

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

Injury No.: 03-097964

Employee: Daniel Williams
Employer: Breckenridge Material Company
Insurer: Hartford Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: September 24, 2003
Place and County of Accident: St. Louis, 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 10, 2006. The award and decision of Administrative Law Judge Margaret D. Landolt, issued August 10, 2006, 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 9th day of May 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Daniel Williams

Injury No.: 03-097964

Dependents: N/A
Employer: Breckenridge Material Company
Additional Party: Second Injury Fund
Insurer: Hartford Insurance Co.
Hearing Date: May 4, 2006

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

Checked by: MDL:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 24, 2003 and six years leading up to 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis, Mo.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was driving a truck when it hit a pothole and jarred Claimant. Claimant also sustained repetitive trauma to his low back over a number of years from driving a cement truck and repetitively lifting materials.
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: Low back
14. Nature and extent of any permanent disability: 20% permanent partial disability of the body as a whole referable to the low back and 30% permanent partial disability of the left hand preexisting
15. Compensation paid to-date for temporary disability: \$5,610.80
16. Value necessary medical aid paid to date by employer/insurer? \$4,460.14

Employee: Daniel Williams

Injury No.:

03-097964

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$808.00
19. Weekly compensation rate: \$347.05/\$538.66
20. Method wages computation: Statutory

COMPENSATION PAYABLE

21. Amount of compensation payable:

80 weeks of permanent partial disability from Employer	\$27,764.00
Credit to Employer for cash advance	(\$5,000.00)
Credit to Employer for overpayment of 3/7 weeks of TTD benefits	(\$230.85)
Underpayment of 10 weeks of temporary total disability	\$6.60

22. Second Injury Fund liability: Yes

26.5 weeks of permanent partial disability from Second Injury Fund	\$9,196.83
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TOTAL: \$31,736.58

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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Ray Gerritzen

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Daniel Williams	Injury No.:	03-097964
Dependents:	N/A	Before the	Division of Workers'
Employer:	Breckenridge Material Company	Compensation	
Additional Party:	Second Injury Fund	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Hartford Insurance Company	Checked by:	MDL:tr

PRELIMINARIES

A hearing was held on May 4, 2006, at the Division of Workers' Compensation in the City of St. Louis. Daniel Williams (Claimant) was represented by Mr. Ray Gerritzen. Breckenridge Material Company (Employer) and its Insurer Hartford Insurance Company were represented by Mr. John Palombi. The Second Injury Fund was represented by Assistant Attorney General Joseph Diekemper. Mr. Gerritzen requested a fee of 25% of Claimant's award.

The parties stipulated that on or about September 24, 2003, Claimant sustained an accidental injury arising out of and in the course of employment; at that time Claimant was an employee of Employer; venue is proper in the City of St. Louis; Employer received proper notice of the injury; and the claim was timely filed. The parties further stipulated that Employer paid temporary total disability benefits in the amount of \$5,610.80, representing a period of time from September 24, 2003 to December 7, 2003, or 10 and 3/7ths weeks. Employer also paid medical benefits of \$4,460.14. The parties further stipulated that Employer advanced \$5,000.00 on August 23, 2004, and should receive a credit for that advance against any benefits awarded.

The issues for resolution by hearing are whether Claimant sustained an occupational disease arising out of and in the course of his employment; medical causation with respect to occupational disease to Claimant's back; liability of Employer for past medical benefits; liability of Employer for future medical care; whether Claimant is entitled to temporary total disability benefits; whether Claimant is permanently and totally disabled; liability of the Second Injury Fund; nature and extent of permanent partial disability sustained by Claimant; what is Claimant's appropriate rate of compensation; whether 3/7ths of a week temporary total disability was overpaid at the rate of \$538.00; and whether Employer underpaid temporary total disability benefits. Some of the exhibits received by the Court were highlighted. The Court did not highlight, mark or alter the exhibits in any way.

