

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

Injury No.: 03-059004

Employee: Woodrow Ward
Employer: Ameren Services
Insurer: Corporate Claims Management (Self-Insured)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)

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 July 8, 2009. The award and decision of Administrative Law Judge Suzette Carlisle, issued July 8, 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 17th day of November 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Woodrow Ward Injury No.: 03-059004
Dependents: N/A Before the
Employer: Ameren Services **Division of Workers'**
Additional Party: Second Injury Fund (Dismissed) **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Corporate Claims Management (Self-insured)
Hearing Date: April 16, 2009 Checked by: SC

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: June 16, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis City, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
While working on a rooftop, Claimant fell 15 feet to the ground and injured his right shoulder, wrist and upper back.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: thoracic back, right wrist and right shoulder
14. Nature and extent of any permanent disability: 17.5% PPD of the right wrist, 22.5% PPD of the right shoulder and 25% PPD of the thoracic spine
15. Compensation paid to-date for temporary disability: \$20,778.24
16. Value necessary medical aid paid to date by employer/insurer? \$84,822.23

Employee: Woodrow Ward

Injury No.:03-059004

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1,186.80
- 19. Weekly compensation rate: \$649.32/340.12
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$0
175.93 weeks of permanent partial disability from Employer	\$59,837.31

22. Second Injury Fund liability: Dismissed

TOTAL: \$59,837.31

23. Future requirements awarded: (As outlined in the award)

Said payments to begin 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: Bradley Cundiff

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Woodrow Ward	Injury No.: 03-059004
Dependents:	N/A	Before the
Employer:	Ameren Service Company	Division of Workers'
		Compensation
Additional Party:	Second Injury Fund (Dismissed)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Corporate Claims Management	Checked by: SC

STATEMENT OF THE CASE

A hearing was held for a final award at the Missouri Division of Workers' Compensation ("DWC") St. Louis office at the request of Woodrow Ward ("Claimant"), on April 16, 2009, pursuant to Section 287.450 RSMo (2000).¹ Attorney Bradley Cundiff represented Claimant. Attorney Loretta Simon represented Ameren Service Co. ("Employer"), which is self-insured through Corporate Claims Management, a third party administrator. Prior to the start of the hearing, the Second Injury Fund was dismissed. The record closed after presentation of evidence. Venue is correct and jurisdiction properly lies with DWC.

Claimant's Exhibits A-M, P-R, and T-Z and Employer's Exhibits 1-7 were admitted. Claimant's Exhibits N, O and S were withdrawn. Any notations contained in the records were present when admitted. Any objections contained in the depositions but not addressed in this award are overruled.

The parties stipulated that on or about June 16, 2003: Claimant was employed by Employer² and sustained an accident that arose out of in the course of employment in St. Louis City; Claimant and Employer operated under the Missouri Workers' Compensation Law; Employer was fully self-insured; Employer received proper notice; a Claim for Compensation was timely filed; Claimant's average weekly wage was \$1,186.80; the rate for Temporary Total Disability ("TTD") and Permanent Total Disability ("PTD") was \$649.32; the rate for Permanent Partial Disability ("PPD") was \$340.12; Employer paid \$20,778.24 in TTD benefits (from June 17, 2003 to November 2, 2003 and March 9, 2004 to June 1, 2004); Employer paid \$84,822.23 in medical benefits; and Claimant achieved maximum medical improvement ("MMI") on June 1, 2004.

The parties identified the following issues for disposition: 1. What is the nature and extent of Employer's liability for permanent partial disability? 2. What is the nature and extent of Employer's liability for permanent total disability? 3. Is Employer liable for past medical expenses totaling \$1,191.00? 4. Is Employer liable for future medical treatment?

¹ All references are to Missouri Revised Statute 2000 unless otherwise noted.

² All references to Employer in this award also include the Insurer.

SUMMARY OF EVIDENCE

Claimant was 43 years old at the time of the accident. He completed high school and his favorite subject was math. He attended college for a year and a half at Southeast State University where he majored in business administration. He has been married since 2003 and has one dependent child, Rachel, born in 1991. Claimant served 4 years in the U.S. Air Force repairing portable generators before his honorable discharge. After discharge, he worked for McCarthy, volunteered to help his former wife start a travel agency, worked for a pest control company, apprenticed with Local 2, and worked for Sachs Electric.

In 1994, Employer hired Claimant as a lineman to build and maintain power lines. Also, Claimant worked as a trouble man, first responder, occasional supervisor, and he completed paperwork.

On June 16, 2003, Claimant fell 15 feet from the roof of a single story garage, injuring the right side of his face, shoulder, right wrist and chest, but he did not lose consciousness. He was hospitalized at BJC Hospital for 3 days, and then transferred to St. John's Hospital for treatment for thoracic spine fractures until June 25th. Dr. James Coyle surgically repaired Claimant's right shoulder. Dr. Don Pruett repaired his right wrist in July 2003. He has not seen a doctor for his wrist since Dr. Pruett released him in November 2003.

On November 20, 2003, Claimant returned to work on light duty for half days, and work hardening for half days. Claimant testified driving at work, physical therapy and work hardening caused increased back and neck pain.

On January 26, 2004, the Functional Capacity Evaluation ("FCE") was performed and Claimant testified he missed two days work due to mid back pain caused by pushing carts and climbing ladders during testing. Claimant testified his symptoms increased after the FCE and he stopped working on February 24, 2004 because Employer could not meet his restrictions and he could not perform the work.

Dr. Coyle released Claimant April 13, 2004 with no overhead work or lifting over 10 pounds. On May 21, 2004, the FCE was repeated, but Claimant was unable to finish the test due to back pain and shortness of breath. Claimant experienced severe pain and could not move for several days. Dr. Coyle increased lifting to 30 pounds.

Dr. Haupt did not place permanent restrictions on Claimant's shoulder. Shoulder complaints include irritation from moisture but it feels "pretty good." Dr. Pruett did not place restrictions on Claimant's right wrist. Claimant has occasional wrist irritation. He has not tested the shoulder or wrist very much. Physical therapy and driving increased mid back pain. Back pain is worse since the FCE. Claimant received no relief from trapezius injections. No doctor has recommended back surgery.

Claimant testified his quality of life is "nothing" and his "life is gone" since the work accident. He no longer takes motorcycle vacations, cannot lift weights, walk, play softball, volleyball, golf, bowl, dance, play baseball, shop or go out to dinner, hang Christmas lights or shoot pool. He has gained 25 pounds.

Claimant testified to the following complaints: mid back pain is at least 3/10 all the time. The pain feels like a "foot in his back" and the intensity varies with activity. Standing and sitting increase mid back pain unless Claimant can recline or lie down. He does not sleep more than 6 hours due to pain.

During a road trip to Ohio, Claimant took breaks and shared the driving. After the trip, he laid down because of increased pain. He can use a riding mower, provided he can lie down afterward. Exercise consists of doing laundry and going to the store. He lies on the couch between loads. Claimant washes, dries, sorts and carries 5 to 8 loads of laundry from the basement each week. Claimant cooks for himself, washes dishes, and takes care of his daily needs. Claimant pays bills by hand. He uses two home computers to access internet, play video games, and send emails up to 2 hours per day.

After the accident, Claimant purchased numerous items on EBay, including several motorcycles, clothes, cameras, Christmas items, and a 1965 Mustang. He drove the motorcycles around the block. He made a \$1,000.00 profit on two motorcycles he sold and lost money on two motorcycles he sold through a local newspaper. Claimant owns 4 cars and a pickup truck. He regularly plays poker with family, but leaves early or lies down because of pain. He visits the casino 2 to 3 times a year.

Employer has no jobs within Claimant's restrictions. Claimant has not applied for work since he stopped working for Employer. He testified he cannot work because he needs recovery time after any activity. Being in a vertical position increases mid back pain.

Claimant seeks reimbursement for \$1,191.00 in medication co-pays, and requests future medication and follow up doctor visits. Currently, Dr. Lucas, Claimant's personal physician, prescribes OxyContin for back pain and Wellbutrin for depression. Claimant testified he cannot get out of bed without it. Claimant testified he has memory problems, feels like he is constantly "drunk, out of control, in la-la land," and has "brain freezes," loss of concentration, and impaired ability to drive or perform detailed work.

Claimant admitted he submitted a false application to Employer stating he owned a travel agency and earned \$1500.00 per month in 1986. But he does not remember submitting an application to Employer in 1987 stating he was a travel agent and earned \$10.00 per hour. Claimant and his first wife invested in a travel business that turned out to be fraudulent, and no products were sold.

