

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

Injury No.: 95-047776

Employee: James Wilford
Employer: Allied Systems
Insurer: 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 20, 2008. The award and decision of Administrative Law Judge Linda J. Wenman, issued October 20, 2008, 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 1st day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James Wilford Injury No.: 95-047776
Dependents: N/A Before the
Employer: Allied Systems **Division of Workers'**
Compensation
Department of Labor and Industrial
Additional Party: Second Injury Fund (dismissed) Relations of Missouri
Jefferson City, Missouri
Insurer: Self-insured
Hearing Date: August 20, 2008 Checked by: LJW

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - 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
 - Date of accident or onset of occupational disease: April 22, 1995
 - State location where accident occurred or occupational disease was contracted: Callaway 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
 - 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 returning to St. Louis from a delivery, Employee's tractor-trailer rear-ended another tractor-trailer on I-70 in Callaway County, MO.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Multiple injuries involving the body as a whole.
 - Nature and extent of any permanent disability: 110% left eye; 40% BAW referable to cranial, spinal and upper extremity injuries; and 25 weeks disfigurement.

15. Compensation paid to-date for temporary disability: \$81,920.16, representing 172 weeks.
16. Value necessary medical aid paid to date by employer/insurer? \$111,291.70

Employee: James Wilford

Injury No.: 95-047776

17. Value necessary medical aid not furnished by employer/insurer? None

- Employee's average weekly wages: Sufficient for maximum rates

19. Weekly compensation rate: \$476.28 / \$249.48

20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

| | |
|----------------------------------------------------------|---------------|
| 43 4/7th weeks of temporary total disability overpayment | (\$20,751.99) |
| 314 weeks of permanent partial disability from Employer | \$78,336.72 |
| 25 weeks of disfigurement from Employer | \$6,237.00 |

22. Second Injury Fund liability: Voluntarily Dismissed

Total: \$63,821.73

23. Future requirements awarded: Pursuant to award

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments in favor of the following attorney for necessary legal services rendered to the claimant: Harry J. Nichols

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Wilford

Injury No.: 95-047776

Dependents: N/A

Before the
Division of Workers'

Employer: Allied Systems

Compensation

Additional Party: Second Injury Fund (dismissed)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Self-insured

Checked by: LJW

PRELIMINARIES

A hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on August 20, 2008. Post-trial briefs were allowed to be received until September 10, 2008. Attorney Harry Nichols represented James Wilford (Claimant). Allied Systems (Employer) is self-insured, and represented by attorney Robert Hendershot. Claimant voluntarily dismissed the Second Injury Fund at the start of hearing.

Prior to the start of the hearing, the parties identified the following issues for disposition in this case: liability of Employer for permanent total disability (PTD) or permanent partial disability (PPD) benefits; future medical care; and a temporary total disability (TTD) overpayment.

Claimant offered Exhibits A-M, Employer offered Exhibits 1-2, and the exhibits were admitted into the record without objection. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is currently 68 years old, and was 54 years old on the date of injury. Claimant has a 12th grade education, and has not received any vocational or technical training. Following high school, Claimant worked as a warehouseman, construction worker, a self-employed mechanic, and truck driver. Claimant has worked as a truck driver since 1973.
2. Prior to April 22, 1995, Claimant had no preexisting disabilities, and only saw a physician when required for his DOT physical.
3. On April 22, 1995, Claimant was returning to St. Louis County after completing a delivery in Columbia, MO. Although Claimant has no independent recollection surrounding the accident, Claimant was informed he drove his tractor-trailer into the rear of another tractor-trailer on I-70. Claimant was air-lifted from the accident scene to the University of Missouri Hospital & Clinics (UMC), and came under the care of the UMC trauma team.
4. While at UMC, Claimant underwent surgery on consecutive days. On April 22, 1995, Claimant's initial surgery included the following: reconstruction of anterior cranial fossa with split calvarial bone graft; cranialization of frontal sinus; obliteration of frontal duct with bone chips; reconstruction of 2/3rds of orbital rim with split calvarial bone graft; placement of a pericranial flap to anterior cranial fossa; open reduction internal fixation (ORIF) of left lateral orbital rim; ORIF of left zygomatic arch fracture; ORIF of left quadripod fracture; ORIF of left orbital floor fracture; bone graft of left orbital floor; ORIF of left maxillary buttress; ORIF of left alveolar fracture; evacuations of intraparenchymal and subdural hematomas; and closure of multiple extensive facial lacerations. On April 23, 1995, Claimant underwent a second surgery for left globe enucleation (removal of his left eye).
5. When stable, Claimant was discharged and transported to St. Louis for further treatment. Claimant came under the care of Dr. Kennedy, a neurosurgeon, and Dr. Nguyen, a rehabilitation specialist. On May 24, 1995, Claimant presented to Dr. Nguyen with complaints of severe bilateral hand pain, inability to completely close his right hand in a

fist, and bilateral shoulder pain. Dr. Nguyen ordered a cervical spine CT scan, and bilateral EMG studies. Claimant was placed on Prednisone.

6. On May 25, 1995, Claimant was examined by Dr. Kennedy, who noted Claimant's neurological examination was within normal limits, and Claimant did not require immediate neurological treatment. Claimant was reexamined on July 12, 1995, and Dr. Kennedy noted a repeat head CT scan demonstrated post-traumatic changes, but no acute changes.

7. On July 18, 1995, Dr. Nguyen noted Claimant's joint pain had decreased, and his range of motion was improving. Claimant complained of back muscle tremors, and Dr. Nguyen noted Claimant's cervical spine MRI demonstrated small bulging at C4-5 and C5-6 without significant cord compression. Dr. Nguyen ordered strengthening exercises and occupational therapy.

8. On September 22, 1995, Dr. Nguyen noted Claimant's pain was decreased, his shoulder and upper extremity range of motion continued to improve with therapy, but Claimant continued to experience stiffness and contractures of his middle, ring and small fingers due to pain and non-use. Dr. Nguyen diagnosed reflex sympathetic dystrophy of Claimant's upper extremities. Claimant was encouraged to continue supervised and home exercise programs. Dr. Nguyen noted Claimant had good potential for functional use of his hands.

9. During October 1995, Claimant was evaluated by Dr. Custer, an ophthalmologist, regarding left ocular revision surgery and left eyelid ptosis. Dr. Custer advised fitting a left ocular prosthesis due to Claimant's lack of ocular muscle function. On April 17, 1996, Dr. Custer noted Claimant's prosthesis was in place, and advised against further surgery. On July 9, 1997, Dr. Custer opined Claimant should not work in situations that might damage his right eye.

10. On August 8, 1997, Claimant complained of occasional cramping sensation to his right forearm that was relieved with pain medication and relaxation. Upon examination, Dr. Nguyen noted slight stiffness of Claimant's fingers; normal range of motion involving Claimant's shoulders, elbows, and wrists; normal muscle strength of his upper extremities; and normal sensation of Claimant's hands and fingers. Dr. Nguyen noted Claimant was independent in all activities of daily living, able to perform self-care, and was able to drive his own car. Dr. Nguyen opined Claimant could return to work performing a job that did not require two eyes.

11. On October 6, 1997, Dr. Nguyen opined Claimant's progress had plateaued. Dr. Nguyen listed Claimant's functional disabilities as: loss of his left eye and left eye vision; left facial fractures and left facial deformity; loss of left facial sensation; occasional headaches and left facial pain; and stiffness of his fingers due to reflex sympathetic dystrophy. Dr. Nguyen's permanent restrictions included: no further work as a truck driver; no heavy labor or operation of heavy machinery; no ladder climbing; no work in high places or narrow walkways. Dr. Nguyen rated Claimant's disability due to the April 22, 1995 injury as 70% PPD.

12. On July 15, 1998, Dr. Custer opined: Claimant would require yearly eye exams; his prosthesis would require yearly polishing; his prosthesis would require replacement approximately every five years; and Claimant may need future surgery, but Dr. Custer could not predict if surgery would be necessary.

13. On June 10, 1999, at the request of his attorney, Claimant was evaluated for cervical spine complaints by Dr. Gornet, an orthopedic spine surgeon. Dr. Gornet diagnosed disc herniations at C4-5 and C5-6 with significant stenosis at both levels. Dr. Gornet recommended Claimant undergo a new CT scan with myelogram.

14. On October 12, 1999, Claimant was evaluated by Dr. Kennedy regarding his cervical spine complaints. Dr. Kennedy noted during December 1997 Claimant had complained to Dr. Gragnani of neck and bilateral arm pain, and Dr. Gragnani had diagnosed a myelopathic injury as a result of the truck accident. Upon examination, Dr. Kennedy noted Claimant's cervical spine range of motion was decreased by 50% in all directions. Dr. Kennedy opined Claimant's injury could have aggravated his underlying spinal canal narrowing causing cord myelopathy. Dr. Kennedy agreed a CT scan with myelogram would be necessary to determine further medical treatment.

15. After reviewing Claimant's CT scan and myelogram, Dr. Kennedy diagnosed severe spinal stenosis at C6-7 with

listhesis at C5-6. Dr. Kennedy opined Claimant should undergo a surgical decompression and fusion. On May 3, 2000, Dr. Kennedy opined Claimant's need for surgery was caused by the progression of spinal stenosis that pre-dated his injury.

16. On April 16, 2001, Dr. Gornet opined Claimant had suffered a cervical spine disc herniation at the time of his truck accident, which was contributing to his spinal stenosis and cervical myelopathy.

17. On February 18, 2003, Dr. Kennedy examined Claimant and found his symptoms to be largely unchanged. Dr. Kennedy noted Claimant's cervical spine range of motion to be relatively normal, but opined Claimant remained a surgical candidate. Dr. Kennedy rated Claimant's injury at 10% BAW PPD, and indicated Claimant could be employed in a sedentary job. At hearing, Claimant testified he has undergone cervical spine surgery.

18. As of hearing, Claimant limits his lifting to twenty-five pounds, has no visual depth perception, and is unable to pass a DOT physical. Claimant continues to receive ophthalmology care, but no other medical care has been suggested referable to his injuries from the truck accident. Claimant currently receives monthly Social Security retirement and union retirement benefits, but has not applied for a job since the accident. Claimant is active with a non-profit charitable organization, fielding telephone calls and assisting in organizing fund raisers. Claimant takes over-the-counter pain medication when needed for discomfort.

19. On October 17, 2001, Claimant was examined by Dr. Hanaway, a neurologist, at the request of Claimant's attorney. Upon examination, Dr. Hanaway noted the following abnormal findings: Claimant displayed a droopy left eyelid; had an inability to close his left eye due to muscle paralysis; decreased sensation surrounding the left eye; multiple healed cranial burr holes; and absent ankle reflexes. Dr. Hanaway was concerned Claimant was displaying signs of depression and recommended neuropsychological testing be completed. Dr. Hanaway opined Claimant was disabled and unable to work.

20. Dr. Hanaway re-examined Claimant on September 3, 2003. During the examination, Claimant complained of upper neck discomfort and headaches. Upon examination, Dr. Hanaway noted mild spasm present in Claimant's upper trapezius muscles; restricted cervical range of motion; positive trigger points at the base of Claimant's neck; absent knee and ankle reflexes; and decreased vibration sensation in his left foot. Dr. Hanaway recommended Claimant undergo a repeat cervical spine MRI, and testing of his blood sugar to determine the source of Claimant's peripheral neuropathy. Dr. Hanaway continued to find Claimant unable to work. Dr. Hanaway expected Claimant to return for further treatment, but did not see Claimant again.

21. Claimant was initially examined by Dr. Gragnani, a physical rehabilitation and occupational medicine specialist, on December 30, 1997. Upon examination, abnormal findings included: decreased sensation from Claimant's left scalp to the top of the left eye orbit; left eye prosthesis, and a permanent left eye-lid lag. Dr. Gragnani's diagnoses included: open head trauma with left frontal lobe parenchymal injury and bleed; possible myelopathic injury to Claimant's cervical spinal cord with upper extremity symptoms by history; loss of left eye vision with placement of prosthesis; facial lacerations; and skull injury. Dr. Gragnani noted Claimant had no observable clinical signs of neurologic dysfunction involving his brain, and largely resolved muscle tightness, stiffness and soreness secondary to transient cervical spinal cord malfunction. Dr. Gragnani opined Claimant was a maximum medical improvement (MMI) by October 1, 1997. Dr. Gragnani further opined Claimant was unable to return to commercial truck driving, but was employable in other work. Dr. Gragnani rated Claimant's injuries at 24% BAW referable to loss of left eye vision; 10% BAW referable to facial paralysis, disfigurement and loss of facial sensation; and 3% BAW referable to upper and lower extremity residual pain. Dr. Gragnani acknowledged Claimant would require routine maintenance and care of his left eye prosthesis.

22. Dr. Gragnani re-examined Claimant on June 8, 2004. Claimant's complaints included headaches, posterior neck pain, and "some" hand weakness. Following examination, Dr. Gragnani noted no significant changes in the diagnoses, MMI status, or rating previously provided.

23. Dr. Gragnani's last examination occurred on October 31, 2005. Claimant's complaints remained loss of left eye vision, neck pain, and decreased grip strength in both hands. Other than Claimant's loss of left eye vision, Dr.

Gragnani found no evidence of other dysfunction. Dr. Gragnani did not alter his original rating. Dr. Gragnani restricted Claimant from commercial truck driving, scaffold, or beam work due to his loss of depth perception. Dr. Gragnani found Claimant fit for ground work.

24. Vocational rehabilitation counselor and licensed psychologist, Samuel Bernstein, interviewed Claimant on September 21, 2001. Dr. Bernstein found Claimant to be an older worker, with an 11th grade education. During his evaluation Dr. Bernstein had Claimant complete the Wide Range Achievement Test., and the Revised BETA Examination. Claimant scored at the 6th grade level in math, and post high school level in reading on the Wide Range Achievement Test. Claimant scored in the average range of intellectual functioning in the Revised BETA Examination. Additionally, Claimant scored within the normal range of anxiety on the Beck Anxiety Inventory, and in the not depressed range on the Hamilton Depression Inventory. After considering Claimant's advanced age, limited education, unskilled employment history, and medical impairments, Dr. Bernstein concluded Claimant was not employable in the open labor market, and is PTD.

25. Vocational rehabilitation counselor Karen Kane-Thaler, interviewed Claimant on July 10, 2006. After meeting with Claimant and reviewing his medical records, Ms. Thaler concluded a portion of Claimant's past employment history would be considered semi-skilled. Based on her review, Ms. Thaler concluded Claimant was able to problem solve, complete paperwork, and complete work duties with minimal supervision. Ms. Thaler completed a labor market survey to determine if employment opportunities existed for Claimant, and identified jobs such as hotel desk clerk, Wal-Mart greeter, parking cashier, sales appointment setter, auto sales, and auto service writer as matching Claimant's skill level and physical abilities. Further, Ms. Thaler opined these positions would have been available at Claimant's MMI date. Ms. Thaler concluded Claimant is employable in the open labor market.

FINDINGS OF FACT & RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Liability of the Employer for Permanent Total Disability

Claimant seeks permanent total disability benefits from Employer. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled on other ground). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled on other grounds). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled on other grounds). Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995).

Claimant asserts he is PTD due to the work injury he suffered on April 22, 1995. No treating physician has opined Claimant is PTD due to the April 22, 1995 injury. Medically, only Dr. Hanaway renders a PTD opinion, but acknowledged Claimant had a remarkable recovery from a very serious injury. Dr. Hanaway admits on clinical examination Claimant's hands were functioning normally, his mental status (except for the accident amnesia) was normal, cranial nerves I, III, and VIII (commonly affected in a head injury) were intact, and during the 2001 examination, Claimant's cervical spine examination was normal. Dr. Hanaway further acknowledged it was eight years after the truck accident when Claimant had evidence of decreased cervical range of motion and spasm.

Vocationally, the experts disagree. Ms. Thaler finds Claimant to be employable in the open labor market, Dr.

Bernstein does not. However, Dr. Bernstein acknowledged he has not interviewed Claimant or reviewed his medical records since 2001, and was unaware Claimant's headaches are now reported as "slight and occasional" as compared to "severe" in 2001. Dr. Bernstein concedes no treating physician has indicated Claimant could not work an eight hour day, and further concedes Claimant's memory problems are not "real serious." Dr. Bernstein readily acknowledged Claimant is able to drive his own car and care for his own needs.

There is no question Claimant was involved in a serious truck accident on April 25, 1995, suffered very serious injuries, had an extensive rehabilitation period, but ultimately did make a remarkable recovery. If PTD was measured by the number of procedures performed in a surgery, Claimant would qualify, but, PTD is determined when maximum medical improvement is achieved and the healing has taken place. Based on the foregoing discussion, I find the medical opinions of Dr. Nguyen and Dr. Gragnani, and the vocational opinion of Ms. Thaler to be persuasive, and I do not find Claimant to be PTD.

Issues related to PPD benefits

A permanent partial disability 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). Due to the April 22, 1995 injury, Claimant suffered numerous injuries. Dr. Nguyen rated Claimant's injuries at 70% BAW PPD. Dr. Kennedy rated Claimant's neurologic injury at 10% BAW PPD, and Dr. Gragnani rated Claimant's injuries at 37% BAW PPD. 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 finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). Based on the testimony and evidence presented, I find Claimant's disability to be 110% PPD referable to the loss of his left eye, and 40% BAW PPD referable to Claimant's cranial and remaining upper extremity symptoms. Additionally, Claimant is entitled to 25 weeks disfigurement. Employer is liable for a total of 339 weeks, or \$84,573.72 in PPD benefits.

Issues related to future medical care

Claimant requests future medical care from Employer. Dr. Custer and Dr. Gragnani agree Claimant will require future medical care for the care and maintenance of his left eye prosthesis. Claimant also retains internal cranial hardware. Claimant is not required to present evidence concerning the specific future medical treatment that will be necessary in order to receive an award of future medical care. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo.App. 1997) (overruled in part). Future medical benefits may be awarded if a claimant shows by reasonable probability that there will be a need for additional medical care due to the work-related injury. *Id.* When future medical benefits are awarded, the medical care must flow from the accident in order to hold an employer liable. *Id.* Reasonable probability is based on reason and experience that inclines the mind to believe, but leaves room for doubt. *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 320 (Mo.App. 1986).

I find Claimant is entitled to receive future medical care from Employer. Employer is instructed to leave medical open regarding Claimant's left eye prosthesis, including routine examinations and prosthesis care, and any reasonable replacements; and any cranial needs related to his April 22, 1995 injury, including, but not limited to, medical examinations, medications, surgical or diagnostic needs. Employer will retain the right to direct any future medical care.

Issues related to temporary total disability overpayment

Employer seeks reimbursement of a TTD overpayment beginning October 7, 1997 and ending August 7, 1998, covering a period of 43 4/7th weeks. Employer paid TTD benefits for a total of 172 weeks. Dr. Nguyen found Claimant able to return to work with restrictions on August 8, 1997, and rated Claimant for PPD on October 6, 1997. Dr. Gragnani found Claimant was at MMI as of October 1, 1997.

TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled in part). Employer seeks

stoppage of its TTD obligation using the date Dr. Nguyen provided his rating, and not on the date Dr. Nguyen opined Claimant was fit to return to work. While Employer technically should not owe TTD benefits after August 8, 1997, I find Employer's request reasonable to terminate TTD benefits as of October 7, 1997. Accordingly, Employer is entitled to a TTD credit of 43 4/7th weeks or \$20,751.99.

CONCLUSION

Claimant is not found to be permanently and totally disabled. Employer will pay 339 weeks of permanent partial disability and disfigurement in the amount of \$84,573.72, and will provide future medical care as outlined in this award. Employer is entitled a TTD credit representing 43 4/7th weeks or \$20,751.99. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

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

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

A cervical spine CT scan had been ordered, but it appears a cervical spine MRI was performed. Cervical spine surgery records were not placed in evidence, and it is unclear who paid for this surgery. Employer objected to Dr. Hanaway's opinion on the basis of a seven day objection, Employer did not request relief, and Employer's objection is overruled.