

Issued by THE LABOR AND INDUSTRIAL RELATIONS
COMMISSION

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

Injury No.: 01-094760

Employee: John R. Wheeler
Employer: Tracker Marine LLC
Insurer: St. Paul Fire & Marine Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 7, 2001
Place and County of Accident: Greene County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 24, 2007. The award and decision of Administrative Law Judge Robert H. House, issued August 24, 2007, 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 22nd day of February 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: John R. Wheeler

Injury No. 01-094760

Before the

DIVISION OF
WORKERS'

COMPENSATION

Department of Labor and
Industrial Relations of
Missouri

Jefferson City, Missouri

Dependents: N/A

Employer: Tracker Marine LLC

Additional Party: Second Injury Fund

Insurer: St. Paul Fire & Marine Insurance Company

Hearing Date: May 9, 2007

Checked by: RHH/meb

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: August 7, 2001
5. State location where accident occurred or occupational disease was contracted: Greene County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment?
Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted:
While lifting a boat hull, claimant injured his back.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: back
14. Nature and extent of any permanent disability: 30 percent permanent partial disability to the body as a whole
15. Compensation paid to-date for temporary disability: \$14,232.24
16. Value necessary medical aid paid to date by employer/insurer? \$89,979.33
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages: \$375.71
19. Weekly compensation rate: \$250.34
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:
No amount is awarded for past medical care.
45 3/7 weeks of temporary total disability \$11,372.59
No amount is awarded for temporary partial disability benefits.
120 weeks of permanent partial disability from Employer 30,040.80
22. Second Injury Fund liability: Yes
25.7 weeks of permanent partial disability from Second Injury Fund 6,433.74
- Total: \$47,847.13

23. Future requirements awarded: None

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 percent 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: John R. Wheeler

Injury No: 01-094760

Before the

DIVISION OF WORKERS'

COMPENSATION

Department of Labor and
Industrial Relations of Missouri

Jefferson City, Missouri

Dependents: N/A

Employer: Tracker Marine LLC

Additional Party Second Injury Fund

Insurer: St. Paul Fire & Marine Insurance Company

Checked by: RHH/meb

The parties presented evidence at a hearing on May 9, 2007. The hearing was left open for 30 days following the hearing in order for the employer and insurer to provide additional evidence regarding the issue of temporary partial disability. Claimant appeared in person and through his attorney, Gary Matheny. Employer and insurer appeared through their attorneys, Robin Bullock and Lucas Smith. At the hearing the following issues were presented for determination: 1) The liability of employer and insurer for temporary total disability benefits, with employee requesting temporary total disability benefits from March 11, 2002, to January 5, 2003, and from January 6, 2003, to November 20, 2003. 2) The liability of employer and insurer

for temporary partial disability benefits from August 7, 2001, to March 9, 2002. 3) The liability of employer and insurer for past medical care in the amount of \$276.84 as a result of an emergency room visit to St. John's Hospital by claimant on February 12, 2003. 4) The nature and extent of claimant's permanent partial disability.

The parties agreed that claimant's average weekly wage was \$375.71, resulting in a workers' compensation rate for all purposes of \$250.34. Medical benefits were paid in the amount of \$89,979.33. Temporary total disability benefits were paid in the amount of \$14,232.24 at the agreed upon rate for 56 6/7 weeks.

Claimant was an employee of Tracker Marine, working in Bolivar, Polk County, Missouri. His basic job was as a fabricator, manufacturing small parts. However, on August 7, 2001, while lifting a boat hull with another employee, he hurt his back. He testified that his back immediately hurt worse than when he had been shot by a shotgun. He felt an electric-like shock radiating down both legs to his feet and toes. Claimant was originally treated by Drs. Woodward and Mauldin, Physiatrists, of Springfield, Missouri. He received epidural steroid injections from Dr. Mauldin, and he was treated with physical therapy. An MRI scan of claimant's back on October 24, 2001, indicated that claimant had a bulging disc at L4-5. Ultimately, claimant was released by Dr. Mauldin on February 25, 2002, finding that claimant had reached maximum medical improvement and finding that claimant was able to work at the medium work demand level. Dr. Mauldin's assessment, in part, was based on a functional capacity evaluation performed on February 21, 2002. Dr. Mauldin rated claimant as having a 5 percent body as a whole permanent partial impairment. Claimant did not return to work because of his restrictions and was subsequently laid off by Tracker Marine. Claimant testified that he continued to have back problems. However, claimant also applied for unemployment compensation benefits which he received from March 16, 2002, through September 10, 2002.