Brenda Ward married Claimant on February 7, 2003. Mrs. Ward testified that prior to the accident; Claimant danced, went to family outings, the casino, to dinner, and fished and worked hard. Now, he often complains about pain. Mrs. Ward does yard work, cooks, power washes the deck, shovels, trims, and uses a push mower. Claimant performed these are tasks before the accident. If Claimant tries to work, he has to lie down due to pain. Claimant naps during the day and sleeps on the recliner or couch. His memory is poor and he no longer plays sports.

Video Evidence

A September 15, 2005 video shows Claimant walking and pumping gas in no apparent distress.

Claimant testified he originally drove his motorcycle to the repair shop. To do so, he hitched the trailer to the truck and drove the motorcycle up a ramp and into the trailer. He bent and secured the front wheel into a well, hooked ties to the front and back tires, wrapped a strap around the frame and hooked the strap to the floor.

A video dated September 25, 2005 shows Claimant walk to the motorcycle, sit down, and drive it into the trailer. When Claimant returned home, he bent to release the trailer gate, sat on the motorcycle, pushed it down the ramp backward, and drove into the garage in no apparent distress. Claimant testified he has taken motorcycles for repair 3 or 4 times since the accident. Claimant testified the trailer gate is easy to lift because it has a spring loaded door.

A video dated November 14, 2005 showed Claimant arrived at the Casino Queen at 9:00 a.m. and left at 1:30 p.m. Later, he went to the gas station, to the Dollar Store, loaded purchases into the trunk, drove to the license bureau, and returned home at 3:30 p.m. Claimant disagreed with the sequence of events, but agreed the events occurred on the same day.

Claimant testified that on June 28, 2006 he left home with his daughter at 8:30 a.m., bought gas, picked up her friend, drove them to a second residence, and picked up his mother. A video shows Claimant drove his mother to Aldi's, bent to load groceries into the car, drove to Walgreens, and went out to eat. While at Aldi's Claimant obtained his own cart and walked with no apparent distress. He bent over for an extended period to put groceries into the trunk and back seat.

Claimant testified he took his mother's groceries into the house and after the trip he needed to lie due to pain. Claimant testified he routinely took his mother to the doctor and to visit his father in a nursing home twice a week until 2005.

Medical Evidence and Expert Opinion

After the June 16, 2003 accident, Claimant was hospitalized at Barnes Jewish Hospital. Diagnostics revealed a mediastinal hematoma, transverse process fractures at T7, T8, and T9, possible right pleural effusion, soft tissue swelling at C1-C2 and rib fractures at T7 and T8. On June 19, 2003, Claimant was transferred to the rehabilitation unit at St. John's Mercy Medical Center for intense rehabilitation. **Dr. Don Pruett** examined Claimant's right wrist. **Dr. James Coyle** examined Claimant's back, and released him on June 25, 2003. Claimant still needed assistance with dressing, tub transfer and walking.

Right Wrist

On August 20, 2003, Dr. Pruett surgically repaired a right triangular fiber cartilage tear, and prescribed physical therapy. On November 11, 2003, he placed Claimant at MMI, rated 10% PPD of the wrist, and instructed Claimant to resume activities as tolerated.

Right Shoulder

On September 26, 2003, **Herbert Haupt, M.D.**, debrided a degenerative labral tear, and partial thickness tears of the biceps and rotator cuff, and performed a subacromial decompression. On January 16, 2004, Dr. Haupt placed Claimant at MMI and rated 5% PPD of the shoulder from the work accident, 3% pre-existing the work accident. At discharge, Claimant had minimal complaints.

Upper Back

On July 14, 2003, Dr. Coyle prescribed physical therapy, medication and referred Claimant to Dr. Tate, a physiciastrist, for continued upper back complaints.

Sandra Tate, M.D. treated Claimant from August 2003 to February 2004, and prescribed aquatic and physical therapy, and trigger point injections. In October and November 2003, Claimant reported increased pain with weight training, yard work, and after he returned to work.

On December 11, 2003, Dr. Tate ordered work hardening, which showed consistent effort but Claimant reported increased pain. MRI and CT scans of the thoracic spine were negative.

On January 26, 2004, FCE results showed Claimant capable of lifting 50 to 70 pounds with mid back complaints. Work required the ability to lift fifty pounds. However, after the FCE, Claimant missed two days work because of increased pain and bilateral upper extremity numbness. Claimant cancelled the pole climbing part of the test due to increased symptoms. On February 2, 2004, Dr. Tate restricted lifting to 30 pounds, below the weight Claimant lifted during the January 2004 FCE, based on his increased symptoms.

Dr. Coyle returned Claimant to work on February 4, 2004 and restricted lifting to 30 pounds. A cervical MRI showed degeneration at C4-5, C5-6, and C6-7. A CT myelogram revealed mild arthritis at C5-6 and C6-7, and a small central protrusion at C4-5, which Dr. Coyle opined was not related to Claimant's thoracic spine complaints. Dr. Coyle prescribed physical therapy, and injections which increased Claimant's neck pain.

At Dr. Coyle's request, **Dr. Graham** injected an intercostals nerve block at T7-8, on February 19, 2004, without relief. At Dr. Bernardi's request, Dr. Graham injected the right transverse process at T6 on May 14, 2004, without relief. Dr. Graham noted concern that Claimant was upset that no doctor recommended back surgery. A self-administered psychologic test given by Dr. Graham showed "elevations on every scale into the clinical range." Dr. Graham predicted Claimant's subjective complaints would not improve with surgery.

On April 1, 2004, Dr. Coyle returned Claimant to work on light and sedentary duty, with no work above shoulders, and no lifting over 10 pounds. On April 13, 2004, Dr. Coyle restricted all overhead work and lifting over 10 pounds.

During the second FCE on May 21, 2004, Claimant lifted 20 to 40 pounds, below the requirements to return to work. Claimant stopped the test after 2 hours due to an increase in mid back pain. FCE results revealed Claimant could work in the light demand level occasionally.

On September 8, 2004, Dr. Coyle found Claimant had achieved MMI and rated 20% PPD of the body for spine complaints. On December 8, 2004, Dr. Coyle recommended the following permanent restrictions based on the May 2004 FCE results: no lifting over thirty pounds floor to waist and waist to shoulder, twenty pounds floor to shoulder, thirty pounds shoulder to overhead, and thirty pounds for bilateral carrying.

Dr. Coyle did not approve of Claimant's use of OxyContin for a transverse process fracture two to three years after the accident. He found "no objective basis" for Claimant's continued use of the medicine. Dr. Coyle called it a "vicious spiraling cycle," "if you take the narcotics away, the symptoms will return", and "It is a bad situation to have a young, healthy, physically fit person on narcotics two or three years out from an injury, particularly OxyContin." He predicted: "That medication will ruin your life."

Robert Bernardi, M.D. treated Claimant from April 2004 to June 2004 for persistent pain and provided an IME second opinion at Employer's request. On April 29, 2004, a CT myelogram showed a chronic nonunion transverse process fracture on the right at T6, an asymmetric disc bulge mildly flattening the right ventral cord at T3, with possible nerve root compression.

On June 2, 2004, Dr. Bernardi placed Claimant at MMI, and released him to work with the following permanent restrictions based on the May 2004 FCE results: no lifting more than 10 pounds, avoid repetitive bending and twisting, and no sitting longer than an hour without changing positions. He found Claimant could work at a light demand level.

On September 4, 2007, Dr. Bernardi provided an Independent Medical Examination ("IME") at the request of Claimant's attorney. Dr. Bernardi recommended medicine for Claimant's persistent neck and shoulder pain. On November 1, 2007, Dr. Bernardi concluded Claimant's complaints were genuine based on consistent history and valid FCE results, despite the lack of objective findings. The diagnosis and restrictions from 2004 remained unchanged. Dr. Bernardi opined Claimant needed ongoing prescription medication. When asked, Dr. Bernardi opined Claimant could work 6 to 8 hours per day, with an hour to rest or lie down midday, and change positions every hour. No further treatment was recommended, except pain medication. Dr. Bernardi asked Dr. Brunk, Claimant's primary care physician, to refill Tylenol #4 and Vioxx.

Raymond Cohen, D.O. examined Claimant on June 28, 2004, August 31, 2004, and March 1, 2006 at his attorney's request and prescribed OxyContin for pain. Dr. Cohen rated 40% PPD of the right shoulder, 40% PPD of the right wrist, 45% PPD of the thoracic spine, and 15% PPD of the body as a whole for depression. If Claimant received no additional treatment, Dr. Cohen found he was PTD and not capable of gainful employment. However, Claimant received more treatment and Dr. Cohen changed his opinion on August 31, 2004 and January 2005, and found Claimant temporarily totally disabled.

On March 1, 2006, Dr. Cohen opined Claimant was PTD and "not capable of gainful employment". Dr. Cohen recommended pain management with Dr. Guarino and treatment for depression. On September 17, 2004, Dr. Guarino provided trigger point and thoracic facet injections, which did not provide relief. He continued to prescribe OxyContin.

Wayne Stillings, M.D., a board certified psychiatrist, evaluated Claimant at Employer's request on October 18, 2006. Dr. Stillings took Claimant's history, performed a records' review,

reviewed surveillance video, administered MMPI, SIMS and FIFTEEN ITEM tests, and examined Claimant.

MMPI-2 test results show a mood disorder. The SIMS test showed Claimant over reported depressive symptoms. Fifteen Item Test Results show Claimant falsely claimed memory problems.

Dr. Stillings diagnosed: Axis 1. Depressive disorder, pre-existing the work injury, Axis 2. Dependent, passive-aggressive, and depressive personality traits-pre-existing, Axis 3. Based on record review, no psychiatric treatment is needed, Axis 4. Financial, not working, interaction with the legal system, and Axis 5. Global Assessment of Function (“GAF”) of 75, “no significant psychiatric symptoms, functioning well from an emotional standpoint.”

Dr. Stillings opined Claimant had a pre-existing psychiatric condition. Also, the June 2003 work accident is not a substantial factor that caused or aggravated the pre-existing psychiatric condition. Claimant did not require psychiatric treatment related to the work accident. Further, Claimant is able to work from a psychiatric standpoint, without restrictions, limitations or accommodation and does not require psychiatric treatment related to the June 2003 work accident. Dr. Stillings rated 0% permanent partial psychiatric disability from the work accident.

On October 1, 2004, **Mr. Timothy Lalk**, a vocational counselor, testified at the request of Claimant’s attorney. Claimant reported he needed to lie down most of the day to recover from his symptoms and to prevent more symptoms.

Based on Dr. Bernadi’s restrictions Mr. Lalk concluded Claimant could work as a cashier, unarmed security guard, information clerk, parking lot attendant, clerk in a rental store or motel, and security monitor. Based on Dr. Tate’s restrictions, Claimant could work light assembly or production and the jobs listed above. Under Dr. Coyle’s original restrictions, Claimant could work as a professional driver. Based on Dr. Coyle’s new restrictions, Claimant could work in a larger number of jobs.

Based on Dr. Cohen’s June 28, 2004 report and Claimant’s symptoms, Mr. Lalk concluded Claimant could not secure and maintain employment in the open labor market and could not compete for any position because Claimant was unable to work at the level of restrictions set by Drs. Tate, Coyle and Bernardi.

Ms. Donna Kisslinger Abram, a vocational counselor, testified at Employer’s request on November 2, 2006. She determined Claimant has the “education, knowledge, work history, skills, and aptitudes to continue working in the open labor market. Transferable skills include the ability to exercise independent judgment to determine the tools needed for a job and how to use them to achieve the desired result.

Claimant demonstrated above average ability in the following perceptions: spatial, form, clerical, motor coordination, manual dexterity, and hand-eye coordination. Familiarity with computers enabled Claimant to access screen driven software. Claimant’s basic understanding of electricity can be applied in a less physical work environment.

Ms. Abram did not provide a definite opinion about Claimant's work status. She found four potential results depending on the restrictions used. Based on Dr. Cohen's opinion Claimant is PTD. She found no change in Claimant's employment status based on the opinions of Drs. Pruett, Haupt, and Stillings.

For the back, Drs. Coyle and Tate found Claimant could work in the sedentary, light, and medium demand levels, lifting up to 30 pounds. Dr. Bernardi placed him in the light range lifting 10 pounds, and limited bending, twisting, and required position changes. Depending on the restrictions used, Ms. Abram found between 4,787 and 8,346 job classifications. Using restrictions set by Drs. Coyle and Tate, some of the available job classifications include: trouble shooter, cable installer & repairman, safety inspector, construction checker and courier. Job classifications using Dr. Bernardi's restrictions include, among others, electrical installation supervisor, utility service supervisor, electric meter tester, cardiac monitor technician, and test desk trouble locator.³

Ms. Abram found Claimant employable in the open labor market based on the opinions of Drs. Stillings, Coyle, Pruett, Bernardi, Tate, and Haupt. She found a sufficient number of employers in the St. Louis market to provide a reasonable search for a variety of jobs. Also, she considered Claimant a younger worker.

