

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

Injury No.: 00-022997

Employee: Gary Sullivan  
Employer: Advanced Drywall Systems, Inc.  
Insurer: American Interstate Insurance  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: February 8, 2000  
Place and County of Accident: St. Louis County

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. We have heard the oral arguments of the parties, reviewed the evidence and considered the whole record. We find 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, except as modified herein. Pursuant to section 286.090 RSMo, we issue this final award and decision modifying the August 30, 2005, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Section 287.120.4 RSMo

We reverse the administrative law judge's denial of a fifteen percent (15%) enhancement under § 287.120.4 RSMo.

Section 287.120.4 RSMo, provides:

Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent.

"To be entitled to the fifteen percent increase under section 287.120.4, a claimant must demonstrate the existence of the statute or order, its violation, and a causal connection between the violation and the compensated injury." *Akers v. Warson Garden Apts.*, 961 S.W.2d 50, 53 (Mo. 1998). Employee has satisfied his burden.

Employee has identified the statute upon which he relies. Section 292.090 RSMo, provides, in relevant part:

All scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling therein, or the falling of such materials or articles as may be used, placed or deposited thereon.

Employee has established that the accident occurred when a wheel came off the scaffold. Employee alleges the scaffold was not "well and safely supported" and/or was not "so secured" as to "insure the safety of persons working thereon..."

In construing identical language in the predecessor to § 287.120.4 RSMo, the Missouri Supreme Court held, "that in the absence of exculpatory showing on the part of the employer, the fall of a scaffold is prima facie evidence of negligence on the part of the employer and a violation of the statute." *Prapuolenis V. Goebel Constr. Co.*, 213 S.W. 792 (Mo. 1919). Our research reveals no authority overturning this holding. Employee produced uncontradicted evidence that the scaffold tipped. The burden shifted to employer to present exculpatory evidence. Employer offered none. Employee has established a violation of § 287.120.4 RSMo.

Employee has established a medical causal connection between the scaffold tipping, which we just held is a violation of § 287.120.4, and his injuries.

Employee has established the three elements prerequisite to an award of compensation under § 287.120.4 as set forth in *Akers, supra*. Section 287.120.4 mandates that we increase the compensation awarded by fifteen percent. Accordingly, the compensation as awarded by the administrative law judge is hereby increased by fifteen percent (15%).

#### Future Medical

The administrative law judge made employee's entitlement to future medical care in the form of ongoing pain management contingent upon employee's future behavior. We do not so limit the award. Employee is awarded future medical care in the form of pain management as needed to cure and relieve him of the effects of the injury pursuant to the provisions of the Workers' Compensation Act.

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.

The award and decision of Administrative Law Judge Linda J. Wenman, issued August 30, 2005, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 7<sup>th</sup> day of September 2006.

#### LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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SEPARATE OPINION FILED

Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

#### SEPARATE OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge allowing compensation should be modified, although not in the same manner as the majority believes.

I find the testimony of Dr. Coyle to be the most persuasive, credible and trustworthy. Dr. Coyle believes that employee's low back condition is entirely due to his preexisting spondylolisthesis. Dr. Coyle cannot make a causal connection between the fall from the scaffold and employee's spondylolisthesis becoming symptomatic because employee's low back did not become symptomatic for many months after the scaffold incident. I find that the scaffold incident did not cause employee's low back condition or his resultant psychological problems.

As a consequence of this finding, I would limit the payment of past medical expenses to treatment of employee's left knee injury and I would limit future medical in the form of pain management to treatment of pain related to the knee injury.

I do not believe employee is permanently and totally disabled as a result of a combination of his primary injury with his preexisting conditions. I believe employee is 45% permanently and partially disabled at the level of the left knee. If employee is permanently and totally disabled it is as a result of his post-injury worsening of his spondylolisthesis and is, thus, not compensable. I would reverse the award of permanent total disability against employer and award 45%

permanent partial disability at the level of the knee.

For the foregoing reasons, I respectfully dissent, in part, from the award of the majority of the Commission.

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Alice A. Bartlett, Member

## AWARD

Employee: Gary Sullivan

Injury No.: 00-022997

Dependents: N/A

Before the  
Division of Workers'  
Compensation

Employer: Advanced Drywall Systems, Inc.

Department of Labor and Industrial  
Second Injury Fund Relations of Missouri  
Jefferson City, Missouri

Additional Party:

Insurer: American Interstate Insurance

Hearing Date: May 23, 2005

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: February 8, 2000
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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 approximately 5 feet from a scaffold while taping drywall.
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: Left leg at knee, lumbar spine
14. Nature and extent of any permanent disability: Permanent total disability from Employer
15. Compensation paid to-date for temporary disability: \$14,602.46 a period of 36 weeks.