SUMMARY OF EVIDENCE

Claimant's Testimony

Claimant is a 39-year-old man who obtained his GED and completed some college credits. After he dropped out of high school, Claimant worked delivering pizzas and waiting tables for a couple of years before entering the Marine Corps in May 1988. Claimant served in the Marines for four years and was in combat in Desert Storm. As an artilleryman, he was exposed to a large amount of burning oil. After returning from Desert Storm, Claimant experienced fatigue, joint pain, and began having health problems such as asthma and allergies. Claimant also started gaining weight. Claimant testified that he is five feet, eight inches tall, and in high school his highest weight was 190 to 195 pounds. In 1988, when Claimant returned from boot camp, he weighed 191 pounds. In combat, Claimant weighed about 215 pounds. When he left the Marines he weighed 225 to 230 pounds, and has had problems with obesity ever since.

After Claimant left the Marines in 1992, he obtained a job as a security guard and remained there for approximately one year. As a security guard he was required to sit at a console and patrol. It was not a physically demanding job. Following his employment as a security guard, Claimant went to work for Pop's Saloon where he was a doorman and disc jockey. He removed unruly patrons and cut people off if they had too much to drink. Claimant remained at Pop's on and off for approximately seven years and then was a school bus driver.

Following his work as a bus driver, Claimant went to work for Employer. When Claimant first started working for Employer, he bagged and carried sand, loaded and unloaded supply trucks, and loaded rebar. His job required him to climb ladders and he had to carry 75 to 100 pound bags of weight to the top of the truck one to three times a week. Ten percent of his time working was carrying bags.

Prior to September 24, 2003, Claimant operated truck #169. According to Claimant, the truck had a bad seat and every time he rode in it, it catapulted him up and down in the seat. Claimant reported the bad seat to Employer. Anytime Claimant hit a bump, it bounced him around more than a normal truck. Claimant had truck #169 for one and one-half years.

Claimant testified that he kept a log regarding the bad seat, and filed it with Employer. Claimant testified that everyday he wrote down on his inspection sheet that the seat was bad. According to Claimant, there were probably 200 to 300 entries in the log regarding the bad seat. Claimant testified that he heard Employer sold the truck. Claimant knows other drivers have had trouble with that truck.

Claimant testified that before September 24, 2003, his asthma was a daily issue. Claimant had to use inhalers and daily treatments and still has problems with his asthma. At Employer it was difficult for him to work. Asthma affects his daily work because of the treatments, and he has to use a nebulizer two to three times a day. This has been going on since he was diagnosed after coming back from the Gulf War. His VA doctor told him that working in cement is hard on him because of his asthma.

Claimant was diagnosed with sleep apnea since the war. His sleep apnea causes him to be fatigued all the time because he does not get a restful sleep. For the most part, his sleep apnea is corrected with the use of a CPAP. He now needs a humidifier in conjunction with his CPAP.

On July 15, 1999, Claimant was first diagnosed with pancreatitis. Claimant testified that he lost time from work because of his pancreatitis which caused him to be sick to his stomach.

On July 28, 1999, Claimant fell on his left hand and wrist. Rebar pierced his hand and tore his muscles. Reconstructive surgery was done at St. Mary's Hospital by Dr. Dunn. As a result of this injury, Claimant has difficulty lifting any weight. The palm of his hand is lumpy. The hand injury affected his driving at work, climbing a ladder, and he had difficulty carrying things with his left hand. In Claimant's opinion, his hand functions at about 70% of how it used to function before his hand accident.

Claimant had an accident in April 2000 when he hit a bump and bounced, hitting his head on the top of the truck. Claimant testified Employer sent him to Concentra where he was x-rayed and told nothing was wrong with his back. Claimant testified that after his treatment at Concentra, he went to Dr. Lane, a chiropractor, on his own. Claimant went to Dr. Lane off and on for a period of two years. Dr. Lane performed adjustments and other treatments. Claimant also went to the emergency room on February 20, 2002 for lower back pain from trauma from playing basketball. At that time, he described pain into his hips.

On September 24, 2003, Claimant was working as a ready-mix driver. He testified he was paid by the hour and made around \$20.00 per hour. In the summer months of 2003, Claimant worked a lot. He is sure there were days he missed because of his back, his asthma, and his sleep apnea. He estimated his pay to be \$800.00 a week based on a 40-hour week at \$20.00 an hour plus overtime. Claimant testified on cross-examination that if Employer indicated he made \$20.20 per hour on the date of the injury that sounds correct. As a teamster, Claimant received time-and-a-half for anything over eight hours.

