

Dr. Wayne Stillings, a board certified psychiatrist, testified by deposition that he believed the accident mildly aggravated Claimant's pre-existing personality disorder. He provided the Claimant with a permanent partial disability of 2% of the man as a whole for the aggravation of his pre-existing psychiatric condition. He also found that Claimant had a pre-existing personality disorder resulting in PPD of 10%. He testified Claimant did not need any further psychiatric treatment in relationship to the May 6, 2005 work injury, was at MMI, and was capable of working without restrictions from a psychiatric standpoint.

Dr. Michael Jarvis, a board certified psychiatrist, testified by deposition on behalf of Claimant. He disagreed with Dr. Stillings' opinion that Claimant had a pre-existing personality disorder. Dr. Jarvis testified the injury for which Claimant sought surgery resulted in pain and disability, and consequently adjustment disorder with depressed mood. As a result, Claimant is markedly impaired emotionally and psychologically as a direct result of his work related injury. He needs future psychiatric care, including psychotherapy. He testified that Claimant is 100% disabled due to his psychiatric condition because he lacks the concentration, the memory, the energy and those sorts of things.

Dr. Anthony Guarino, the director of pain management for Barnes Jewish West County Hospital, examined Claimant at the request of Claimant's attorney. Dr. Guarino believes that as a result of his pain, Claimant is totally disabled and is not employable in today's market. Dr. Guarino explained Claimant has experienced unnecessary stress because he has not received pain management. Dr. Guarino recommends analgesics, anti-depressants, and anti-epileptics.

Donna Kisslinger Abram, a certified vocational rehabilitation counselor, evaluated the Claimant on behalf of the Employer/Insurer. It was her professional opinion Claimant is employable and placeable in the open labor market, although the economy would make placement difficult. His poor pain control, medications, reduced ability to drive, near advanced age also negatively impact his ability to work. She admitted Claimant was totally disabled based on the opinions of Drs. Guarino and Poetz, and that Claimant should only consider jobs that are medically safe for him.

Timothy Lalk, a certified vocational rehabilitation counselor, testified by deposition on behalf of Claimant. He testified Claimant's employability is dependent on which expert's opinion is considered. With Dr. Mirkin and the FCE, Claimant was employable in the open labor market in certain positions.² Considering Dr. Poetz's restrictions, but ignoring his statement about avoiding any activity which exacerbated his symptoms further limits the number of jobs he would be able to perform. However, considering Dr. Poetz's opinion *in toto*, that he should not do anything that increases his symptoms coupled with the need to lie down, he does not believe Claimant is able to compete for, secure and maintain employment in the open labor market.

² Examples included food service, desk clerk in a rental store or motel, unarmed security guard or information clerk, cashier in a convenience store, self service store and a variety of other customer service representative positions.

RULINGS OF LAW

Based on the substantial and competent evidence of record, including Claimant's testimony, the expert medical and vocational evidence I find most credible, and the documentary evidence, as well as the Law of the State of Missouri, I find and rule as follows:

1. Permanent Total Disability.

Claimant seeks permanent total disability from Employer, claiming he is unable to compete in the open labor market as the result of his work accident. There is no doubt Claimant sustained an injury to the low back while operating a forklift for Employer. The question is whether that injury, and its resultant medical treatment, has rendered Claimant totally disabled. "Total disability" is statutorily defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. § 287.020.7; *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004). The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).³ The test for permanent and total disability is whether the claimant would be able to compete in the open labor market. *Id.*

Whether Claimant can compete for a job is determined by the credible evidence. In this case, each side has presented a medical doctor, a psychiatrist, and a vocational expert in support of its case. The decision to accept one of two conflicting medical opinions is an issue of fact for the Commission. *Marcus v. Steel Constructors, Inc.*, 434 S.W.2d 475, 479 (Mo. 1968); *Johnson v. Denton Constr. Co.*, 911 S.W.2d 286, 288 (Mo. 1995). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop 'N Save Warehouse Foods Inc.*, 855 S.W.2d 460, 462 (Mo. App. E.D. 1993); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

From a purely medical perspective, the parties' competing experts, Drs. Mirkin and Poetz, rely on different evidence to support their conclusions. As the treating physician, Dr. Mirkin has firsthand knowledge, and is arguably in a stronger position to evaluate Claimant. Indeed, Dr. Mirkin predicted Claimant would have to find a "very low level activity" job, and could not do anything physical due to his fusion. However, based on a onetime FCE, Dr. Mirkin changed his mind at the end, and stated Claimant could do medium level work, despite the risk for further problems related to the fusion. I find there are inconsistencies in Dr. Mirkin's

³ This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect thereon.

testimony. He places too much weight on the FCE, and deemphasizes Claimant's credible complaints of pain with related limitations.

Dr. Poetz's approach is more convincing, and consistent with the credible evidence. As he found, medium level work is contraindicated in a case such as Claimant's, with his significant pathology and risk of complications. Claimant's inability to focus, concentrate, and get to work foreclose even sedentary work. His limitations, although general, are realistic, as is his opinion Claimant is totally disabled. Overall, Dr. Poetz's opinion is more credible than Dr. Mirkin's.

Likewise, the psychiatric evidence is in conflict. Between the two psychiatrists, I find the opinion of Dr. Jarvis to be clearly stated, and consistent with the credible evidence. There is no evidence of preexisting psychological problems, yet Dr. Stillings bases his opinion on the existence of a prior personality disorder. On the other hand, Dr. Jarvis credibly explains how the injury led to pain, surgery, and disability. This cycle of pain resulted in adjustment disorder with depressed mood. Dr. Guarino's testimony regarding the pain Claimant suffers, which I find more credible than Dr. Graham's, supports Dr. Jarvis' opinion. I find Drs. Jarvis and Guarino offer a more clear and credible explanation and evaluation of Claimant's state of psychological ill-being, and need for further treatment.

The vocational experts rely upon the medical expert opinions and restrictions in reaching their conclusions. Mr. Lalk provides a more definitive opinion based on the credible evidence than does Ms. Abram. The credible opinions of Drs. Poetz and Guarino form the foundation for the opinion of Mr. Lalk that Claimant is unemployable in the open labor market. I find the opinion Claimant is not able to secure and maintain employment to be more credible than the view to the contrary. Ms. Abram asserts Claimant is employable, but her opinion he is placeable is very weak and unsupported. She underemphasizes the importance of the factors she finds negatively impact his placement (poor pain control, need to recline, medications, and reduced ability to drive). The Lalk opinion Claimant is unable to secure and maintain employment in the open labor market is the most credible and consistent with the facts found in this case.

After a complete review of the evidence of record, I find Claimant has met his burden of establishing he is permanently and totally disabled due to his work injury. His injury was significant, his treatment extensive, and his disability profound. Claimant is credible, as are the experts he submitted in support of his claim. Claimant is permanently and totally disabled as a result of his work injury, and Employer/Insurer is responsible for providing permanent total disability benefits according to the Act, beginning October 13, 2006.

2. Future Medical Treatment.

Claimant also seeks future medical treatment. In *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 270 (Mo.App. S.D. 2004), on this issue, the court found:

Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. *Mickey v. City Wide Maintenance*, 996 S.W.2d 144, 149 (Mo.App. W.D.1999). A claimant is not required to produce "conclusive" testimony or evidence to support a claim for future medical benefits; it is sufficient if the evidence shows by "reasonable probability" that he is in need of additional medical treatment by reason of

the work-related accident. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. E.D.1997). The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003).

The determination of what sort of care as may be necessarily rendered to the employee is within the exclusive province of the Division of Workers' Compensation. *State ex rel. Rival Co. v. Gant*, 945 S.W.2d 475, 477 (Mo.App. W.D. 1997) citing *State ex rel. Standard Register Co. v. Mummert*, 880 S.W.2d 925, 926 (Mo.App.1994).

I find it to be reasonably probable Claimant will require certain medical treatment to cure and relieve the effects of his injury. Specifically, the necessary treatment is the pain relief treatment recommended by Dr. Guarino, and the psychological treatment advocated by Dr. Jarvis. Although Claimant's attorney asked many questions regarding the increased risk Claimant has of further injury to the disks adjacent to his fusion, I find the issue of additional surgical treatment to be speculative at best. There is not sufficient evidence to order future surgical treatment, but there is sufficient evidence for pain control treatment and psychological treatment. Employer shall maintain control of all medical treatment as provided by the Act.

CONCLUSION

Employer/Insurer shall provide permanent, total disability benefits, and future medical treatment, as provided in this Award. The disability benefits awarded are subject to a lien of 25% in favor of attorney James Hoffmann

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation