

**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying Award and Decision of Administrative Law Judge  
by Separate Opinion)

Injury No.: 03-067308

Employee: Danny Venable  
Employer: St. Louis Bridge Construction  
Insurer: St. Paul Marine and Fire Insurance Co.  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and briefs, heard the parties' oral arguments and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying and supplementing the October 4, 2010, award and decision of the administrative law judge (ALJ). We adopt the findings, conclusions, decision and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision and modifications set forth below.

On September 19, 2005, ALJ Kevin Dinwiddie issued a Temporary or Partial Award, in which he found that the psychiatric disability opinions of Dr. Wolfgram were more credible than Dr. Liss' opinions. ALJ Dinwiddie discredited Dr. Liss' medical causation opinions because Dr. Liss had not reviewed Dr. Mirkin's treatment records or employee's subsequent physical therapy records. ALJ Dinwiddie further found that Dr. Liss' opinions were largely based on medical reports that were not in evidence.

ALJ Dinwiddie found that Dr. Wolfgram's psychiatric disability opinions were supported by the medical records and were more persuasive than those of Dr. Liss. Therefore, based on Dr. Wolfgram's opinions, ALJ Dinwiddie found that employee suffered from an adjustment disorder with depressed mood that is work-related, and that employee's clinical state was temporary and amenable to treatment. ALJ Dinwiddie further ordered employer and insurer to provide treatment consistent with the recommendations of Dr. Wolfgram.

On October 4, 2010, ALJ Grant Gorman issued a Final Award, in which he found that employee is permanently and totally disabled as a result of the primary work injury of July 21, 2003, alone. As his basis for making findings contrary to those of ALJ Dinwiddie, ALJ Gorman specifically found, in accordance with *Dilallo v. City of Maryland Heights*, 996 S.W.2d 675, 676 (Mo. App. 1999) and *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552 (Mo. App. 2006), that "additional significant evidence" had been adduced and received into evidence in the final hearing which was not part of the hardship hearing. ALJ Gorman listed said additional significant evidence as Dr. Slusarski's additional treatment records, Dr. Liss' second deposition testimony he provided after reviewing all of

---

<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2002 unless otherwise indicated.

Employee: Danny Venable

- 2 -

the medical records (which were admitted into the record), and the new and contradictory opinions of Dr. Wolfgram.

While we agree with ALJ Gorman's conclusions that the aforementioned represents additional significant evidence, we find that ALJ Gorman's award should be supplemented with additional facts concerning the depositions of Drs. Liss and Wolfgram and how their second depositions amounted to additional significant evidence.

In Dr. Wolfgram's 2005 deposition, he opined that employee suffered from a depressive reaction to his work injury and that he needed treatment. Dr. Wolfgram concluded that employee's psychiatric condition was temporary and amenable to treatment. However, nearly five years later, Dr. Wolfgram opined in his 2010 deposition that employee's condition was still merely temporary. Dr. Wolfgram went on to state in his 2010 deposition that employee has "multiple mental and physical problems that preexisted the work injury...[and] from a psychiatric standpoint, the work injury does not contribute to work restrictions or the need for psychiatric treatment." Despite this testimony, Dr. Wolfgram actually quoted ALJ Dinwiddie's first award with approval where it said that employee had treatable psychiatric disability **due to the work injury**. Dr. Wolfgram ultimately opined that employee is not currently capable of working due to his psychiatric condition.

Dr. Liss first saw employee in 2005 and diagnosed him with major depression as a result of the work injury and its sequelae. When Dr. Liss testified in 2005 he had not reviewed all of employee's treatment records.

Dr. Liss saw employee four years later. After reviewing all of employee's medical records, Dr. Liss testified in his second deposition that employee did not suffer from preexisting psychiatric illness, but that following his injury in 2003 he suffered from post-traumatic stress and from major depression. Dr. Liss opined that employee needs psychiatric care and is totally disabled from working due to his work-related psychiatric conditions.