Claimant testified that on September 24, 2003, he was driving through a quarry when he hit a bump, was thrown to the top of the cab, and down on the seat. He immediately felt pain in his back and reported the injury. After he went home, he felt numbness in his back and shooting pains going down his legs. Employer referred him to SSM. At SSM, medications were prescribed and he was referred to Dr. Tate. Claimant does not agree with Dr. Gray at SSM who estimated his weight at 400 plus pounds. Claimant reported he had previously had shooting pains, but nothing like he experienced after the date of the injury.

Claimant testified Dr. Tate examined him, but did not weigh him. Claimant estimated his weight to be 320 to 325 pounds at the time of the accident. According to Claimant, his weight fluctuated between 300 to 325 pounds at the time of the injury. Claimant testified that he did not weigh 400 pounds when he saw Dr. Tate. Claimant testified that at the current time he weighs 375 pounds. According to Claimant, he would not be able to fit in any of the concrete trucks now. It was impossible for him to weigh 400 pounds at the time of the injury because at 300 to 325 pounds he had difficulty fitting into his truck. Dr. Tate sent Claimant for a bone scan and an x-ray. She also sent him for rehabilitation at ProRehab. At the time he was at ProRehab, he was unable to lift anything without having extreme pain in his back. His pain was unbearable after September 24, 2003.

Following his physical therapy, he returned to Dr. Tate and told her he was still in pain. She recommended an MRI, but there was no MRI in the St. Louis area that could fit him into the machine. He did obtain a CT scan, which showed damage to his discs. Dr. Tate referred him to a therapist to see if he could work. He was unable to complete the tests due to pain. According to Claimant, he tried his best. After the functional capacity exam, Dr. Tate released him and informed him that nothing was related to his work. She released him to work but he was unable to function on his job. He couldn't even get himself dressed. He does not believe he could have worked.

He could not answer phones because he got shooting pains. He was unable to bend over.

Claimant testified that if he could get his back fixed now, he would like to go back to work. Claimant is asking the Court for treatment from Employer to get his back fixed. Claimant does not believe he can drive a concrete truck. He doesn't think he could take the repetitive beating from driving the concrete truck.

After seeing Dr. Tate, Claimant saw Dr. Poetz who prescribed Celebrex and Vicodin. Dr. Poetz referred Claimant to Dr. Smith who performed epidural steroid injections. After his injections, he did better at first but then the pain returned. He received bills from Dr. Poetz and Dr. Steven Smith at Christian Hospital.

Claimant attributes his weight gain to his accident. According to Claimant, he was never as big as he is now until his work accident. Claimant testified he would never have put on 150 pounds without injuring his back. All he did was sit around after his accident and was unable to sleep. He could hardly walk he was in so much pain. Claimant sleeps in intervals of two to three hours a night. He has sleep apnea, but his back pain wakes him up. Claimant's highest recorded weight was 484 pounds. The VA Hospital is the only place that has a scale that will go that high. Claimant testified that one and one-half months ago he weighed 380 pounds. Claimant started walking and has lost 104 pounds. Claimant would like to have surgery and get on with his life. He believes it would take him another ten months to get down to a weight where surgery would be possible.

Claimant testified that he does not agree with Dr. Gray who estimated his weight to be 400 to 425 pounds. He also believes Dr. Tate was wrong when she estimated his weight at over 400 pounds. He does not recall telling Dr. Tate that he weighed 415 pounds on December 4, 2003. Claimant does not remember receiving a letter from Employer dated December 24, 2003, offering him transitional employment, although he was living at his address in Maplewood on that date.

Claimant is currently on a weight reduction program and has undertaken a walking program. He walks with Jeffrey Mannestar, a police officer friend of his, most nights depending on how he is feeling.

Before September 24, 2003, Claimant was able to get a full night's sleep and was able to get through the day without lying down. He was able to run and play with his children more and able to lift what he was asked to lift. He used to play softball and football.

Claimant uses an inhaler twice a day. He uses Albuterol in his nebulizer two times a day. He also uses Flovent two times a day. He takes N-insulin and R-insulin twice a day for diabetes which was diagnosed in 2004. He has test strips for his diabetes, which he uses two to three times a day. He has a nasal solution he uses twice daily. He uses Albuterol as needed. Claimant takes Hydrocodone and Vicodin every six hours, and Celebrex once a day. He takes one aspirin a day and Remitidine and Prevacid for GERD.