16. Value necessary medical aid paid to date by employer/insurer? \$28,915.27

Employee: Gary Sullivan

Injury No.: 00-022997

17. Value necessary medical aid not furnished by employer/insurer? \$36,652.00

18. Employee's average weekly wages: \$663.33

19. Weekly compensation rate: \$442.22 / \$303.01

20. Method wages computation: Statutory calculation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$36,652.00
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Temporary total disability underpayment	\$1,432.44
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Permanent total disability benefits from Employer beginning, October 20, 2000  
for Claimant's lifetime

22. Second Injury Fund liability: No

TOTAL: TO BE DETERMINED

23. Future requirements awarded: Yes, as outlined in 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 in favor of the following attorney for necessary legal services rendered to the claimant: Scott Bernstein

# FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gary Sullivan

Injury No.: 00-022997

Dependents: N/A

Employer: Advanced Drywall Systems Inc.

Additional Party: Second Injury Fund

Insurer: American Interstate Insurance

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

Checked by: LJW:tr

## PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on May 23, 2005. Briefs were received and the case was formally submitted on June 23, 2005. Attorney Scott Bernstein represented Gary Sullivan (Claimant). Advanced Drywall Systems Inc., (Employer) was insured by American Interstate Insurance, and represented by Attorney Michael Margherio. Assistant Attorney General Rachel Paul represented the Second Injury Fund (SIF). Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

Prior to the start of the hearing the parties identified the following issues for disposition in this case: wage rate; medical causation; liability of Employer and SIF for permanent total disability (PTD) or permanent partial disability (PPD) benefits; liability for past medical expenses; temporary total disability (TTD) underpayment; future medical care; and application of a penalty under §287.140.4 RSMo.

Claimant offered Exhibits A-U. Employer offered Exhibits 1-3, SIF offered Exhibit I, and all exhibits were admitted without objection. 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 49 years old. He attended, but did not complete the 9<sup>th</sup> grade, and did not graduate from high school. Claimant never acquired a GED, and has not received any additional vocational training. Claimant's sole occupation during his working life was as a drywaller. Drywall duties include hard physical work, the ability to access scaffolds and use stilts when required. Claimant's longest period of employment occurred when working for his father, and he frequently did not get along with his father. He worked for other drywall employers successfully, without personality conflicts.

Claimant has memory problems. He has a history of alcohol and marijuana use, and served a jail term for marijuana possession, but has had no arrests for dishonesty or stealing. Claimant is currently seeing a counselor in an effort to stop his alcohol use. He is also a heavy smoker, smoking approximately two packs per day.

Claimant had worked for Employer as a drywaller approximately five months prior to his work injury, with periodic layoffs. Claimant testified he was earning \$21.50 per hour, and was scheduled to work 40 hours per week. The report of injury filed by Employer reported Claimant was paid \$22.93 per hour for a 40 hour work week, and a wage statement confirmed Employer's hourly rate, but demonstrated varying hours worked.

On February 8, 2000, Claimant was working at a firehouse construction site applying tape, when a wheel on the scaffold he was standing on came off, tipping the scaffold. Claimant fell approximately 5 feet to the floor, and felt immediate pain in his left leg. An ambulance took Claimant to a local emergency room. Claimant was diagnosed with a comminuted left tibial plateau fracture; he was placed in a leg immobilizer, told not to bear weight on his left leg, and referred to an orthopedist.

Dr. DiFilippo assumed Claimant's care, and Claimant was placed in a cast for approximately 2 months. CT and MRI scans were obtained that revealed extensive soft tissue injury of the lateral meniscus, partial tears of lateral collateral ligament and posterior cruciate ligament, with additional tears of the anterior cruciate ligament. By June 2000, sufficient bone healing was present, but Dr. DiFilippo sought the opinion of an orthopedic surgeon regarding further care of Claimant's internal knee injuries.

Claimant was referred to Dr. Fagan for additional care, and on June 30, 2000, Dr. Fagan performed an arthroscopy of Claimant's left knee, chondroplasty of the patella, chondroplasty of the lateral tibial plateau, and repair with shrinkage of the anterior cruciate ligament. Claimant underwent protracted periods of physical therapy, and work hardening. On May 30, 2000, Claimant reported to his therapist soreness after falling while using his crutches when his left knee gave way. On October 13, 2000, working hardening evaluated Claimant, and found he met the maximum requirements for his job, considered by the therapist to be a medium physical demand level job. The therapist noted Claimant reported his left knee continued to give out on him at least three times per day. On October 19, 2000, Dr. Fagan released Claimant to resume work. Claimant did not return back to work.

Claimant testified he developed low back pain approximately three months after his knee surgery, and believes he reported the low back pain to Dr. Fagan by July or August 2000. Pain was also present in both his hips. The first report of back symptoms appears in a November 17, 2000 physical therapy note indicating Claimant fell on October 29, 2000, and had not returned to work due to back problems. Claimant testified that after his knee surgery, but before his back surgery, he fell several times, and his back began to hurt. During November 2000, Dr. Fagan's medical partner, Dr. Lee, saw Claimant to evaluate his low back complaints.

Dr. Lee obtained diagnostics, including an MRI of the low back on December 15, 2000. The MRI demonstrated a Grade II spondylolisthesis at L5-S1 with bulging degenerative discs at L4-5 and L5-S1. Employer denied liability for Claimant's back condition. On December 26, 2000, Dr. Lee performed surgery on Claimant's low back consisting of an anterior lumbar fusion with placement of prosthetic cages at L4-5 and L5-S1, and allograft bone graft. Claimant underwent post-operative physical therapy.

Claimant was released from Dr. Fagan's care for his left knee on May 13, 2002. Dr. Fagan noted Claimant's continued complaints of knee instability and pain. On exam, Dr. Fagan noted thigh and hamstring atrophy, but commented there was improvement in musculature. Dr. Fagan did not find any gross instability. Dr. Fagan diagnosed chondromalacia of Claimant's left knee. Dr. Fagan recommended Claimant continue using a patellar sleeve brace, and take over-the-counter anti-inflammatory medications. Dr. Fagan did not believe any further surgical knee procedures would help Claimant. Dr. Fagan suspected some of Claimant's symptoms arose from his back condition. Dr. Fagan found Claimant to be at maximum medical improvement (MMI).

Despite his original surgery, Claimant continued to experience low back pain, and required increasing dosages of narcotics. On May 6, 2002, Claimant entered pain management therapy. He admitted to the use of increasing amount of alcohol, marijuana, and use of other individuals' pain medication, in addition to his own. He was also found to be depressed and suicidal. Psychiatric care was recommended. On August 26, 2002, Dr. Lee took Claimant off work until further notice. Ultimately, Claimant underwent two additional low back surgeries. On March 13, 2003, Dr. Lee performed an L-3 laminectomy due to spinal stenosis, removal of segmental hardware, and an exploration of the previous lumbar fusion. On March 27, 2003, Claimant underwent repair of a cerebral spinal fluid leak. Dr. Lee's last medical note occurred in December 2003, indicating Claimant needed to be followed by pain management.

Claimant has moved to Texarkana, Arkansas, and currently receives his pain management from Dr. Sharma, a physical medicine and rehabilitation specialist. Dr. Sharma diagnosed Claimant with failed back syndrome. Claimant is currently being treated with Methadone, Vicodin, Celexa, and a sleeping pill. He is on a waiting list for stress management sessions.

At hearing, Claimant admitted he remained depressed, and contemplates suicide approximately three times a month. Claimant last thought about suicide in the days leading up to his hearing. Prior to his work related injury, he never took psychiatric medication, but testified he has been suicidal in the past, and sought counseling, although he doesn't remember the counselor's name. He lives with his mother in Arkansas.

Claimant testified his physical condition is worsening. He is unable to bend, kneel, squat, or climb ladders. He has difficulty climbing stairs, and must go down stairs sideways. He can sit or stand for approximately 20-25 minutes, and sleeps 1-2 hours a night. Claimant used to hunt and fish, but he has been unable to do either since the injury. He spends his day trying to read, and is currently learning to play the guitar. He has been approved for Social Security Disability.

Upon cross-examination by Employer, Claimant acknowledged using the same scaffold in the days leading up injury, and having no mechanical problems with the scaffold. Claimant testified he did not attempt to move the scaffold while on it. Claimant acknowledged he can fully extend his left knee, but it produces pain. He does exercises he was taught in therapy, but not on a daily basis. Claimant testified he experienced occasional back soreness prior to the injury, but the soreness would go away. Claimant verified he has not sought employment since the injury, although he attempted to work for his brother without success.

Upon cross-examination by SIF, Claimant verified he experienced no physical problems prior to the scaffold injury, and worked without restrictions. Regarding preexisting depression, Claimant testified a doctor told him in 1989 he was depressed. When confronted with his deposition testimony indicating an initial depression diagnosis in 2000, Claimant testified he doesn't remember his deposition. He did verify he had never been prescribed psychiatric drugs prior to the scaffold injury, and his memory problems started after the injury. Claimant acknowledged being diagnosed with Graves disease after the scaffold injury, and indicated he remains in treatment for the disease. Finally, Claimant acknowledged a recent charge of assault on a police officer after finding out his daughter had been raped, and he reacted by becoming enraged. The charge is pending.