We find Dr. Wolfgram's opinions to be contradictory and incredible. Dr. Wolfgram's testimony in his 2010 deposition is significantly different from his testimony in his 2005 deposition. On the other hand, Dr. Liss' testimony was consistent in both of his depositions. In addition, Dr. Liss' second deposition testimony was given after he had reviewed all of employee's medical records; thereby nullifying ALJ Dinwiddie's basis for finding that Dr. Liss' opinions lacked the proper foundation to be credible.

We find, as did ALJ Gorman, that Dr. Wolfgram and Dr. Liss' second depositions represent additional significant evidence sufficient to refute ALJ Dinwiddie's finding that Dr. Wolfgram's opinions are more credible than Dr. Liss'.

In addition to the aforementioned supplementation, we also find that ALJ Gorman's award needs to be modified with respect to the MO HealthNet lien he ordered employer to reimburse the Missouri Department of Social Services. We find that ALJ Gorman erred in finding employer liable for this lien.

Employee: Danny Venable

- 3 -

Section 287.140 RSMo provides, in pertinent part, as follows:

[E]mployer shall provide such medical, surgical, chiropractic, and hospital treatment, ... as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

No medical evidence was submitted at either the Temporary Hearing on May 20, 2005, or at the Final Hearing on May 11, 2010, indicating that the treatment employee obtained from November 19, 2004, through November 26, 2004, was medically causally related to the work injury of July 21, 2003. Accordingly, as there is no medical evidence to support a finding that the treatment was reasonably necessary to cure and relieve employee from the effects of the injury, employer should not be ordered to reimburse the Missouri Department of Social Services for the same. Therefore, we find that employer is not liable for the MO HealthNet lien.

**Award**

We affirm, as modified and supplemented herein, ALJ Gorman's award of permanent total disability benefits and future medical treatment.

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

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

The award and decision of Administrative Law Judge Grant C. Gorman, issued October 4, 2010, is attached and incorporated to the extent it is not inconsistent with this final award.

Given at Jefferson City, State of Missouri, this 26<sup>th</sup> day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## TEMPORARY OR PARTIAL AWARD

Employee:	Danny Venable	Injury No. 03-067308
Employer:	St. Louis Bridge Construction Company	Before the <b>DIVISION OF WORKERS'</b> <b>COMPENSATION</b>
Add. Party:	State Treasurer, as Custodian of the Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	St. Paul Fire and Marine Insurance Company	
Hearing Date:	5/20/05; finally submitted 6/23/05	Checked by: KD:df

### 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: 7/21/03
5. State location where accident occurred or occupational disease contracted: St. Charles County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee was bridge building and had an expansion joint roll onto him.
12. Did accident or occupational disease cause death? No Date of death? n/a
13. Parts of body injured by accident or occupational disease: Low back, psychiatric ill-being
14. Compensation paid to-date for temporary disability: \$20,976.12
15. Value necessary medical aid paid to date by employer/insurer? \$97,220.89
16. Value necessary medical aid not furnished by employer/insurer? See Award

Employee: Danny Venable

Injury No. 03-067308

17. Employee's average weekly wages: \$953.46
18. Weekly compensation rate: \$635.64/\$347.05
19. Method wages computation: By agreement of the parties

**COMPENSATION PAYABLE**

20. Amount of compensation payable:

The issue as to medical causation and need for treatment as to injury to the neck/cervical spine is found in favor of the employer and insurer.

The issue as to temporary total disability is found in favor of the employer and insurer.

The issue as to causation with respect to a psychiatric condition is found in favor of the employee. See Award as to obligation of employer and insurer to provide treatment.

TOTAL:

This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

**IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.**

The compensation awarded to the claimant shall be subject to a lien in the amount of of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Danny Venable	Injury No: 03-067308
Employer:	St. Louis Bridge Construction Company	Before the <b>DIVISION OF WORKERS' COMPENSATION</b> Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Add. Party:	State Treasurer, as Custodian of the Second Injury Fund	
Insurer:	St. Paul Fire and Marine Insurance Company	Checked by: KD:df

The claimant, Mr. Danny Venable, and the employer and its insurer, St. Louis Bridge Construction Company and St. Paul Fire and Marine Insurance Company, appeared at hearing by and through their counsel and entered into certain stipulations and agreements as to the issues and evidence to be submitted in this claim for compensation. This matter comes on in the nature of a hardship application. The parties agree that the claimant suffered a compensable injury by accident occurring on of about 7/21/03.