OTHER EVIDENCE

The records of SSM Corporate Health Services indicate that Claimant was treated on September 24, 2003. Claimant was placed on restricted duty of no lifting over 20 pounds and to avoid repetitive bending. He was prescribed Vioxx and Scelaxin. The diagnosis was lumbar strain with numbness in feet and hands after jolt in truck (previous back trouble related to work). Dr. Gray's treatment note indicates that Claimant weighs about 400 plus pounds.

The records of Dr. Sandra Tate indicate that she saw Claimant on October 14, 2003, for follow up for his complaints of low back pain. Claimant admitted to difficulties of chronic low back pain over the previous six years, which he reported to be due to the bouncing around in the concrete truck. Dr. Tate recommended a bone scan. Claimant's straight leg raise was negative to 90 degrees in the sitting/lying positions. Dr. Tate's assessment was that Claimant had ongoing difficulties with chronic low back pain with reported exacerbation of symptoms from a September 24, 2003, incident where the truck bottomed out. Dr. Tate recommended physical therapy and continued him on medication. She restricted him to no lifting over 30 pounds and no excessive bending at the waist.

When Claimant did not improve after physical therapy, Dr. Tate recommended an MRI. When Claimant was unable to obtain an MRI, a CT scan of his lumbosacral spine was performed on November 19 which revealed degenerative disc changes at L2-3, L3-4, and L4-5. There was a broad-based disc protrusion at L2-3, which was asymmetric to the right. There were bilateral pars defects at L5 and grade 1 spondylolisthesis at L5-S1.

On November 23, 2003, Claimant's straight leg raising caused pain in the lying position but was negative in the seated position. Dr. Tate expressed the opinion that there was significant symptom magnification. She felt Claimant did have degenerative disc changes but had a history of chronic back pain and morbid obesity. Dr. Tate recommended a functional capacity examination to attempt to get an idea of what kind of activities Claimant could be performing at work.

When Dr. Tate saw Claimant again on December 4, 2003, she noted that Claimant had performed his functional capacity evaluation but offered very poor effort, and elected to lift up to only seven pounds total. He failed eight out of eleven validity criteria, and refused to attempt a majority of the functional tasks. It was not possible to delineate Claimant's full functional abilities. Dr. Tate noted that Claimant weighed approximately 415 pounds. Dr. Tate's assessment was that Claimant had complaints of chronic low back pain. He had degenerative disc changes noted diffusely as well as some degenerative joint changes as well. There was no evidence of radiculopathy. It was Dr. Tate's opinion that Claimant had chronic low back pain related to his degenerative changes, and morbid obesity, and not related to the specific work accident of September 24, 2003. Dr. Tate felt that there was significant symptom magnification noted on physical examination. She found Claimant to be at maximum medical improvement and released him to full duty.

The records from ProRehab indicated that Claimant performed a functional capacity examination on December 3, 2003. According to the report, Claimant put forth poor effort. It was found that his subjective complaints were out of proportion with his displayed function. Claimant failed eight out of the eleven validity criteria indicating inconsistent effort, self-limiting effort, and non-organic signs. Because of his symptom magnification, it was felt that he would not appear to be an appropriate rehabilitation candidate at that time.

Prior to his work injury of September 24, 2003, Claimant had ongoing back complaints which he attributed to his work driving a truck. Claimant treated with Dr. Lane, a chiropractor at the Back and Neck Care Center. Dr. Lane's records reflect that Claimant's treatment for lower back symptoms began in December 1998. On December 15, 1998, Claimant complained of pain in his lower back and neck. Dr. Lane's primary diagnosis was lumbar facet syndrome with associated myospasm. Dr. Lane rated that the treatment would be prolonged due to Claimant's weight and work activities. Dr. Lane treated Claimant until February 26, 1999, when he told Claimant to return as needed.

On April 24, 2000, Claimant returned to Dr. Lane after driving his truck on the highway and hitting a bump in the road and hitting his head on the roof of his truck. Dr. Lane's records contain the Concentra records of April 24, 2000, which provided a diagnosis of cervical strain, lumbar strain and contusion of the face, scalp, and neck.

Claimant returned to Dr. Lane on October 26, 2001, after a work accident. Claimant was complaining that bouncing up and down while driving his concrete truck had caused his pain to start in his lower back. Again, the primary diagnosis was lumbar facet syndrome with associated myospasm. Dr. Lane provided conservative treatment until April 2003.

Dr. Lane's records contain two change of condition reports. On October 26, 2001, Claimant indicated that he had a change in condition that happened from bouncing in Truck 68 and jarring his lower back. On February 4, 2003, Claimant reported a change in condition as a result of a new truck with a bad seat, and listed the date of injury of January 30, 2003. Claimant received treatment until April 1, 2003.

The medical records of Christian Hospital reflect that Claimant received three epidural steroid injections in February 2004 from Dr. Smith at the L4-5 level to the right. Dr. Smith felt that since Claimant had not responded to conservative measures he would most likely require surgical intervention, but it was unlikely anyone would consider surgery given his weight.

Voluminous records of the Department of Veterans Affairs reflect treatment for various conditions beginning in 1999 until August 8, 2005.

Dr. Walentynowicz, an orthopedic surgeon, testified on behalf of Employer. Dr. Walentynowicz examined Claimant on August 20, 2004. Dr. Walentynowicz noted that Claimant weighed 438 pounds. Claimant was tender around the lumbosacral junction. It was difficult to assess muscular spasm because of Claimant's size. Straight leg raising in a seated position was negative. Dr. Walentynowicz diagnosed chronic low back pain with underlying degenerative disc disease and spondylolisthesis, and the secondary diagnosis of morbid obesity. Dr. Walentynowicz testified that Claimant was at maximum medical improvement as a result of his work injury of September 24, 2003.

Dr. Walentynowicz felt that Claimant was quite debilitated from his obesity and emphasized that weight control may be helpful in controlling his residual complaints. Dr. Walentynowicz felt that Claimant's work accident was a relatively minor aggravation to the degenerative condition of his spine. Dr. Walentynowicz felt that the reason Claimant was not working was primarily because of his obesity and his other medical problems. Dr. Walentynowicz' interpretation of Claimant's CT scan was that he had a broad-based disc bulge or a slight herniation at L2-3, and degenerative changes at L2-3, L1-2, and a pars defect at L5 and spondylolisthesis. Dr. Walentynowicz testified that in the absence of radicular signs and symptoms, surgery for a herniated disc has a very poor result.

Dr. Walentynowicz testified that a chronic condition such as Claimant's can take a minimum of six months to years to develop, and that a herniated disc can come from repetitive trauma such as bouncing in a truck or a sudden jarring. Spondylolisthesis can also result from a trauma or can be a preexisting condition. Dr. Walentynowicz testified that causation is determined by history and onset of symptomology and he did not go into Claimant's history of onset of symptomology with him. Dr. Walentynowicz testified that Claimant had a 5% permanent partial disability to the lumbar spine attributable to his work related injury, and an overall 15% permanent partial disability to the lumbar spine.

Dr. Sandra Tate, who is board certified in physical medicine and rehabilitation, testified on behalf of Employer. Dr. Tate testified that Claimant's CT scan revealed degenerative disc changes at L2-3, L3-4, and L4-5 with a broad based disc protrusion of L2-3 which was slightly asymmetric to the right, a bilateral pars defect at L5 and a Grade 1 spondylolisthesis at L5-S1. A pars defect is usually a congenital defect that the ossification center basically has not ossified and can lead to spondylolisthesis. Spondylolisthesis is basically slippage and can also result from traumatic episodes. They are graded on through four, and grade one is less than 25%, so it's an offset of one vertebrae that is slightly forward compared to the line of the normal lumbar spine.

Dr. Tate testified that Claimant had preexisting degenerative disc and degenerative joint changes with no evidence of radiculopathy. He also has morbid obesity and he has chronic low back pain related to his degenerative changes and morbid obesity not tied to a specific work incident of September 24, 2003. Dr. Tate testified Claimant could resume his full duties at work and was at maximum medical improvement as of December 4, 2003.