Doris Sullivan: Ms. Sullivan is Claimant's mother. She testified by telephone, as she cares for Claimant's disabled brother and she is a diabetic. Ms. Sullivan expressed concern regarding Claimant's current mental status, and testified she took Claimant to a mental health care provider when he was a child, but Claimant was not placed on medication. Ms. Sullivan confirmed Claimant's volatile up bringing, and his troubled relationship with his father. Ms. Sullivan reported Claimant recently received two back injections, and didn't have back or knee problems prior to the scaffold injury.

Upon cross-examination by Employer, Ms. Sullivan reported she noticed depression in Claimant by age 13 or 14, and he has abused alcohol since his early twenties. Claimant moved in with her two years ago, and Ms. Sullivan verified Claimant is sleeping better due to his current medications.

Upon cross-examination by SIF, Ms. Sullivan has noticed Claimant's mental status has improved since he has been receiving treatment for Graves disease.

### Deposition Testimony

David Wilmes: David Wilmes serves as Vice-President of Employer, and his duties include providing job estimates and serving as a project manager. He hired Claimant for the firehouse job. Mr. Wilmes confirmed Claimant was using a mini-scaffold supplied by Employer. The scaffold was a self-contained, adjustable unit approximately four-feet long by four-feet high and about two-feet wide. If employees do not have their own scaffold, they obtain a scaffold from Employer and bring to the jobsite. Mr. Wilmes does not know what happened to the scaffold involved in Claimant's injury, he only knew Employer no longer has that scaffold in its possession.

Gregory Wilmes: Gregory Wilmes serves as Employer's President, and he was the taping foreman on the firehouse project. Mr. Wilmes inspected the scaffold used by Claimant approximately three days after the injury. Mr. Wilmes testified he found the scaffold to be in working order. Mr. Wilmes believed the scaffold was used after Claimant's injury, but doesn't believe Employer still has the scaffold today. Mr. Wilmes testified the scaffolds are not numbered or inventoried, frequently are stolen, and Employer loses many scaffolds. Mr. Wilmes surmises the

scaffold involved in Claimant's injury was either stolen or thrown away.

## Medical Deposition Testimony

Dr. Cohen: Dr. Cohen examined Claimant on June 11, 2002, and January 15, 2004. Claimant's history of the injury is consistent with the records and testimony of Dr. Cohen. During the June 11, 2002, examination Dr. Cohen found Claimant to be depressed with a flat affect. Claimant's right knee was normal in all testing. Claimant's left knee abnormalities included a mildly positive anterior drawer test; was positive for crepitus with range of motion; and demonstrated a 4/5 weak left quadriceps muscle. Claimant was also noted to walk with a limp. Examination of the lumbar spine found Claimant to be tender over the paraspinal muscles, and Claimant's lumbar range of motion was reduced by approximately 25%.

Dr. Cohen diagnosed Claimant as status-post left knee surgery for tibial fracture, ACL tear, and chondral injury to the left tibial plateau; lumbar surgery after a fall on crutches, and instability at L4-5; resulting failed back syndrome; and depression. Dr. Cohen identified Claimant's preexisting conditions as clinically asymptomatic spondylolisthesis. Dr. Cohen opined Claimant's work to be the substantial factor in relation to the diagnosed injuries, and Claimant's subsequent need for medical care. Dr. Cohen found the medical care provided to be reasonable and necessary to Claimant's care.

Dr. Cohen rated Claimant's left knee injury at 45% PPD at the knee level; Claimant's depression at 25% BAW; and his lumbar spine at 60% BAW. Dr. Cohen believed Claimant to be PTD due to these disabilities. Finally, Dr. Cohen opined Claimant would be in need of ongoing treatment for chronic pain associated with his disabilities.

On January 15, 2004, Dr. Cohen re-examined Claimant. Dr. Cohen noted Claimant had undergone two additional lumbar surgeries. Dr. Cohen noted improvement in Claimant's depression since being placed on Celexa, but otherwise found Claimant's condition unchanged. In the supplemental rating, Dr. Cohen adjusted Claimant's lumbar disability to reflect 70% BAW. Dr. Cohen opined Claimant remained PTD, and was unable to compete in the open labor market. On re-direct Dr. Cohen clarified his belief Claimant's back problems are directly linked to abnormal body mechanics.

Upon cross-examination by Employer, Dr. Cohen agreed with Dr. Coyle's lumbar diagnosis of isthmic spondylolisthesis. Dr. Cohen does not believe Claimant injured his back in the scaffold fall, but does believe Claimant's back condition developed during treatment of his left knee, although it did not arise after his first fall on crutches. Dr. Cohen also agreed smoking can interfere with healing. Dr. Cohen acknowledged a future need of a knee replacement would be considered a potential need, and Claimant is not a current candidate for knee replacement. Dr. Cohen testified that despite Claimant's depression improving after being placed on medication, depression with chronic pain is difficult to control, and Claimant's depression would be a hindrance to holding a job. Dr. Cohen conceded if Claimant was fully accommodated it was possible he could do certain types of sedentary work.