The issues to be resolved at hearing are medical causation; need for future medical care; and as to temporary total disability.

Mr. Venable appeared at hearing and testified on his own behalf. The claimant further elicited the testimony of his wife, Mrs. Debra Venable. Mr. Venable further submitted the deposition testimony of Dr. Raymond F. Cohen, and of Jay L. Liss, M.D. The employer and insurer submitted the deposition testimony of Dr. R. Peter Mirkin; Edwin D. Wolfram, M.D.; and of Mr. Steve Brunjes. Also in evidence is Claimant's Exhibit C, consisting of a compilation of medical records.

**FINDINGS OF FACT AND RULINGS OF LAW**

Mr. Danny Venable is a 45 year-old ironworker, and was injured at work for St. Louis Bridge Construction Company (hereinafter referred to as "employer") on 7/21/03. Mr. Venable, who was also serving as a shop steward at the time, had an expansion joint roll onto him. The expansion joint, estimated to have weighed between 1100 and 1700 pounds, was rolled off of the claimant, who suffered immediate back pain. Claimant first treated at UrgentCare in Wentzville, and the next day was treated at Unity Corporate Health. Claimant had an MRI on 7/23/03, showing a history of prior right laminectomy. The MRI included a finding of "right ventral lesion at L5-S1, likely moderate sized disc herniation". Claimant treated with Dr. Mirkin, who reviewed the MRI and determined that claimant should be given epidural steroid injection for findings of disc herniation.

After physical therapy and epidural steroid injection failed to cure and relieve of back complaints, on 9/30/03 Dr. Mirkin performed fusion of L4-L5-S1, utilizing interbody cages and bone grafting from the right iliac crest. While there are no treatment records in evidence that predate the involved work injury in July of 2003, and Dr. Mirkin failed to comment specifically as to what prior operative changes were pre-existing in the low back as of the date of his fusion surgery, the operative note as contained in Claimant's Exhibit C suggests that Dr. Mirkin performed a re-exploration and revision of a prior decompression laminectomy at L4-L5-S1. Mr. Venable testified that he suffered a prior back injury in 1983, and recalls that the surgery consisted of removal of ruptured disc material at L4-L5.

Claimant had physical therapy to rehabilitate his back post the fusion surgery, with follow up evaluation by Dr. Mirkin. Dr. Mirkin noted that x-rays showed maturing fusion with good alignment, and upon further x-ray noted on or about 1/19/04 that the fusion was solid, and that a functional capacity evaluation would be performed. Dr. Mirkin reviewed the results of the fce, indicating to him that the

Employee: Danny Venable

Injury No. 03-067308

claimant was capable of functioning in a medium capacity. In his note dated 3/1/04, Dr. Mirkin concluded that claimant was at maximum medical improvement, and released him to return to work with a 40 pound lifting restriction.

Mr. Venable has not worked since his release by Dr. Mirkin in March of 2004, noting that the employer informed him that they had no job available for an ironworker with a 40 pound lifting restriction. Mr. Venable further testified that he became severely depressed when he was advised that he would be unable to perform ironwork, noting that he "gave up on everything". Mr. Venable further related that he is getting by on a 50% ironworker's pension, and has been suffering from financial stress ever since his temporary total disability benefits were terminated.

Mr. Venable further testified that while receiving physical therapy for his lower back complaints prior to his back surgery, he was also experiencing numbness in the little finger of his right hand, with pain in his neck and running down his right arm. Mr. Venable relates that he made complaints to Dr. Mirkin as to his neck and arm, and recalls suffering from severe neck pain shortly after his back fusion. A medical report authored by Dr. Orlando Cruz on or about 10/03/03 includes a history of severe neck pain suffered by claimant the day after surgery. Claimant had both cervical x-rays and a cervical MRI performed on 10/2/03. With respect to those diagnostics, Dr. Cruz states as follows:

He had a cervical spine series of x-rays done yesterday which revealed no fracture or bone destruction and a small posterior spur at C5-C6 and C6-C7. MRI revealed broad, asymmetric disk bulging and spurring, more to the right, with a stenotic right C5-C6 neural foramen and central canal stenosis with diminished AP dimension of the canal to 8 mm. Also, a 3-mm central and right disk protrusion and spur at the C4-C5, with borderline central canal stenosis. There was a left parasagittal 3-mm disk protrusion and spur at the C3-C4 level with narrow left C3-C4 neural foramen.