Dr. Poetz testified on behalf of Claimant. Dr. Poetz is a family practice physician. Dr. Poetz examined Claimant and diagnosed spondylolisthesis, a broad-based disc bulge or herniation at the L2-3 level, and degenerative changes at several other levels. Dr. Poetz recommended surgery. He felt surgical management would be the appropriate approach to Claimant's situation, but that Claimant was a poor surgical candidate because of his weight. Dr. Poetz testified that Claimant's preexisting condition of obesity is interfering with surgical intervention. Dr. Poetz felt that Claimant should enter a managed weight loss plan for a period of time until such time as he is able to lose enough weight to make him a better surgical candidate, and then surgical intervention would be appropriate. Dr. Poetz testified that he would first refer Claimant for a myelogram and a post-myelogram CT. That would determine if surgery is warranted or not. If so, he would put him in the care of either a neurosurgeon or an orthopedic surgeon. Dr. Poetz testified he agreed with Dr. Smith that is unlikely that anyone would consider surgical intervention with Claimant at his present weight status. Dr. Poetz advised Claimant not to return to work until after his problem had been resolved through surgery or some other conservative means. Dr. Poetz opined that Claimant had received injury from both the six and one-half years of repetitive wear and tear on his low back as well as the September 24, 2003, seat injury. Dr. Poetz did not believe Claimant was at maximum medical improvement.

Timothy Lalk, a vocational rehabilitation counselor, testified on behalf of Claimant. Mr. Lalk testified that Claimant would be unable to find employment because no employer would hire him. Mr. Lalk testified that if Claimant lost weight and could be treated by an orthopedic surgeon, he could find employment. Mr. Lalk testified that when an employer sees an individual such as Claimant who is unable to perform simple activities like walking,

or just getting out of a seat and changing positions, most employers would not be willing to take the risk of hiring him.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon my observations of Claimant at hearing, my comprehensive review of the evidence and the application of Missouri law I find:

The parties stipulate that Claimant sustained a compensable injury to his low back on September 24, 2003. The evidence reveals that Claimant received physical therapy and appropriate treatment from Employer/Insurer through Dr. Tate and SSM Corporate Health. I further find that as a result of the work injury, Claimant achieved maximum medical improvement on or about December 3, 2003, when Dr. Tate released him. Both Dr. Tate and Dr. Walentynowicz found Claimant to be at maximum medical improvement, and did not recommend any additional treatment.

I further find that Claimant sustained an occupational disease arising out of and in the course of his employment with respect to his low back. Dr. Poetz testified that Claimant was injured as a result of the six and one-half years of repetitive tear on his low back. Dr. Lane's records document that Claimant repeatedly complained of back problems due to the seat on the truck he was driving for Employer. The accident on September 24, 2003, was not the first time Claimant had hurt himself from bouncing in his truck.

While I find Dr. Walentynowicz to be credible on other issues, I find Dr. Poetz to be more persuasive on the issue of medical causation with regard to Claimant's degenerative back condition. Neither Dr. Tate nor Dr. Walentynowicz were asked to specifically address the issue of whether Claimant's degeneration was caused by wear and tear on his back from driving his truck over a period of years. Dr. Walentynowicz conceded that a chronic condition such as Claimant's can take a minimum of six months to years to develop. He also testified that a herniated disc can come from repetitive trauma such as bouncing in a truck or a sudden jarring from a seat collapse. Dr. Walentynowicz testified that causation is determined by history and the onset of symptomology, and he did not go into Claimant's history of onset of symptomology with him. Dr. Tate also testified that a pars defect can result from traumatic episodes.

Future Medical Treatment

Claimant's request for additional medical treatment is unsupported by the medical evidence. I find Claimant not to be a surgical candidate based upon the expert opinion of Dr. Walentynowicz, an orthopedic surgeon. Dr. Walentynowicz examined Claimant, found no evidence of radiculopathy, reviewed Claimant's CT scan, and found no objective evidence that surgery would be of any benefit. Dr. Walentynowicz found that the reason Claimant is not working is not due to his low back problems but complications as a result of his obesity and other medical problems. I find Dr. Walentynowicz's opinion to be credible.