Upon cross-examination by SIF, Dr. Cohen acknowledged there are no medical records demonstrating spondylolisthesis prior to Claimant's scaffold injury. Claimant also had no prior low back problems, no prior left knee injuries, and no prior treatment for depression.

Dr. Coyle: Dr. Coyle is board certified orthopedic surgeon, who specializes in spine surgery. Dr. Coyle examined Claimant on September 23, 2002. Claimant was seen after his first back surgery, but before his two subsequent surgeries. Claimant's history of his injury is consistent with the records and testimony of Dr. Coyle, adding he had relief from low back pain until five or six months after his surgery. Upon examination, Dr. Coyle found no abnormalities in Claimant's posture or gait. Claimant was able to forward flex approximately eighty degrees at his waist, had bilateral gluteal and SI joint tenderness, and negative straight leg raising. Claimant demonstrated 2+ reflexes at the knee. Dr. Coyle reviewed Claimant's lumbar MRI, diagnosed isthmic spondylolisthesis at L5-S1, and found no evidence of acute fracture or traumatic injury.

Dr. Coyle found the surgery performed by Dr. Lee to be reasonable and appropriate to treat Claimant's low back condition. Dr. Coyle opined Claimant's spondylolisthesis preexisted Claimant's scaffold fall, and was not

aggravated by the scaffold fall. Dr. Coyle found Claimant's post-operative return of back symptoms after five to six months to be consistent with someone who is a heavy smoker, as approximately 40% of single level fusions fail with patients who smoke.

Upon cross-examination by SIF, Dr. Coyle confirmed he did not believe Claimant's leg casting, and later knee surgery impacted upon Claimant's development of back symptoms. Dr. Coyle testified that to relate Claimant's back symptoms to his scaffold fall, the symptoms would have been expected to appear within a shorter period of time. When asked if another incident after his scaffold fall could have aggravated Claimant's back, Dr. Coyle considered the question hypothetical, but conceivable. Dr. Coyle remarked many individuals with symptomatic spondylolisthesis do not have an injury or incident that precipitates the condition, and the condition can become symptomatic at any time.

Upon cross-examination by Claimant, Dr. Coyle testified he does not believe Claimant's sedentary state, or use of pain medication may have masked an undetected back injury that occurred with the scaffold fall. Dr. Coyle clarified Claimant's back fusion was not done due to spondylolisthesis instability, but due to the extensive arthritic level at L5-S1. Dr. Coyle acknowledged if Claimant had acute back pain following the scaffold fall, he would concede the preexisting problem was aggravated by the fall. Dr. Coyle also found it speculative that Claimant's symptomatic spondylolisthesis would be caused by an altered gait. Finally, Dr. Coyle testified Claimant's spondylolisthesis became symptomatic after his scaffold fall, but not in proximity to the fall.

Dr. Stillings: Dr. Stillings, a psychiatrist, examined Claimant on August 1, 2002. Claimant's history of the injury is consistent with the records and testimony of Dr. Stillings. Dr. Stillings interviewed Claimant, administered an MMPI, 15 Item Test, and the revised Oswestry Disability Index. Claimant's MMPI demonstrated grossly over-reported subjective and physical complaints. The MMPI showed nine out of ten elevated scales, indicating Claimant was claiming almost every psychiatric disorder, a sure sign of over-reporting. Dr. Stillings testified the 15 Item Test is good at identifying people who exaggerate, but it can be falsely negative. The revised Oswestry Disability Index assists in determining whether a person is being candid in reporting their level of dysfunction.

Based on the interview and testing, Dr. Stillings formed the following diagnoses: chronic depression, early onset type; longstanding parent/child relationship problems; and alcohol and substance abuse. Claimant scored a 65 GAF (global assessment functioning), demonstrating adequate functioning on an emotional level. Dr. Stillings opined Claimant had no psychiatric illness related to the scaffold fall; Claimant has chronic depression that preexisted the fall, but that was aggravated by the fall; and Claimant was an over-reporter of physical and emotional symptoms making him a poor candidate for pain management. Dr. Stillings rated Claimant's depression aggravation at 2-3% BAW. During a reconvened deposition, Dr. Stillings rated Claimant's preexisting depression <sup>[1]</sup> to be 20% BAW, and opined the preexisting depression to be a hindrance and obstacle to employment.

Upon cross-examination by Claimant, Dr. Stillings acknowledged administering the MMPI once, and that the results reflected the testing of that particular day. Dr. Stillings was not aware Claimant had undergone two additional back surgeries. Dr. Stillings clarified Claimant's illicit drug use included marijuana and narcotics, but the report did not indicate what narcotic was detected. Dr. Stillings conceded the illicit drugs present did not include "street drugs".