The only reference to neck pain made by Dr. Mirkin within the medical records is contained in his letter to the insurer dated 10/10/03, where he states, "He had some neck pain in the hospital and that has resolved". The only discussion or comment bearing on neck complaints within the deposition of Dr. Mirkin is contained within his response on page 11 of his deposition, Employer and Insurer's Exhibit No.1, where he states, "He told me he had some neck pain when he was in the hospital, but that had improved from the time he left the hospital until the time he saw me."

Subsequent to his release by Dr. Mirkin, claimant sought an examination and evaluation from Dr. Raymond F. Cohen. Dr. Cohen met with Mr. Venable on 5/24/04 and again on 12/20/04 (See Claimant's Exhibit A). Claimant notes that he sought treatment for depression after being so advised by Dr. Cohen, noting that he went to his private physician, Dr. Fritz, who has been prescribing both depression medication and sleep aids.

Claimant's Exhibit C also contains a report from Dr. John Ferguson, based upon his evaluation of Mr. Venable on 11/19/04. The report of Dr. Ferguson contains the following history:

Following his posterior lumbar interbody fusion at the L4-L5 and L5-S1 levels, the patient reports that he underwent physical therapy, but still had ongoing residual low back and neck pain. The low back pain is the most severe problem and involves the hips bilaterally, left greater than the right. He denies any leg pain at this point in time, but does report significant neck pain that radiates into the right arm. He feels that this problem actually commenced time wise when he awoke

Employee: Danny Venable

Injury No. 03-067308

from surgery. He currently complains of ongoing right shoulder and arm pain. He has some residual discomfort in the feet and legs of a minimal nature. He notes residual numbness in the right arm, right leg and left leg.

Dr. Ferguson performed a neurological examination, reviewed certain x-rays and an MRI of the cervical spine, and concluded that claimant was 1) status post posterior lumbar interbody fusion at L4-L5 and L5-S1 with residual low back pain, and 2) Diffuse cervical spondylosis with associated neck and right upper extremity pain. Dr. Ferguson recommended conservative treatment for what he describes as significant degenerative changes at all cervical levels C-3 to C-7. He further recommends continued physical therapy and conservative management of residual low back pain.

Mr. Steve Brunjes, an occupational therapist with ProRehab Impact, testified on behalf of the employer and insurer by his deposition taken on 5/19/05 (Employer and Insurer's Exhibit No. 3). Mr. Brunjes provided treatment, consisting of exercise and functional job simulation activities, to rehabilitate the claimant following a low back injury at work. Mr. Brunjes participated in fifteen treatment sessions and one functional capacity evaluation. Mr. Brunjes believes that the claimant put forth a good effort, but believes that the claimant's pain complaints were inconsistent with the function he displayed. In other words, Mr. Brunjes believes that the high level of pain complaint would suggest that the pain was incapacitating, which would be inconsistent with the level at which Mr. Venable was actually able to perform.

Mr. Brunjes recalls that the claimant did not report any cervical or shoulder problems during the functional capacity evaluation performed on 2/25/04. Mr. Brunjes concluded that the ability of the claimant to lift 50 pounds would place Mr. Venable at the high end of the medium work demand level, and that he would be employable on a full time basis at the medium work demand level.

Dr. Edwin Wolfgram met with the claimant at the request of the employer and performed a disability evaluation on 3/29/05. Dr. Wolfgram noted the medical history, including the surgery for a disc herniation at L5-S1 and follow up physical therapy. Dr. Wolfgram noted the history of neck complaint in the various records, and as to the lack thereof in certain of the records, and concludes that the claimant suffers from chronic degenerative changes in the neck that are not the product of the fall.