Despite finding Claimant employable under all restrictions except Dr. Cohen's opinion, Ms. Abram expressed concern about Claimant's ability to work given his belief that he cannot work due to pain and narcotic medication. Ms. Abrams noted most of the doctors felt he could work despite the medication. Before Claimant could find a new job, Ms. Abram concluded he needed to be open to the idea of returning to work. Also, no doctors recommended use of a recliner for most of the day, but if needed, this could impact his ability to find work.

FINDINGS OF FACT and RULINGS OF LAW

After giving careful consideration to the entire record, based upon the above testimony, Claimant's demeanor, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant did not meet his burden to show he is PTD for the reasons stated below:

The parties agree Claimant cannot return to his former employment as a lineman with Employer. The question is whether he can compete in the open labor market for other positions. Claimant asserts he is PTD as a result of work accident. Employer contends Claimant is PPD, not PTD. In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim... *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968).

Section 287.020.7 defines "total disability" as the inability to return to any employment and not merely inability to return to the employment the employee was engaged in at the time of the accident. The test for PTD is the worker's ability to compete in the open labor market. *Karoutzos v. Treasurer of State*, 55 S.W. 3d 493, 499 (Mo.App. 2001) (*Citations omitted*). (*Overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.

³ Multiple jobs are contained within each job classification.

2003).⁴ The “crucial question is whether or not an employer can reasonably be expected to hire the claimant in his present physical condition and can reasonably expect him to perform the work successfully.” *Muller v. Treasurer of Missouri*, 87 S.W.3d 36 (Mo. App. 2002).

I find credible the opinions of Drs. Pruett, Haupt, Coyle, Tate, Bernardi and Stillings that Claimant can work. None of the treating physicians found Claimant to be PTD. Although they disagreed on the extent of Claimant’s restrictions, they all agreed he could work. Drs. Pruett, Haupt and Stillings found no change in Claimant’s ability to work. Drs. Coyle and Tate concluded he could work in the sedentary, light and medium demand jobs. Dr. Bernardi placed Claimant in the light range, lifting 10 pounds, with limited bending, twisting, and frequent position changes.

I find not credible Dr. Cohen’s opinion that Claimant is PTD as a result of the injuries sustained in the work accident. Dr. Cohen is the only physician who found Claimant to be PTD. Also, Dr. Cohen’s opinion that Claimant is severely depressed is not credible. Dr. Cohen is not a psychiatrist and he did not review the report of Dr. Stillings, a board certified psychiatrist, which stated Claimant was not depressed from the work accident and did not need psychiatric treatment. Dr. Cohen did not review video tapes which showed Claimant walking, bending, sitting, standing, driving a motorcycle and automobile, and lifting groceries without apparent distress.

I find Ms. Abram’s analysis more credible than Mr. Lalk’s regarding Claimant’s ability to compete in the open labor market. Ms. Abrams considered restrictions set by all the physicians. and found between 4,787 and 8,346 available job classifications depending on the restrictions used. Sedentary, light and medium demand jobs included, among others, cable installer & repairman, safety inspector, and construction checker. Light jobs included electrical installation supervisor, utility service supervisor, and electric meter tester, to name a few.

Similarly, Mr. Lalk found jobs Claimant could work based on restrictions set by all the treating physicians. But, unlike Ms. Abrams, Mr. Lalk relied on Dr. Cohen’s opinion and Claimant’s statement that he needs to lie down most of the day because of increased pain with activity. However, Mr. Lalk did not review Dr. Cohen’s August 31, 2004 report that changed Claimant’s status from PTD to TTD. Nor did Mr. Lalk review Dr. Cohen’s September 30, 2004 report that stated he would re-evaluate Claimant after he completed treatment. Furthermore, the record contains no credible evidence that Claimant was severely depressed and needed psychiatric treatment. In fact, Dr. Stillings, a board certified psychiatrist, provided credible testimony that Claimant did not need psychiatric treatment, overstated his depressive state, and falsely reported memory problems.

Ms. Abrams found Claimant has transferable skills based on his education, knowledge of electricity, ability to exercise independent judgment, determine the tools needed for a job and how to use them. Also, Claimant demonstrated above average ability when tested for spatial, and clerical perceptions, motor coordination, manual dexterity, hand-eye coordination, and average for clerical perception, general learning ability, verbal and numerical aptitude. Mr. Lalk did not test Claimant because Claimant had completed at least one semester of college.

⁴ Several cases herein were overruled by *Hampton* on grounds other than those for which the cases are cited. No further reference will be made to *Hampton*.