Upon cross-examination by SIF, Dr. Stillings testified Claimant had a chaotic early family life, and showed six major depressing factors in his childhood. Dr. Stillings acknowledged Claimant did not report specific events as to how depression disrupted his ability to work prior to the scaffold injury. Dr. Stillings doesn't believe Claimant fabricated his childhood and family problems. Dr. Stillings finds the lack of prior records diagnosing the disorder to be typical for this psychiatric diagnosis, and although Claimant over-reported, he is not a malingerer.

#### Vocational Deposition Testimony

Mr. Timothy Lalk: Mr. Lalk is a vocational rehabilitation counselor who interviewed Claimant on June 27, 2003. Mr. Lalk interviewed Claimant to obtain vocational and medical histories, and reviewed Claimant's medical records. Based on the interview and review conducted, Mr. Lalk administered a Wide-Range Achievement Test

that demonstrated a high school reading level, and 3rd grade math level. Mr. Lalk also administered the Adult Basic Learning Examination for reading comprehension, and found Claimant had an approximate 7<sup>th</sup> grade reading comprehension. Based on the testing results, Mr. Lalk determined testing by a neuro-psychologist would be needed to determine if Claimant had a learning disability or if his depression or medications would impact further learning. Mr. Lalk found Claimant's reading skills deficient to a point that even remedial work did not look promising, and math scores that were dramatically deficient.

Based on Claimant's interview, medical record review, the testing administered, his physical and emotional limitations Mr. Lalk concluded Claimant was unable to return to work as a drywaller. Mr. Lalk found Claimant's current physical limitations would restrict him to sedentary or near sedentary employment. Claimant retained some physical capabilities of work in limited positions with accommodations, but due to his medical and emotional factors he would have difficulty functioning in a work environment. Mr. Lalk opined that at the current time he could not recommend any vocational rehabilitation services until Claimant has completed treatment with Dr. Lee and is re-evaluated.

Upon cross-examination by Employer, Mr. Lalk predicted Claimant would have a difficult time being hired, and once hired, Claimant would have a difficult time learning and performing the job. Mr. Lalk acknowledged he didn't find Claimant unable to compete in the open labor market yet, but he would only recommend vocational rehabilitation if he saw improvement in Claimant's physical, mental and emotional states after he has finished treating with Dr. Lee.

Upon cross-examination by SIF, Mr. Lalk acknowledged he had not reviewed any medical records that predated the scaffold injury, and Claimant had not reported treatment for depression prior to the injury. Further, although Claimant indicated current alcohol use, he had no prior history of alcohol abuse.

#### 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 related to wage rate

Section 287.250.1(4) RSMo., directs the calculation of wage rate if the wages were fixed by the day, hour, or output of an employee. The statute section instructs the average weekly wage be calculated based on the thirteen weeks immediately preceding the injury. If thirteen weeks of employment are not available, the actual number of available weeks is to be averaged to determine the average weekly wage. The absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered an absence for a calendar week. Once the average weekly wage is determined, Claimant is entitled to receive 2/3 of the amount subject to a maximum.

Employer provided wage information for eight weeks. Claimant was considered a full time employee, paid at \$22.93 per hour. Of the eight weeks reported, during the week ending 2/1/00, Claimant worked a total of eight hours. Applying the applicable statutory provisions, Claimant's average weekly wage is calculated by dividing his gross wages of the remaining seven weeks, and calculating 2/3 of that amount to determine Claimant's appropriate weekly wage rate. The calculation utilized is as follows: \$4,643.33 (total wages) ÷ 7 (weeks) = \$663.33 (average weekly wage) x 2/3 = \$442.22. I find Claimant's applicable wage rates to be \$442.22 for temporary total disability, and \$303.01, the State maximum, for permanent partial disability.

##### Issues relating to medical causation

Medical causation issues normally require the assistance of expert medical testimony. 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 on other grounds). 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 on other grounds). 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.

None of the medical experts dispute Claimant suffered a significant injury to his left knee. The medical causation question presented in this case involves an additional body part that has been alleged to be associated with this injury, namely Claimant's low back. The medical experts provided opinions in this case, and their testimony has been summarized. Dr. Cohen opined Claimant's low back complaints and subsequent treatment are the result of abnormal body movements during treatment for his left knee (Exhibit J, pg.32). Dr. Coyle analyzed Claimant's low back condition by locating the source of Claimant's pain (spondylolisthesis), and questioning what may have prompted the spondylolisthesis to become symptomatic. Dr. Coyle determined that a casual connection could not be made between Claimant's spondylolisthesis and the scaffold fall, because Claimant's symptoms arose many months after the scaffold fall (Exhibit 1, pgs. 27-28). Dr. Cohen agreed with Dr. Coyle's diagnosis, and his assessment of the lack of relationship between the scaffold fall and Claimant's low back condition (Exhibit J, pgs.10-11). I agree with medical experts, and do not find Claimant's low back condition to be directly caused by his scaffold fall.

However, I believe the inquiry into Claimant's low back condition and the effects of the injury ended prematurely. Dr. Coyle acknowledged Claimant was asymptomatic with regard to his back well after the scaffold fall (Exhibit 1, pg.28). Dr. Coyle opined Claimant's low back syndrome became symptomatic after his scaffold fall, but not in proximity to his fall (Exhibit 1, pg.48). Dr. Coyle goes on to testify the symptomatic condition could be caused by a specific incident, but it would be expected to occur in proximity to the incident (Exhibit 1, pg.48).

Claimant testified his low back complaints began three months after his knee surgery, and he informed Dr. Fagan of his low back complaints in either July or August 2000. As demonstrated during his testimony, Claimant is an extremely poor historian, and has a poor memory. A review of the medical evidence demonstrated Claimant's knee surgery occurred on June 30, 2000 (Exhibit U), and three months following the surgery would place the start of Claimant's low back complaints at late September 2000. There is simply no time frame that would fit a July or August notification by Claimant to Dr. Fagan, and the medical records due not support such notification.

The first recorded complaints by Claimant of low back pain are noted by a physical therapist on November 17, 2000, and state: "PT has onset of LBP after falling on October 29, 2000 . . ." (Exhibit U). Throughout his treatment Claimant had frequent episodes of falling, either on or off crutches, due to his left knee instability. The proximity of the October 29, 2000 fall and the start of Claimant's low back pain, compared with Claimant's assertion that his low back pain began about three months following his knee surgery correspond with the medical records. Treatment began with Dr. Lee in mid-November 2000, and proceeded thereafter. As stated by Dr. Coyle, the symptomatic spondylolisthesis could be caused by a specific incident, but it would be expected to occur in proximity to the incident. I find Claimant's fall of October 29, 2000, to be the incident causing Claimant's asymptomatic spondylolisthesis to become symptomatic. As the fall flowed from his original injury to his left leg, Claimant has met his burden to establish medical causation relating his low back condition to the February 8, 2000 work related injury.

#### Liability of the Employer and Second Injury Fund for Permanent Total Disability

Claimant seeks permanent total disability benefits from either Employer or Second Injury Fund. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. See *Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled on other ground). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled on other grounds). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled on other grounds). The Second Injury Fund is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has

completed payment for disability of the last injury alone. §287.220.1 RSMo. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995).

Claimant alleges PTD against either Employer or SIF. In order for SIF to be liable for PTD benefits, there must be previous disability in existence prior to Claimant's last work related injury. For SIF liability to be triggered, there must be an actual and measurable disability present at the time the last injury is sustained. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999) (overruled on other grounds). Here, Claimant did not have a measurable disability at the time of the last injury. The only preexisting injury rated by Dr. Cohen and supported by the medical records is Claimant's asymptomatic spondylolisthesis. Dr. Stillings does find a preexisting psychiatric disability. While I agree with Dr. Stillings that Claimant had a chaotic, disruptive, difficult childhood, and that chronic depression will have an effect on ones life, Dr. Stillings conceded Claimant's awareness of the effect "would be highly doubtful", and Claimant did not report any specific instances in which it had effected his life (Exhibit 2, pgs. 30-31). Rather, it appears Claimant's psychiatric disorder up to the point of his last injury was also virtually asymptomatic. Claimant worked on a consistent basis, was not in counseling, and took no psychiatric medications. Claimant's testimony that a doctor told him in 1989 he was depressed did not result in Claimant seeking mental health treatment, and no records were offered to corroborate this testimony. Claimant's mother testified she once sought care for Claimant as a child, but again no treatment ensued, and no records were introduced to support the testimony. I do not find Claimant had a measurable psychiatric disability at the time of his last injury, and SIF is not liable for PTD benefits.

For Employer to be liable for PTD benefits the last injury alone must have taken Claimant out of the workforce. I find this to be the case. Although Mr. Lalk did not find Claimant unemployable in the open labor market when he interviewed Claimant, Mr. Lalk reserved judgment on that issue until treatment had ended with Dr. Lee, and only if he saw improvement in Claimant's physical, mental, and emotional factors (Exhibit I, pg.21). There is no direct evidence that treatment has ended with Dr. Lee, but there is ample evidence that Claimant's physical, mental, and emotional factors have not improved.

Prior to the last injury, Claimant was employed in physical labor. By April 12, 2002, Dr. Lee was writing Claimant would be unable to work at a labor intensive job, would have pain with sitting or standing for prolonged periods, and he would have pain operating or riding in a motor vehicle. Dr. Lee considered Claimant's long-term prognosis for symptomatic improvement such to improve his level of functioning to be poor (Exhibit S). Dr. Stillings found Claimant would be a poor candidate for pain management from a psychiatric standpoint (Exhibit G, pg.16). Claimant has struggled with appropriate behavior in pain management (Exhibits K&N). Although Dr. Cohen noted improvement in Claimant's depression at his second examination on January 15, 2004, by the time of this hearing Claimant was voicing suicidal thoughts at least three times per month.

The credible evidence all points to Claimant's downward spiral flowing from his fall from the scaffold fracturing his left leg, to the development of low back pain leading to three back surgeries, and along the way an ever deepening depression. I find Claimant can no longer compete in the open labor market. I further find Claimant's February 8, 2000 injury and its subsequent events have rendered Claimant unemployable. Employer last paid Claimant TTD benefits for a period ending October 19, 2000. Employer is liable for PTD benefits beginning October 20, 2000, and continuing thereafter for Claimant's lifetime.

#### **Issues relating to permanent partial disability owed by Employer or SIF**

As Employer has been found to be liable for PTD benefits, the issue of PPD benefits is moot. Likewise, as it has been determined that Claimant had no measurable disability at the time of his last injury, there can be no SIF liability for PPD benefits.

#### **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 \$28,915.27 in medical benefits to date. Claimant alleges liability of Employer for medical expenses in the amount of \$36,652.00, for care received after Dr. Fagan found Claimant to be at MMI. Copies of itemized medical bills totaling this amount were presented (Exhibit E), and supported by appropriate medical records. Dr. Cohen testified that the treatment provided was medically necessary to cure and relieve Claimant's injury, and the charges were fair and reasonable (Exhibit J, pg.7). The bills were not disputed. I find that Employer owes \$36,652.00 in medical benefits.

#### Issues relating to temporary total disability underpayment

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). Claimant alleges a TTD underpayment due to the disputed wage rate. Employer paid thirty-six weeks of TTD at a rate of 402.43 per week (Exhibit C). The corrected wage rate is \$442.22 per week, producing a weekly underpayment of \$39.79. I find Employer liable for an additional \$1,432.44 (\$39.79 x 36 weeks) to correct the TTD underpayment.

#### Issues relating to future medical care

Claimant seeks future medical benefits relating to this injury. Claimant is not required to present evidence concerning the specific future medical treatment that will be necessary in order to receive an award of future medical care. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo.App. 1997) (overruled on other grounds). Future medical benefits may be awarded if a claimant shows by reasonable probability that there will be a need for additional medical care due to the work-related injury. *Id.* When future medical benefits are awarded, the medical care must flow from the accident in order to hold an employer liable. *Id.*

Dr. Fagan recommended Claimant continue with a patellae sleeve brace he already wears, take over-the-counter anti-inflammatory medication as needed, and continue his home exercise program for his left knee. Dr. Fagan opined future surgery to Claimant's left knee would not make Claimant better (Exhibit S). Dr. Cohen recommends Claimant will require ongoing pain management, and has a potential need for a future knee replacement (Exhibit J). I find Dr. Cohen's future knee replacement to be nothing more than speculative. However, I do find Claimant has met his burden to demonstrate future medical needs regarding ongoing pain management including psychiatric or psychological care. Employer shall retain the right to direct all further care. Failure of Claimant to maintain sobriety and freedom from non-prescribed drug use will result in voiding Employer's liability for future medical care.

#### Issues relating to Section 287.120 penalty

Section 287.120.4 RSMo, provides that when an employer fails to comply with any state statute, the compensation awarded shall be increased by 15%. Claimant alleges Employer violated §292.090 RSMo., by failing to exercise due caution in use of its scaffold. The wheel of the scaffold in question, for whatever reason, came off. Claimant had used the same scaffold on previous days without incident, and other used it after him. Claimant produced no evidence to demonstrate Employer had a pattern or history of providing its employees faulty scaffolds. This was an unfortunate accident, but it was an accident, and that is why we have workers' compensation statutes. I do not award the penalty requested.

### **CONCLUSION**

In summary, Claimant sustained an injury on February 8, 2000 that arose out of and in the course of his employment with Employer. Employer is liable PTD benefits effective October 20, 2000. Further, Employer is liable for unpaid medical, a TTD underpayment, and future medical benefits as outlined in this award. SIF has no liability. Claimant's attorney is entitled to a 25% lien.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

LINDA J. WENMAN  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*

\_\_\_\_\_  
[\[1\]](#) During the original deposition, SIF raised a timely seven-day objection to Dr. Stillings preexisting rating. The deposition was reconvened to cure the objection.