As to his psychiatric evaluation, Dr. Wolfgram diagnoses the claimant as suffering from "adjustment disorder with depressed mood" and from "pain disorder associated with psychological factors". Dr. Wolfgram proposes that both conditions are not necessarily permanent; are to some extent the result of the inactivity associated with the claimant's sedentary life post injury; and that both conditions are treatable. Dr. Wolfgram is somewhat disparaging of certain individuals with an interest in the well being of Mr. Venable post injury, suggesting that the claimant should not have lapsed into a state of inactivity after formal physical therapy concluded. Dr. Wolfgram further suggested that interest in a secondary benefit at issue may have influenced the claimant's current status, and suggests that a completion of the litigation process would be helpful. Dr. Wolfgram recommends physical therapy such as aqua aerobics. When asked on cross-examination as to whether counseling would be of benefit, he concurs, but quickly emphasizes that it is important that the treatment be appropriate, as opposed to such treatment as psychoanalysis or referral to a pain center. When asked specifically as to what counseling he would recommend, Dr. Wolfgram responded rather vaguely, as follows: "It could be done by a variety of trained professionals. It would depend more on how the counselor sees this in terms of a holistic manner." (Employer and Insurer's Exhibit No. 2, at p. 56). In any event, Dr. Wolfgram does not believe the claimant is in need of either pain medications or antidepressants.

Further on cross-examination, Dr. Wolfgram agrees that loss of identity plays a part in the depressed mood suffered by Mr. Venable, noting "He's no longer a big bread winner, he's no longer solving problems, he's no longer honored and admired by those close to him" (Exhibit No. 2, at p. 62).

Claimant also was subject to a psychiatric evaluation by Dr. Jay. L. Liss on 3/5/05. Dr. Liss notes that at the time of his evaluation Mr. Venable was taking Paxil, an antidepressant prescribed for

Employee: Danny Venable

Injury No. 03-067308

clinical medical depression. Claimant was given a variety of tests, including the Beck Depressive Inventory, prior to his one on one interview with Dr. Liss. Dr. Liss concluded that claimant suffered from chronic pain, and further suffered from major depression. Whereas Dr. Wolfgram, without explanation of its significance, concluded that Mr. Venable had a global assessment of functioning score of 68, Dr. Liss rated the claimant at a 52, and interpreted the value as suggesting that Mr. Venable is "seriously afflicted by a major psychiatric illness requiring ongoing immediate treatment".(Claimant's Exhibit B, at p. 11). Dr. Liss further opined, at page 12 of his deposition that "Mr. Venable has a serious psychiatric illness which prevents him from functioning at any appropriate level. And he is in need of medical intervention and psychiatric care.... General psychiatric care consists of medication and supportive psychotherapy given by the psychiatrist or psychologist, or in his condition, a team approach, including treatment for chronic pain associated with his depression...". Dr. Liss further concludes that claimant is totally disabled, and that his condition could improve with psychiatric treatment.

Ms. Debra Venable, the wife of the claimant, also testified in the matter. Ms. Venable acknowledged that they married at the ages of 16 and 17, and have three children from the marriage, age 27, 25, and 16. Ms. Venable recalls that after his first injury, Mr. Venable went through a "wounded animal" phase before eventually recovering. After the most recent injury, Ms. Venable notes that claimant has had worsening changes in his personality over the last year, and notes that post the injury the following changes in their relationship has occurred; Mr. Venable no longer performs such tasks as yard mowing or vehicle maintenance, leaving such tasks to his wife; Ms. Venable is left to perform all of the parenting of their 16 year old daughter; Mr. Venable has become argumentative with his wife and others, taking all manner of comment as criticism; and after the accident, the two have not enjoyed the same physical relationship that they had prior to the accident.

Ms. Venable recalls that the claimant did not start to treat for depression until qualifying for Medicaid and seeing Dr. Fritz. Ms. Venable recalls that Mr. Venable was diagnosed as having diabetes in around February or March of 2004, and began treating with Dr. Fritz thereafter.

**MEDICAL CAUSATION /NEED FOR FURTHER MEDICAL CARE/TEMPORARY  
TOTAL DISABILITY**

As to the complaints of Mr. Venable referable to his neck and arm, there is nothing in the medical records to support the conclusion that the claimant was making any complaint as to his neck and arm prior to his low back surgery on 9/30/03. Mr. Venable testified that he complained to Dr. Mirkin of pain from his neck to his hand, with finger numbness, while receiving therapy prior to his surgery. This testimony could have been either contradicted or corroborated by Dr. Mirkin at his deposition in May of 2005, but neither party so inquired. Further, it is clear that claimant first began making complaints as to severe neck pain the day after his surgery. It is curious that Dr. Mirkin thought the complaints sufficiently serious as to warrant requesting a cervical MRI; that a cervical MRI was performed on 10/2/03, interpreted as showing, among others, spurring and disc protrusion at multiple levels; yet there is nothing in the medical records of Dr. Mirkin in evidence to substantiate that he reviewed the results of a cervical MRI, and the only notation as to the neck is in a letter dated 10/10/03, some eight days after the MRI, stating "He had some neck pain in the hospital and that has resolved". According to Dr. Ferguson, claimant stated that significant neck pain radiating in to the right arm began when he awoke from surgery.

The employer offers the opinion testimony of Dr. Wolfgram, whose review of the records leads him to conclude that claimant suffers from chronic degenerative changes in the neck that are not work related. Dr. Cohen, to the contrary, concludes that the work injury resulted in disability to the neck that he deems related to the work injury. He concludes that claimant suffers a permanent disability referable to a cervical myofascial pain disorder and a cervical disk protrusion (Claimant's Exhibit A, at page 11).

The most remarkable difference between the opinions of Drs. Wolfgram and Cohen as to medical causation with respect to a neck complaint, other than their ultimate conclusions, is the foundation for

Employee: Danny Venable

Injury No. 03-067308

their conclusions. Dr. Wolfgram relies in large part on the lack of neck complaint in the treatment records, and the report of Dr. Ferguson, to conclude that the claimant's neck complaints are not related to the work injury. Dr. Wolfgram acknowledges that his evaluation addresses both psychiatric and medical issues, but it is clear that he did not perform a physical examination of Mr. Venable, and was unable to use his findings on examination to support his conclusion as to diagnosis and causation.

Dr. Cohen acknowledges the various reports and medical records that he reviewed in coming to his conclusion as to causation, but does not provide a history of injury or complaint from Mr. Venable, nor does he share any of his findings on physical examination of Mr. Venable to support his conclusion as to causation.

The claimant has the burden of proving all the essential elements of the claim for compensation. It is noted that the proof as to medical causation need not be by absolute certainty, but rather by a reasonable probability. "Probable" means founded on reason and experience which inclines the mind to believe but leaves room for doubt. Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo.App. 1986).

"Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause". Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200, 202 (Mo.App. 1991); McGrath v. Satellite Sprinkler Systems, Inc., 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of expert testimony is to be determined from 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, 105 (Mo.App.1991).

A medical expert's opinion must have in support of it reasons and facts supported by competent evidence which will give the opinion sufficient probative force to be substantial evidence."(citations omitted) Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 904 (Mo.App. 1990).

The opinion of Dr. Cohen as to causation with respect to a neck condition is simply lacking the requisite foundation to be deemed probative on the issue as to whether the work was a substantial factor in the resulting medical condition complained of by Mr. Venable. There is nothing in the deposition testimony of Dr. Cohen to explain the cause and effect relationship between the injury suffered by Mr. Venable at work and the cervical disk injury diagnosed by Dr. Cohen. The only treatment record in evidence that provides any kind of history as to the neck suggests that the prior neck complaint of Mr. Venable had resolved. The employee had the opportunity to cross-examine Dr. Mirkin as to the history of his treatment and evaluation of Mr. Venable, but opted not to do so. The facts in the record simply do not support a conclusion by Dr. Cohen which itself is not supported by the necessary foundation to be deemed persuasive as a matter of a reasonable probability. The issue as to medical causation with respect to a complaint of ill being in the neck is found in favor of the employer/insurer. The finding on the issue as to causation with respect to the neck complaint renders moot the issue as to liability for treatment as to a neck condition.

Drs. Liss and Wolfgram do not agree specifically as to a diagnosis, but both do agree that the mental condition suffered by Mr. Venable is amenable to treatment. If the substantial weight of credible expert medical opinion supports the belief that further treatment is likely to cure the claimant of some of the effects of his injury, then the claimant has yet to reach maximum medical improvement.

The first issue is as to a medical causal relationship between the injury by accident on 7/21/03 and the complaints of psychiatric ill being diagnosed by Drs. Liss and Wolfgram. Dr. Wolfgram does not dispute that there is a causal relationship between the involved injury by accident and mental condition that he diagnosed. In his report dated April 28, 2005, made a part of his testimony by agreement of the parties as Employer's Exhibit 1 to Employer and Insurer's Exhibit No. 2, Dr. Wolfgram states as follows in the DIAGNOSES section of his report:

AXIS IV: Psychological Stressors.

Mr. Venable had a previous back injury. He had major medical

Employee: Danny Venable

Injury No. 03-067308

problems prior to the July history. His health was deteriorating on multiple fronts prior to the 2003 injury. The injury of 2003 was a contributing factor to his current clinical state.

Dr. Wolfgram further attributes the mental condition he diagnosed in part to claimant's sedentary lifestyle post injury, and concurs on cross-examination that loss of identity following this work injury plays a part in the depressed mood suffered by Mr. Venable..

Dr. Liss likewise believes there is a casual relationship between the involved work injury and the psychiatric condition that he diagnosed. Whereas Dr. Wolfgram believes that the claimant suffers from an adjustment disorder with depressed mood, believed by Dr. Wolfgram to be a psychiatric condition that fails to rise to the level of a temporary or permanent disability, Dr. Liss believes that claimant suffers from major depression, to the extent that he believes Mr. Venable suffers from "a serious psychiatric illness which prevents him from functioning at any appropriate level" (Claimant's Exhibit B, at p. 12). Dr. Liss further causally relates the depression to the work injury, noting that chronologically the claimant did not have any major psychiatric treatment or history of such illness prior to the injury (Claimant's Exhibit B, at pp. 28-29).

Dr. Liss reached a conclusion as to medical causal relationship between a condition of major depression and the work injury without the benefits of the various treatment and physical therapy records in evidence, and acknowledges that the only records he reviewed and relied upon in reaching his conclusions were as follows: an office visit of November 5<sup>th</sup>, 2004 to Dr. Fritz; an MRI of the lumbar spine dated 11/26/04; and certain reports from Dr. Cohen as to back and cervical injury. To the extent that the reports of Dr. Cohen were attached to his deposition but were not offered in lieu of his testimony by deposition, those reports are not in evidence. As a consequence, the opinion testimony of Dr. Liss is based largely on medical reports that are not in evidence.

Dr. Wolfgram based his psychiatric diagnosis in part on a review of the various medical treatment and physical therapy records in evidence, and to the extent that his conclusion is based on his own observation of the claimant and on the various medical records in evidence, his opinion as to extent of psychiatric disability is found to be supported by the medical records and to be more persuasive than that of Dr. Liss. The expert psychiatric opinion of Dr. Liss as to causation suffers the same flaw as does the expert medical opinion of Dr. Cohen as to causation; in both instances, their opinions lack the requisite foundation to be deemed probative.

Dr. Wolfgram persuades that as a result of the involved work injury on 7/21/03, the claimant has suffered a psychiatric condition that is not temporarily and totally disabling. Dr. Wolfgram further persuades that the claimant suffers from an adjustment disorder with depressed mood that is work related, and that the claimant's current clinical state is temporary and amenable to treatment. The employer and insurer are to provide further treatment consistent with the recommendations of Dr. Wolfgram.

This award is temporary or partial in nature, and the matter to be reset, if necessary, on notice from the parties as to issues ripe for adjudication.

Employee: Danny Venable

Injury No. 03-067308

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

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

KEVIN DINWIDDIE  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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