Ms. Abram found a sufficient number of employers in the St. Louis market for Claimant to conduct a reasonable search and did not believe Claimant's age was a barrier to employment. However, Claimant testified he has not applied for work since he stopped working for Employer in 2004. Ms. Abram did not believe medication should prevent Claimant from working since doctors knew he was taking it when they set the restrictions.

I find Claimant's testimony is not credible that he has to lie down for most of the work day. This complaint first appeared in Mr. Lalk's 2004 report and again in Ms. Abrams 2006 report. However, Dr. Cohen's reports do not reflect Claimant's need to lie down or recline most of the day. Medical evidence does not reflect this complaint was made to treating physicians in 2003 and 2004. No doctor restricted Claimant to a prone position all day. When asked, Dr. Bernardi suggested he could rest during lunchtime, if needed. However, this would not prevent Claimant from working.

At the hearing, Claimant periodically shifted in his seat and stood up. However, Claimant did not dispute video evidence taken November 14, 2005, of him at the casino for four hours and another 2 ½ hours spent buying gas, shopping, and going to the license bureau. Nor did he deny a September 24, 2005 video showing him riding his motorcycle up a ramp and into and out of a trailer, lifting the trailer ramp and gate, driving, repetitively bending, twisting, and walking. A video taken on September 15, 2005 showed Claimant walking and pumping gas, and talking in no apparent distress. While performing these activities, Claimant showed no signs of discomfort or indication he needed to lie down.

Based on credible expert testimony by Drs. Tate, Pruett, Haupt, Coyle, Bernardi and Stillings, Mr. Lalk and Ms. Abram, medical records and reports, work-related injuries, Claimant's age, and transferable skills, I find an employer can reasonably be expected to hire Claimant in his current physical condition, and can reasonably expect him to perform the work successfully. I find Claimant is not PTD.

Permanent Partial Disability

The parties agree Claimant cannot return to his position as a lineman due to the work accident. The question is the nature and extent of his disability. A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. ***Phelps v. Jeff Wolk Construction Co.***, 803 S.W.2d 641,646 (Mo.App. 1991). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the fact finder. ***Banner Iron Works v. Mordis***, 663 S.W.2d 770, 773 (Mo.App. 1983).

Dr. Pruett surgically repaired the right wrist cartilage tear. Dr. Pruett noted increased range of motion and strength, rated 10% PPD of the wrist, and released Claimant to resume activities as tolerated. Dr. Cohen rated 40% of the right wrist. Claimant testified he has some irritation with weather changes. I find Claimant sustained 17.5% PPD of the right wrist from the work accident.

Dr. Haupt surgically repaired a degenerative labral tear, partial thickness tears of the biceps and rotator cuff, and performed a subacromial decompression. Dr. Haupt found good range of

motion, excellent strength and rated 5% PPD of the right shoulder from the work accident, with no restrictions. Dr. Cohen rated 40% PPD of the right shoulder. Claimant testified he has some irritation with weather changes. I find Claimant sustained 22.5% PPD of the right shoulder from the work accident.⁵

Claimant sustained the following injuries to his upper back: mediastinal hematoma, a chronic nonunion transverse process fracture on the right at T6, transverse process fractures at T7, T8, and T9, possible right pleural effusion, soft tissue swelling at C1-C2, rib fractures at T7 and T8, and asymmetric disc bulge mildly flattening the right ventral cord at T3, with possible nerve root compression. Claimant received numerous forms of conservative treatment including physical and aquatic therapy, work hardening, various types of injections, and medication. A May 2004 FCE showed Claimant could not return to his job as a lineman. Dr. Tate restricted lifting to 30 pounds, below the January FCE findings because Claimant experienced increased pain after testing.

Dr. Bernardi restricted lifting to 10 pounds, with limited bending, twisting, and frequent position changes. Dr. Coyle rated 20% PPD of the body for spine complaints and imposed lifting restrictions. Dr. Coyle rated Claimant the way he would rate a fusion based on his complaints. Dr. Cohen rated 45% PPD of the thoracic spine. No doctor recommended surgery based on a lack of objective findings. Claimant testified upper back pain feels like a constant "foot in his back" with penetrating pain that increases unless he is reclining or lying down. Based upon the credible expert testimony of Drs. Tate, Bernardi and Coyle, medical records and reports, and Claimant's demeanor, I find Claimant sustained 25% PPD of the body as a whole for the thoracic spine.