Dr. Poetz's opinion is too speculative. He would first refer Claimant for a myelogram and a post-myelogram CT. That would determine if surgery is warranted or not. If warranted, Dr. Poetz would then put him in the care of either a neurosurgeon or an orthopedic surgeon. There really is no doctor at this time recommending a surgical procedure for Claimant. Dr. Smith, who is a pain management doctor, stated that because conservative measures had failed he thought surgery was the only option for treatment but did not recommend a specific surgery, and is not an orthopedic surgeon like Dr. Walentynowicz. I find that Dr. Walentynowicz, a board certified orthopedic surgeon, is in the best position to determine whether future medical treatment in the form of surgery would cure and relieve Claimant from the effects of his work related injury. Case law makes it clear that the argument that a worker's compensation claimant might someday be a good candidate for surgery is not sufficient to sustain an award for future medical benefits. *Sutton v. Vee-Jay Cement Contracting Co.*, 37 S.W.3d 803 (Mo.App. 2000) (overruled on other grounds). Citing *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271 (Mo.App. 1996) (overruled on other grounds).

Claimant has not sustained his burden of proving that there is a reasonable probability that he will need

additional medical treatment related to his work injury, and therefore I find Claimant is not entitled to an award of future medical treatment.

Rate/Overpayment of Temporary Total Disability

Claimant's permanent partial disability rate is the maximum rate of \$347.05. That is based upon forty hours a week at \$20.20 per hour, or an average weekly wage of \$808.00 per week. That yields a maximum permanent partial disability rate and a temporary total disability rate of \$538.66 per week.

Pursuant to the stipulation of the parties, Employer paid Claimant temporary total disability through December 7, 2003. Since Claimant was found to be at maximum medical improvement on December 4, 2003, Employer is entitled to a credit for 3/7 weeks of temporary total disability benefits or \$230.85.

I further find Employer underpaid Claimant's temporary total disability for 10 weeks by paying him at the approximate rate of \$538.00. Therefore, Claimant is entitled to \$6.60 for that underpayment.

Medical Expenses

Claimant chose to treat on his own with Dr. Smith and Dr. Poetz. Although §287.140 RSMo 2000 requires Employer to provide such medical treatment as may be reasonably required to cure and relieve from the effects of the injury, Claimant retains the right to select his own physician at his own expense. There is no evidence that Claimant requested treatment from Employer. It appears that Claimant chose to treat on his own, and shall do so at his own expense.

Permanent Partial Disability

I find Claimant sustained an injury which caused permanent partial disability of 20% of the body as a whole relative to his low back as a result of his work injury of September 24, 2003, and his degenerative back condition. I find Claimant is entitled to 80 weeks of compensation at the maximum rate of \$347.05, and Employer/Insurer is entitled to a credit to the permanent partial disability award of \$5,000.00 previously paid in the form of a cash advance to Claimant.

Permanent Total Disability/Liability of the Second Injury Fund

Claimant is not permanently and totally disabled. Although Claimant is currently unable to compete in the open labor market, it is due to his morbid obesity which I do not find to be a permanent disability. Claimant has shown that he is able to lose weight successfully. Claimant has already lost 104 pounds through diet and an exercise program of walking. I do not find that Claimant's weight gain is a result of his work injury. The treatment notes of SSM Corporate Health on the date of the injury reflect a weight of 400 plus pounds. Dr. Tate noted on October 7, 2003 that Claimant weighed 400 pounds. While Claimant vehemently denied weighing that much on the date of injury, I find his estimate of his weight to be less reliable than that of trained medical professionals. Furthermore, Dr. Poetz testified that Claimant's obesity was a preexisting condition.

I find Claimant's 20% permanent partial disability with regard to the primary injury combines with his prior left hand injury to create a greater overall disability than their simple sums, and further constituted a hindrance or obstacle to employment or re-employment prior to September 24, 2003. I find Claimant sustained a 30% permanent partial disability with respect to his left hand. Claimant testified that his hand currently functions at 70% of normal. A load factor of 20% shall apply, and Claimant is thus entitled to 26.5 weeks of compensation from the Second Injury Fund at the maximum rate of compensation of \$347.05 or \$9,196.83.

Dr. Poetz did not rate Claimant's other preexisting medical conditions, and this Court lacks the expertise to assign a percentage of disability to the conditions of asthma, GERD or pancreatitis.

This award is subject to an attorney's lien of 25% in favor of Claimant's attorney, Mr. Ray Gerritzen.

Date: _____

Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

Employee: Daniel Williams

Injury No.:

03-097964