On June 25, 2002, Dr. Timothy Graven examined claimant. He reviewed claimant's MRI and opined that claimant had degenerative disc disease, along with a chronic lumbosacral strain and lumbar radiculopathy. He recommended a discogram if EMG and nerve conduction studies were normal. Claimant later was examined by Dr. Jerome Levy for a rating report which Dr. Levy issued on October 3, 2002. Dr. Levy found claimant was at maximum medical improvement and rated claimant as having a disability of 25 percent of the body as a whole.

Claimant continued to have problems with his back and on his own went to Dr. Thomas Briggs, a board-certified neurosurgeon. Dr. Briggs reviewed the October 24, 2001, MRI and opined that claimant had a degenerative disc at L4-5, along with a central disc herniation, mild to moderate in size. Dr. Briggs believed that a discogram was appropriate. A discogram was performed and confirmed the annular tear at L4-5. As a result of the discogram, Dr. Briggs recommended surgery for a lumbar fusion when Dr. Briggs reexamined claimant on July 30, 2003. On November 20, 2003, Dr. Briggs performed a lumbar discectomy at L4-5 with posterior lumbar interbody fusion with peek cage insertion and posterior lateral fusion with instrumentation. Dr. Briggs continued to treat claimant following his surgery, ultimately referring claimant to Dr. Ted Lennard, a physiatrist. Dr. Lennard continued to treat claimant for several months, providing him with prescriptive medications and a rehabilitation program. Claimant underwent an additional functional capacity examination on December 16, 2004. Dr. Lennard then issued a report on December 21, 2004, indicating that claimant had reached maximum medical improvement. He imposed a permanent 25-pound lifting restriction with occasional bending. Dr. Lennard rated claimant as having a 20-percent permanent partial impairment to the body as a whole.

Claimant's attorney sent claimant for a rating examination to Dr. Theodore Sandow, a board-certified orthopedic surgeon, who found that claimant had a permanent partial disability of 30 percent to the body as a whole as a result of his injury and subsequent surgery. He further opined that claimant should avoid repetitive bending, stooping, twisting, or lifting over 20 pounds. Claimant later obtained the services of the

attorney who presented claimant's case at hearing, Gary Matheny. Mr. Matheny sent claimant to Shawn Berkin, a board-certified osteopathic physician, who rated claimant on February 28, 2006, finding that claimant sustained a permanent partial disability of 42 ½ percent to the body as a whole based upon his back injury at work. He found that claimant should avoid excessive squatting, kneeling, stooping, turning, twisting, lifting, and climbing. He further indicated that claimant had a 20-pound lifting restriction from floor to waist as a single event and a 10-pound lifting restriction from the waist to the level of the shoulder.

It is clear from claimant's testimony that he continues to have significant back pain and limitations in his ability to work. Claimant testified that he has constant muscular pain in his low back, that he cannot sleep at night, that he has difficulty walking across uneven ground, and that his back problems have aggravated a previous knee injury. He stated that he would use various mechanical devices or carts to assist him with moving objects rather than having to lift them. He avoids bending at the waist or lifting items that are too heavy. He also indicated that he would ask other people to assist in lifting. He also indicated that, upon lifting items that he believed were too heavy, he would put them back down and find another way to move them.

It is clear from the testimony of claimant's current supervisor at work for Poor Boy Tree Service, Rowdy Loyd Routon, that claimant's work involved significant physical labor. Mr. Routon stated that he has observed claimant performing strenuous lifting without any indication of pain or discomfort. He also indicated that he has observed claimant standing for significant periods of time at work without problem. He also has never observed claimant seeking any assistance in lifting material on a daily basis that would weigh 30, 40, or 50 pounds. The only indication of any difficulties at work by claimant as noted by Mr. Routon was two weeks prior to Mr. Routon's deposition when he noticed that claimant had difficulty squatting while sanding items at work.

Claimant has sought payment of a bill from St. John's Emergency Room for a visit on February 12, 2003. Claimant testified that he had a sharp pain in his back the day before the emergency room visit when he bent over and felt back pain upon trying to stand back up. The emergency room visit indicated that he was kneeling over and had back pain when he stood up, being unable to stand up straight. He testified that his mother had to drive him to the emergency room since he could not do so. He testified that he had pain in his back and both legs and could not stand straight at that time. This emergency room visit was during a period of time while claimant was being treated by Dr. Briggs. However, neither Dr. Briggs nor any other doctor has testified that this incident was related to claimant's injury at work. Dr. Shawn Berkin on February 28, 2006, noted that "Mr. Wheeler experienced an exacerbation of his lower back pain" when he was examined at the emergency room without providing any opinion as to causation. Claimant relates that emergency room visit to his initial injury at work. Nevertheless, I find that there is insufficient evidence in the record for me to find that that emergency room visit is directly related to claimant's injury at work. None of claimant's treating or examining doctors directly relate that emergency room visit to claimant's injury at work, and as a result I deny claimant's request for payment of that past medical bill.

Claimant has sought temporary total disability benefits for two different periods of time. The first period is from March 11, 2002, to January 5, 2003. Claimant had been released by Dr. Mauldin on February 25, 2002. Apparently, claimant was also not allowed to work for Tracker Marine after February 22, 2002. However, he sought and obtained unemployment compensation benefits from March 16, 2002, through September 10, 2002. Pursuant to Section 287.170.3, RSMo, employer and insurer are entitled to a dollar-for-dollar credit against any benefits that may be owed for temporary total disability during the period that claimant received unemployment compensation benefits. Consequently, even if claimant were entitled to temporary total disability benefits during that period, employer and insurer would be entitled to a credit for that time period. Additionally, it is clear that claimant had been released by Dr. Mauldin on February 25, 2002, and he was not taken off work again by any physician until January 6, 2003. At that time, Dr. Briggs found that claimant was temporarily and totally disabled. Dr. Briggs indicated that claimant's temporary total

disability would be “indeterminate.” Dr. Briggs testified that claimant’s indeterminate status was because Dr. Briggs “thought I was going to have some additional studies and be able to make a comment as to whether something more could or should be done and relate that to his long-work status” He believed that claimant could not perform any work that “would potentially aggravate his condition.” Dr. Briggs ultimately ordered a discogram and found that claimant was in need of surgery. Dr. Briggs performed that surgery. Apparently, the employer and insurer provided that surgery to claimant and paid temporary total disability benefits following the surgery. Nevertheless, based upon Dr. Briggs’ finding that claimant was temporarily and totally disabled beginning January 6, 2003, until temporary total disability benefits began after the surgery, I find that claimant was temporarily and totally disabled from January 6, 2003, to November 20, 2003, (the date of his surgery) for a total of 45 3/7 weeks. I order employer and insurer to pay claimant \$11,372.59, representing 45 3/7 weeks of compensation at the agreed upon rate of \$250.34.

Claimant has also sought temporary partial disability from August 7, 2001, to March 9, 2002. It was during that period that claimant was performing work under the restrictions provided by his treating physicians at that time. Claimant presented into evidence an exhibit which indicated his alleged temporary partial disability based upon a difference between his average weekly wage and the wages he was paid during that period of time. However, claimant’s testimony was that the only work that he missed during that period was for medical treatment. The record is replete with numerous visits to Drs. Mauldin and Woodward, along with physical therapy visits during that period of time. Temporary partial disability is not defined under the law in the workers’ compensation statute. However, it has been defined to be a disability that is “temporary in nature and partial in degree.” *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App.E.D. 1985). Temporary disability is to be paid during a healing period and not at a time when the employee has reached maximum medical improvement. *Minnick v. South Metro Fire Protection Dist.*, 926 S.W.2d 906 (Mo.App.W.D. 1996).

Following his injury, claimant was treated by Drs. Mauldin and Woodward for the period of time that he has sought temporary partial disability benefits. He went back to work with lifting restrictions at various times of 50 and 30 pounds. It was not until the final restrictions of 25 pounds of lifting by Dr. Mauldin on February 25, 2002, that claimant testified he no longer was provided work at Tracker Marine. Yet, he continued to work through the pay period ending 3-04-02 according to Exhibit C. The question presented in this case is whether claimant is entitled to temporary partial disability benefits for missing work, according to his testimony, only to receive medical treatment during the period claimed. I could find no appellate decisions regarding that issue. From the pay stubs that claimant presented in evidence, it appears that claimant worked at least 30 hours a week except for the eight pay periods ending 8-11-01, 11-03-01, 12-22-01, 12-29-01, 1-05-02, 1-26-02, 2-02-02, and 2-23-02. In analyzing claimant’s average weekly wage, less wages paid as indicated by claimant on Exhibit C, he alleges he would be entitled to \$724.06 for the difference between his average weekly wage and the wages he was able to earn during that period of time that he claims temporary partial disability. This includes \$4.79 claimed for March 4, 2002, following his release on February 23, 2002, by Dr. Mauldin. Section 287.180 provides that “temporary partial disability, compensation shall be paid during such disability but not for more than 100 weeks, and shall be sixty-six and two-thirds percent of the difference between the average earnings prior to the accident and the amount which the employee, in the exercise of reasonable diligence, will be able to earn during the disability, to be determined in view of the nature and extent of the injury and the ability of the employee to compete in the open labor market.” Claimant’s calculation fails to reduce his refund for temporary partial disability to two-thirds of the “difference” in average earnings and what he was actually paid.

From claimant’s testimony, it is clear that he was working, albeit under lifting restrictions by his treating physicians at various times of 30 or 50 pounds. He continued to receive treatment, including physical therapy, during that period of time. He underwent epidural steroid injections during that time. Nevertheless, claimant testified that he was able to work and that he missed work only for the treatment that he received and for no other reason. As a result, I find that claimant would have been able to compete in the open labor

market in light of his restrictions and that he was not temporarily and partially disabled. Consequently, I deny claimant's request for temporary partial disability benefits.

Claimant has also sought a determination of the nature and extent of his permanent partial disability. Claimant has several ratings. There are three ratings following his surgery involving a back fusion. Dr. Lennard has rated claimant's impairment at 20 percent to the body as a whole. Dr. Sandow has rated claimant's permanent partial disability as 30 percent to the body as a whole. Dr. Berkin has rated claimant's disability as being 42 ½ percent to the body as a whole. Based upon the findings of those three physicians and the testimony of claimant concerning the nature of those limitations and the lifting restrictions of 25 pounds as assessed by Dr. Mauldin, 20 pounds as assessed by Dr. Sandow, and 20 pounds from floor to waist and 10 pounds from waist to shoulder as assessed by Dr. Berkin, along with Claimant's testimony of continued pain in back and legs, and considering the nature of the fusion required as a result of claimant's injury, I find that claimant has sustained a permanent partial disability of 30 percent to the body as a whole. Consequently, I order employer and insurer to pay claimant 120 weeks of compensation (30 percent X 400 = 120) times the agreed upon rate of \$250.34 for a total of \$30,040.80.

The Second Injury Fund entered into an agreement with claimant that they would be responsible for a permanent partial disability should the primary injury in the case meet the statutory threshold of 12 ½ percent to the body as a whole. The Fund agreed to pay based upon a preexisting disability of 20 percent to the right knee and 75 percent of the left eye with a load of 10 percent. Consequently, I order the Second Injury Fund pursuant to that agreement to pay claimant as follows: 32 weeks (20 percent X 160 = 32) plus 105 weeks (75 percent X 140 = 105) plus 120 (30 percent X 400 = 120) for a total of 257 weeks multiplied by a loading factor of 10 percent for a total of 25.7 weeks at the agreed upon rate of \$250.34 for a total of \$6,433.74. Claimant's former attorney, Bradley Bradshaw, is allowed an attorney's lien for expenses in the amount of \$552.73. Claimant's former attorney, John Wise, is allowed an attorney's fee of \$2,500, plus expenses in the amount of \$2,859.82. Claimant's current attorney, Gary Matheny, is allowed an attorney's fee of 25 percent of all amounts ordered herein (less the \$2,500 allowed to John Wise) plus his expenses. The amounts allowed for attorneys' fees shall constitute a lien upon this award.

Date: August 24, 2007

Made by: /s/ Robert H. House

ROBERT H. HOUSE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker
JEFFREY W. BUKER
Division Director
Division of Workers' Compensation