Past Medical Expenses

Claimant asserts he is entitled to \$1,191.00 in reimbursement for out of pockets expenses paid for OxyContin and Wellbutrin, medications prescribed by Dr. Lucas. In a post-hearing brief, Employer contends Claimant is not entitled to reimbursement because the medications were not prescribed by an authorized treating physician.

Once an employee testifies that his visits to the medical provider were the product of his injury and identifies the bills, which relate to the professional services rendered as shown by the medical records in evidence, a factual basis exists for the award of the bills. **Martin v. Mid-America Farm Lines, Inc.**, 769 S.W. 105 (Mo. banc 1989).

Claimant submitted a list of prescription expenses for his back and depression and testified about his symptoms without medication. But, no authorized treating physician prescribed OxyContin after Claimant reached MMI in June 2004. In fact, Dr. Coyle warned against continued use of narcotic medication for a transverse process fracture without an objective basis for the medication. Dr. Stillings found Claimant was not depressed as a result of the work accident and did not need psychotropic medication. Dr. Bernardi recommended Tylenol #4 and Vioxx for

⁵ Shoulder disability was calculated by "backing out" wrist disability as follows: 175 weeks X 17.5% PPD = 30.625 weeks of wrist disability. 232 weeks - 30.625 = 201.375 weeks remaining to determine shoulder disability. 201.375 X = 22.5 weeks = 45.309 weeks of shoulder disability. 30.625 + 45.309 = 75.93 weeks of disability for the right upper extremity.

pain management, not OxyContin. I find Claimant did not meet his burden to show he is entitled to reimbursement for out of pocket expenses for OxyContin and Wellbutrin.

Future Medical Care

Claimant asserts he is entitled to future medication and doctors' visits related to the work accident. In a post-hearing brief, Employer contends Claimant is not entitled to future medical care.

Section 287.140.1 provides the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment ...as may reasonably be required after injury or disability to cure and relieve from the effects of the injury. Future medical care may be awarded in a permanent partial disability case. The employee must prove beyond speculation and by competent and substantial evidence that his work-related injury is in need of treatment. ***Williams v. A.B. Chance Co.***, 676 S.W.2d 1 (Mo. App. 1984). The amount of the award for future medical expenses may be indefinite. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. ***Talley v. Runny Meade Estates, Ltd.***, 831 S.W.2d 692, 695 (Mo. App. 1992) (*Citations omitted*). It is sufficient to show the need for additional medical treatment by reason of the compensable accident is a "reasonable probability." ***Rana v. Landstar TLC***, 46 S.W. 3d 614,622 (Mo.App. 2001). "Probable" means founded on reason and experience which inclines the mind to believe but leaves room for doubt." ***Id.*** (*Citations omitted*).

The parties stipulate Claimant achieved MMI on June 1, 2004. However, all doctors agree Claimant's symptoms did not improve with conservative treatment. When Dr. Bernardi released Claimant, he wrote:

I think he has had a very complete evaluation and I don't believe this pain is amenable to any type of surgical intervention. Physical therapy has made his symptoms worse and injection therapy has not provided him with any type of long-term relief. I think at this point he is at maximum medical improvement. He will need refills of his pain medications on a regular basis. He probably should contact his family physician, Dr. Brunk about this. Today, I wrote him a prescription for Tylenol #4 with three refills and Vioxx with three refills.

Instead, Dr. Cohen prescribed OxyContin, but Dr. Coyle warned:

...I'm not in favor of him being on OxyContin. That's just a terrible situation for someone with transverse process fractures and really no objective basis for him to be on that medication several years out from an injury. That medication will ruin your life.

Also, Dr. Stillings, the only board certified psychiatrist to render an opinion in this case, found Claimant had no depression related to the work accident and needed no psychiatric treatment.

I find credible the opinion of Dr. Bernardi that Claimant needs pain medication as a result of the work accident, but not OxyContin. I find credible Dr. Stillings opinion that no psychiatric treatment is needed. I find Claimant has shown a reasonable probability exists that he will need additional pain medication to cure and relieve the effect of the injury. Employer is directed to

provide medication and office visits under the supervision of a physician authorized by Employer.

CONCLUSION

Claimant sustained permanent partial disability from the June 16, 2003 work accident. Employer is not liable for past medical expenses. Employer is directed to provide pain medication and office visits through a physician authorized by Employer. Claimant's attorney is entitled to a 25% lien for legal services rendered.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation