

FINAL AWARD DENYING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge  
by Supplemental Opinion)

Injury No.: 01-081106

Employee: Charles Argast  
Employer: The Young Group (Settled)  
Insurer: Amerisure Companies (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: May 21, 2001  
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, heard oral argument, read the briefs, 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 November 14, 2006, as supplemented herein.

The administrative law judge denied the claim against the Second Injury Fund as he concluded that employee's only disability was to the cervical spine which was the result of the May 21, 2001 injury.

This Commission believes that employee did not suffer from any pre-existing disabilities which could combine with his work injury to create permanent total disability. Employee was able to perform his regular job duties up and until his injury in May of 2001. Employee did not suffer from any pre-existing disabilities that hindered his ability to work prior to May 21, 2001. There is no evidence that employee suffered from any disabilities that pre-existed his May 2001 injury; therefore, the Second Injury Fund is not liable for permanent total disability benefits.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 14, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2<sup>nd</sup> day of August 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

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

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Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo.App. W.D. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge.

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William F. Ringer, Chairman

## AWARD

|                   |                               |             |                                    |
|-------------------|-------------------------------|-------------|------------------------------------|
| Employee:         | Charles Argast                | Injury No.: | 01-081106                          |
| Dependents:       | N/A                           |             | Before the                         |
| Employer:         | The Young Group (Settled)     |             | <b>Division of Workers'</b>        |
|                   |                               |             | <b>Compensation</b>                |
| Additional Party: | Second Injury Fund            |             | Department of Labor and Industrial |
|                   |                               |             | Relations of Missouri              |
|                   |                               |             | Jefferson City, Missouri           |
| Insurer:          | Amerisure Companies (Settled) |             |                                    |
| Hearing Date:     | August 21, 2006               | Checked by: | JED:tr                             |

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: May 21, 2001
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 drilling holes through 16-inch walls.
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: Neck
14. Nature and extent of any permanent disability: 45% PPD of the body referable to the cervicl spine (settled).

- 15. Compensation paid to-date for temporary disability: -0-
- 16. Value necessary medical aid paid to date by employer/insurer? \$4,336.88

Employee: Charles Argast Injury No.: 01-081106

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Undetermined
- 19. Weekly compensation rate: \$599.96/\$314.26
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:  
 180 Weeks PPD from Employer (Settled)

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: N/A

Said payments to begin N/A 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 N/A 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: Charles Argast Injury No.: 01-081106

Dependents: N/A Before the

Employer: The Young Group (Settled)

Additional Party: Second Injury Fund

Insurer: Amerisure Companies (Settled)

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

Checked by: JED:tr

This case involves two separate Claims for Compensation each alleging cervical disc injury to Claimant with alleged accident dates of May 21, 2001 and November 27, 2001. These two cases may be referred to hereinafter as the first and second cases, respectively. The second case alleges permanent total disability against the Second Injury Fund (hereafter "SIF"). Employer and insurer previously settled their risk of liability regarding the allegations underlying the claimed injuries of May 21, 2001 and of November 27, 2001. Both parties are represented by counsel. Separate awards issue on each Claim.

Issues for Trial

*Second case Only*

1. occurrence of an accident;
2. whether injury arose out of an in the course of employment;
3. medical causation/attribution;

*Both Cases*

4. nature and extent of permanent disability; and
5. liability of the SIF.

FINDINGS OF FACT

*Medical Facts*

1. Claimant commenced treatment in May 2001 for neck and arm symptoms with Dr. Einerston, his chiropractor but within the month, referral to Dr. Emmons occurred who immediately ordered an MRI which was positive for spondylitic changes from C-4 to C-7 without nerve root impingement.
2. Dr. Graven examined Claimant in June 2001, and interpreted an EMG/NCS as positive for C-6 disc radiculopathy.
3. Dr. Graven's office notes from the first examination include a history of "[no] injury."
4. Dr. Graven placed Claimant in epidural injection therapy throughout August 2001 with some symptom relief.
5. In October 2001, Dr. Graven referred Claimant to Dr. Scodary, a neurosurgeon for persistent severe symptoms. Claimant apparently did not consult Dr. Scodary.
6. After returning to work with symptoms, and some missed appointments in October, Claimant underwent a second series of epidural injections on December 10 and 17, 2001. No mention is made in Dr. Graven's treatment record of a new accident or new injury. [\[1\]](#)
7. On December 31, 2001, Claimant presented for the third injection whereupon, prior to injection, an episode of fantastic symptomatology ensued resulting in overnight admission, narcotic intravenous pain medication and in-patient pain management procedures per Dr. Piatkowski.
8. Dr. Terrence Piper dictated another report during the interim period dated January 2, 2002 that included

summary of a physical examination reflecting severe upper extremity symptoms relative to multiple cervical disc diagnoses. The note also included patient history of severe arm and leg symptoms surrounding the preparatory injection for the third epidural (second round). Claimant stated he “felt like his arms and legs were on fire.” Dr. Piper dictated no diagnoses relative to leg symptoms or absence of sensation; no treatment records parallel this account of leg symptoms.

9. Six weeks later, Claimant underwent a cervical laminectomy and fusion (C3-C7) surgeries, separately, on January 9 and 21, 2002.

#### *Additional Facts*

10. Regarding degree of permanent disability, Claimant was articulate, ambulated freely into the court room and is under no treatment plan. His upper extremity deficits are evident from the treatment record. His lower extremity complaints are unaccompanied by medical diagnoses or treatment. Employer’s expert did not dispute Claimant’s inability to return to the same employment. Claimant’s high school performance was significantly above average and his industrial skill set is commensurate with his annual prior income of \$75,000 to \$100,000.

11. The treating physicians did not testify.

12. Claimant testified that while working on the alleged accident date of November 27, 2001, he was installing ten-foot lengths of two-inch stainless steel piping when he felt a shock. Claimant finished the job.

13. Claimant filed a Claim for the May 21, 2001 accident and cervical disc injury which was treated as described. Claimant filed a second Claim for cervical disc injury and alleged November 27, 2001 as an accident date.

#### *Pre-Existing Conditions*

14. In 1980, while at work Claimant sustained a crush injury to his left index and long fingers necessitating surgery. (Ex. B, pp. 92-96). Claimant stated that he lacked strength in his left hand for about one year after the accident but did not have any problems thereafter.

15. In May, 1999, Claimant fell asleep while traveling on a plane with his neck twisted and developed left sided neck pain radiating into his shoulder and elbow. Dr. Perez diagnosed “torticollis.” An x-ray of the cervical spine revealed multilevel degenerative change. (Ex. B, pp. 89-91).

#### *Opinion Evidence*

16. Claimant’s expert, Dr. Musich testified that the “work trauma of May, 2001 and November, 2001” cause Claimant’s cervical pathology and symptomatology.

17. Dr. Musich found the work injury of May 2001 caused forty-five percent PPD and the work trauma of November 2001 caused thirty-five percent PPD.

18. Dr. Musich found Claimant permanently and totally disabled “due to the combination of all of his disabilities.”

19. Claimant vocational expert, Mr. Israel saw Claimant once in 2003 and stated he relied on the conclusion of “physicians” and quoted Dr. Graven regarding Claimant’s current status as permanently disabled.

20. Mr. Israel quoted Claimant’ non-treating expert regarding causation and combination between the two claims for permanent total disability,

21. Claimant “read and interpreted blueprints, sketches and product specifications to determine sequence and methods of fabricating, assembling and installing sheet metal products.” Mr. Israel identified inspector and tester, supervisor of assembly department, unit assembler and metal hanger as positions for which Claimant “has acquired significant knowledge or skills transferable to other types of related work[.]” Further, “[h]e had shown good capacity to learn or adapt to work that he has been previously unaccustomed to performing.”

22. Mr. Israel stated alternative employments “generally do not afford the degree of latitude and work site accommodations that [Claimant’s] physical disabilities would now necessitate.” Mr. Israel offered no specific history for Claimant’s re-employment efforts.

23. Mr. Israel, found Claimant unemployable on the open labor market. Mr. Israel referenced “medical guidelines” and “limitations” but identified none.

24. Dr. Wayne, Employer’s expert, found no work related disability stating that the condition was chronic and degenerative as reflected in the radiological studies.

## **RULINGS OF LAW**

### *First Case*

#### Nature & Extent of Permanent Disability

Claimant present medical records evidencing a cervical disc pathology that included radicular symptoms soon after the reported accident that was treated with two rounds of epidural injections and, ultimately cervical fusion surgeries. Claimant has not returned to work and presented additional evidence of his inability to return to the same job. Claimant has significant strength deficits in the upper extremities, including diminished endurance, and apparently, very deficient manual dexterity of the hands. He ambulates freely and experiences no sleeplessness. PTD usually entails involuntary sedentariness; it is this quality that the constrains employability so significantly.

Claimant offered less credible evidence through expert testimony that he was unemployable in the open labor market. Dr. Musich’s testimony, detailed below under the causation issues for the second claim, is fundamentally flawed with a lack of foundation for his assertion of the occurrence of a second accident and injury and, separately, his admission that no MMI plateau may be identified relative to the alleged accident date of November 2, 2001.

Claimant’s vocational expert, Mr. Israel, is similarly flawed because of his express admission that he relied on the conclusion of physicians, primarily Dr. Musich judging by the quotes, who, in addition to the above deficits, is not a treating physician and speaks from a purely forensic viewpoint. Mr. Israel’s comments and opinions were unexplained in great part and quite speculative rather than a derivative of Claimant’s re-employment experiences. He made no mention of claimant’s supervisory experience, job application efforts and failed to predicate a specific model of disabling pain. Claimant apparently has not treated in two years.

Each of these experts tied his testimony to a theory of combination of the May 21, 2001 injury and the alleged second accident and injury which was denied for lack of evidence. Accordingly, without proper foundation and a reconciliation with the treatment record, these opinions by claimant’s experts lack the facts and reasoning required to give the opinions probative value. Claimant’s age, lack of ongoing treatment, education, industrial fabrication skills, supervisory experience and ability to ambulate do not suggest permanent total disability but rather, very significant upper extremity deficits that preclude returning to his exceptionally high-paying prior employment.

#### Liability of the SIF

Where an employee has a preexisting permanent partial disability, whether from a work injury or otherwise, which combines with the current work injury to create an increased overall disability, that employee is entitle to such additional benefits. Section 287.220.1 RSMo (2000). Here, insufficient evidence was presented that the SIF allegations manifested as hindrances or obstacles to employment. Section 287.220.1 RSMo (2000).

According to Claimant’s testimony, the prior injury to his left hand caused decreased strength or approximately one year. There was no evidence that the prior hand injury caused a hindrance or obstacle to his employment. Similarly, there was no evidence that Claimant’s prior neck injury caused a hindrance or obstacle to his employment. Accordingly, there existed no significant preexisting disability which combined with the primary

disability to create and make the SIF responsible for greater overall disability.

## *Second Case*

### Accident, Injury and Medical Causation

The essential inquiry here, in the second case, is whether one or two accidents with injury occurred. Claimant failed to prove the occurrence of a second accident and injury. Claimant offered his testimony and that of his expert as proof of a second accident and injury. Claimant's testimony is completely uncorroborated by medical treatment records or other evidence. Claimant's expert opinion relies on hearsay evidence from Claimant. The expert, however, had no date for this asserted second accident. On the other hand, Claimant's cervical disc pathology is documented from May 21, 2001 through surgeries in January 2002 which period is characterized by severe recurring persistent symptoms of neck pain, headaches and upper extremity radiculopathy.

Missouri courts hold that where the facts support two opposing theories of injury no presumption of an occurrence of an accident applies. Kinney v. City of St. Louis, 654 S.W.2d 342 (Mo.App. 1983). An employee bears the burden of proving that not only did an accident occur, but it also resulted in an injury. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman, supra. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Id. Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra.

Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman, supra at 175, 176. This requires Claimant's medical expert to establish the probability claimant's injuries were caused by the work accident. McGrath, supra.

An expert's factual assumptions must be those reasonably relied on by experts in field and, second, trial judge must decide if foundational requirements have been met to meet the minimum standard of reliability. Bruflat v. Mister, 993 S.W.2d 829, 833 (Mo.App. 1996). In all events, and with all proofs in complex medical evidence, a medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence. Silman, supra at 176. Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984). Admission of a contrary matter weakens the value of expert opinion. DeLisle v. Cape Mutual Insurance, 675 S.W.2d 97 (Mo.App. 1984).

### *Claimant's Testimony*

Claimant's testimony was brief and uncorroborated. He testified that he experienced sudden severe episode of symptoms occurring while at work. This testimony does not prove the occurrence of an accident and injury. First, these symptoms were of the same sort previously treated and, in addition, were the pending subject of Dr. Graven's referral to Dr. Scodary, a neurosurgeon. Second, he identified no event or mishap preceding the onset. Third, the symptoms onset required no immediate treatment. Fourth, despite very active treatment in the weeks and months following the alleged accident of November 27, 2001, no provider recorded a patient history of a second accident.

More importantly, cervical disc pathology is a sophisticated condition requiring technical diagnostics, evaluation by specialists and, frequently, surgical intervention. Claimant's condition is further complicated by the chronicity and pre-existing nature of his condition. Thus, his testimony about the occurrence of an accident merely consists of a report of a resumption of severe symptom onset which Dr. Graven notes on December 4, 2001. This is not expert testimony. Silman, supra.

Separately, Claimant's testimony about a report of injury by telephone to his supervisor was not reliable. The testimony lacked convincing details and was uncorroborated by document or witness. The reliability of Claimant's testimony regarding the occurrence of an accident is not sufficiently probative. On the one hand, he admits severe radicular symptoms (including the leg) as early on as July 2001 and, on the other hand, no physician ever diagnosed a condition explaining his unusual accounts of legs symptoms. These questions made it imperative that his expert adhere to conventional

methods relied on by experts in the field.

### *Medical Records and Opinion Reports*

Claimant apparently failed to meet appointments twice in October 2001, and required no visits occurred in November 2001, and despite prescribing the second series of epidural injections in December 2001, and following Claimant's surgeries and, thereafter, throughout 2002, Dr. Graven's notes reflect no new accident occurring in November 2001. This silence takes on more weight when the October referral to Dr. Scodary, a surgeon, is commented upon in the December 4 note without mention of a new accident. One early December note (pasted out of date sequence) records the "resumption" of symptoms. Thus, despite continuous, close monitor by Dr. Graven, no new accident or new injury is noted. Unbroken treatment does not signal an MMI plateau.

From a medical causation standpoint, this disc pathology was still manifesting/resolving on the on the alleged second accident date. It is routine that such cases remain open for a year or more; nothing in the record suggests Dr. Graven was reasonably certain that Claimant had attained MMI. The active symptomatology and treatment plan at the time of the alleged second accident date bears directly on the analysis of whether a new injury occurred.

On direct examination, the parties permitted Dr. Musich to merely reference his written report regarding accident history. In his report, he mentions no accident date, no patient history from a treatment record, but characterizes same, later in his report, as, alternatively, "additional neck trauma" and "the November 2001, work injury":

Following the late November 2001, *additional neck trauma* Mr. Argast was reevaluated by Dr. Graven in early December 2001, noting radicular symptoms in the upper extremities. Following *the November 2001, work injury* Mr. Argast was recommended for epidural steroid injections" (Underline and italics added.)

A fair reading of this text suggests the author intends the reader to discern unfolding, interconnected medical events but without ever establishing an accident date, or a new injury.

Elsewhere during cross-examination, Dr. Musich purports to assure the examiner of the "specific history" elicited from Claimant:

Q: And you described the mechanics of [the] May 2001, injury while he was drilling one-inch holes in a 17-inch brick wall at Mallinckrodt and he was drilling at an elevated level off the floor (sic) and his drill was physically jerking his torso and cervical spine, is that correct?  
A: Yes, that was his specific history to me.

Eighteen months after the alleged accident date, Dr. Musich, who is not an accident witness, purports to detail the second accident (second claim) with pipe sizes and the heights of the work platform but did not testify about either an accident mechanism or a date upon which to place this pretension of detail (Exhibit C, pp. 20-21; *Report dated May 22, 2003, p. 3*):

Q: Did he explain to you that he had any jerking or pulling that aggravated his symptoms?  
A: He didn't mention anything to me, *but I'm not saying that it didn't happen.*  
(Italics added.)

This is unreliable hearsay from Claimant because Claimant's statement came during a forensic medical evaluation. Only on cross-examination, preliminary to inquiry about whether MMI had been attained, did defense counsel supply the alleged date(s) by leading questions which the expert readily acknowledged. (The gratuitous remark italicized evidences how his advocacy strays too far from the treatment record, or other business records, that might permit an expert to comment on something personally unwitnessed.)

### *Pathology and MMI*

"[A] subsequent incident or injury may be of such a character that its consequences are the natural result of the original injury and may thus warrant [the award of additional] compensation..., on the other hand, the facts and circumstances of the second injury may constitute an independent, intervening cause..." This is a fact question determined by the evidence. Hall v. Spot Martin, 304 S.W.2d 844, 852 (Mo. 1957). Here, Claimant fails to establish resolution of the original pathology (first case) and fails to identify a new pathology underlying a new injury. Rather, the second claim contemplates the same disabling condition.

Dr. Musich admitted at deposition that prior to the second alleged accident of "November 2001," the treating physician, Dr. Graven, had not found Claimant at MMI, had not released Claimant from treatment and had just referred Claimant to a neurosurgeon, Dr. Scodary:

Q: Now as I read your report, it would appear he had some kind of event in May of '01 and then underwent a course of treatment through the offices of Dr. Graven, correct?

A: Yes.

Q: And Dr. Graven was continuing to treat him up through the November event, correct?

A: Correct.

Q: He had not found him to be at maximum medical improvement with regard to the May event at the time of the traumatic event in November of '01?

A: Correct.

Q: In fact, Dr. Graven had placed a referral in October of '01 to Dr. Scodary, correct?

A: Yes, he did.

Thus, the same disabling condition of cervical disc pathology, without attainment of MMI, was essentially admitted following the leading questions on specific accident dates (pp. 10, 12-13). DeLisle, supra. Neither Dr. Musich's report nor his deposition testimony about a second injury contains specifics that integrate with the undisputed medical facts of unbroken treatment from May 2001 through the surgeries in January 2002. Dr. Musich also overlooked a diagnosis for the July 2001 and December 2001 severe leg complaints.

This admission undercuts Dr. Musich's opinion that:

"... the work trauma of May, 2001 and November, 2001 are substantial factors in the development of severe cervical pathology and subsequent myelopathy that required extensive surgical treatment and have resulted in significant posts-traumatic symptomatology."

Claimant's expert could only say that *both injuries* produced the cervical pathology and symptomatology. Indeed, without an accident date (from any source), the witness simply cannot assert that a second injury occurred. Subsequently, and although not found in the narrative report, PPD opinions for the first and second claims were given, without objection, as forty-five and thirty-five percent, respectively. Regardless of the lack of causation evidence on the second claim, the suggestion of a forty-five percent PPD of the neck prior to a surgery strains credulity.

In a discussion of liability for medical bills in two separate claims, the Commission reviewed the parties' experts' causation testimony and found Claimant's expert failed to show that the need for medical bills is the result of [one of two separate injuries]. See Bowers v. Hiland Dairy Company, Injury No. 99-069528 (March 10, 2005) citing Pemberton v. 3M Co., 992 S.W.2d 365, 368-369 (Mo.App. 1999). Here, the opposing expert, Dr. Wayne did not find MMI in his narrative report and did not acknowledge a second injury in his deposition. These findings are reconcilable with the balance of the record and, accordingly, are more persuasive.

At deposition, Dr. Wayne, did not find MMI or any MMI plateau. His testimony was consistent with an unbroken treatment record. His written report of November 12, 2001 expressly states he does not know if Claimant has attained MMI. The alleged date of the second accident and injury is just two weeks later.

Claimant's symptom onset in May 2001 steadily progressed, including two rounds of injection therapy, until culminating with surgery in January 2002 with partial relief. Claimant has severe permanent limitations as a result of the first case. These events do not permit an inference of an MMI plateau in November 2001. The medical service dates are in evidence for these eight months and the continuum belies a new injury. While the unbroken

treatment record is sufficient in itself, Dr. Musich's admission makes inescapable the conclusion that no new injury occurred on November 2, 2001.

Conclusion

Claimant's only disability is to the cervical spine which, albeit extremely serious, is the result of the May 21, 2001 injury. Claimant is found to have sustained PPD in the amount of forty-five percent PPD of the body referable to the cervical spine. Claimant worked completely unrestricted prior to that date. Accordingly, on the basis of the substantial and competent evidence contained within the whole record, Claimant is found, in the first case, to have failed to prove a combination between the reported injury (current injury) and the *de minimis* prior alleged disabilities. Claim against the SIF is denied. The other issues are moot.

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

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

Joseph E. Denigan  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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

Employee: Charles Argast

Injury No.:

01-081106

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge  
by Supplemental Opinion)

Injury No.: 01-156947

Employee: Charles Argast

Employer: The Young Group (Settled)

Insurer: Amerisure Companies (Settled)

Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: Alleged November 27, 2001

Place and County of Accident: St. Louis County

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, heard oral argument, read the briefs, 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 November 14, 2006, as supplemented herein.

The administrative law judge concluded that the record does not support a finding that a second injury occurred on November 27, 2001. The administrative law judge concluded that employee's November 2001 injury was the natural result of the May 2001 injury.

We believe employee's cervical injuries and subsequent fusion were the result of the injury he sustained in May of 2001. Employee steadily received treatment following his May 2001 injury and never experienced a complete resolution of his symptoms. We found no evidence within the medical record to corroborate a second injury occurring on November 27, 2001. The medical records are devoid of any reference to any injury, work-related or otherwise, in November 2001. Instead the record indicates that employee's treatment and surgery was a result of the progression of employee's May 21, 2001 cervical injury.

The Commission agrees with the ultimate conclusion reached by the administrative law judge, that employee failed to prove the occurrence of a second cervical disc injury.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 14, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2<sup>nd</sup> day of August 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

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

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

DISSENTING OPINION FILED

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo.App. W.D. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge.

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

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge found that there was no evidence of a second injury to the cervical spine on November 27, 2001; however, evidence supports a finding of a second cervical injury. It was the combination of this injury, his cervical

injury on May 21, 2001, along with employee's pre-existing cervical degenerative disc disease that rendered employee permanently and totally disabled.

"In order to be entitled to Fund liability, the claimant must establish either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself." *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo.App. W.D. 2004) citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo.App. W.D. 2001).

"Liability of the Second Injury Fund is triggered only 'by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.'" *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo.App. W.D. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Competent and substantial evidence establishes that employee is entitled to permanent total disability benefits against the Second Injury Fund. Employee is permanently and totally disabled due to a combination of his pre-existing disabilities and his subsequent cervical injury. Employee suffered from pre-existing cervical degenerative disc disease as well as a previous disability due to his cervical injury on May 21, 2001.

An MRI taken on June 6, 2001, showed mild spondylitic changes and an EMG/NGV taken on June 29, 2001, showed degenerative changes and findings suggestive of radiculopathy. Additionally, an x-ray performed of the cervical spine in 1999 revealed multilevel degenerative changes. The medical evidence clearly shows that employee's degenerative disc disease of the cervical spine pre-existed employee's two cervical injuries. Dr. Musich testified that employee's symptomatology and resultant fusion were partly due to degenerative changes in combination with employee's work-related trauma.

Employee's first cervical injury occurred on May 21, 2001. After his injury, employee underwent epidural steroid injections which provided some benefit; but employee was still experiencing some symptoms associated with the injury and treatment. Employee's ongoing symptoms were a hindrance or obstacle to his employment at the time of his second cervical injury. It is without question that this injury was an actual and measurable disability at the time of the second injury.

Employee's second cervical injury occurred on November 27, 2001. Employee testified that he was installing stainless steel piping when he felt a pop in his neck that shocked his entire body. He felt excruciating pain throughout his extremities. Employee had an MRI in January of 2002 which showed cervical myelopathy and stenosis; subsequently, employee underwent an anterior cervical discectomy. Employee underwent a lateral mass fusion on January 21, 2002.

Employee provided testimony regarding his cervical injuries and his ability to sustain work. He testified that employment would be too rough given that he continues to suffer from severe neck pain radiating down both arms as well as persistent numbness in both hands. He testified as to extreme difficulty writing and holding on to objects as well as significant discomfort sitting, standing and walking. Employee also testified that he continued to take prescription pain medication and muscle relaxants for his condition.

Employee also had medical expert testimony to corroborate his testimony. Employee's medical and vocational experts testified that employee was unable to sustain work as a result of his cervical injuries. Dr. Musich testified that employee was permanently and totally disabled as a result of his pre-existing degenerative condition combined with both his cervical injuries along with employee's work history and lack of transferable skills. James Israel, vocational expert, testified that employee's persistent neck pain made sustained employment, even sedentary or light, untenable.

The record demonstrates that employee did suffer from actual and measurable disabilities at the time of his work injury on November 27, 2001, that were an obstacle or hindrance to employment. Therefore, employee is not permanently and totally disabled as a result of the May 21, 2001 injury alone. The evidence supports a finding that employee's pre-existing disabilities combined with his subsequent cervical injury to render him permanently and totally disabled.

Based on the foregoing, I conclude that employee is permanently and totally disabled as a result of the combination of employee's pre-existing disabilities and his November 27, 2001 injury.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

**AWARD**

Employee: Charles Argast Injury No.: 01-156947  
Dependents: N/A Before the  
Employer: The Young Group (Settled) **Division of Workers'**  
**Compensation**  
Department of Labor and Industrial  
Additional Party: Second Injury Fund Relations of Missouri  
Jefferson City, Missouri  
Insurer: Amerisure Companies (Settled)  
Hearing Date: August 21, 2006 Checked by: JED:tr

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No
3. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
6. Date of accident or onset of occupational disease: alleged November 27, 2001
7. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? N/A
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
10. 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: N/A
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: N/A
15. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Charles Argast Injury No.: 01-156947

19. Value necessary medical aid not furnished by employer/insurer? N/A
20. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$628.90/\$329.42
20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None

22. Second Injury Fund liability: N/A

TOTAL: -0-

23. Future requirements awarded: N/A

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:

N/A

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

|                   |                               |   |
|-------------------|-------------------------------|---|
| Employee:         | Charles Argast                | Injury No.: 01-156947   |
| Dependents:       | N/A                           | Before the<br><b>Division of Workers'</b><br><b>Compensation</b>                        |
| Employer:         | The Young Group (Settled)     | Department of Labor and Industrial<br>Relations of Missouri<br>Jefferson City, Missouri |
| Additional Party: | Second Injury Fund            |   |
| Insurer:          | Amerisure Companies (Settled) | Checked by: JED:tr  |

This case involves two separate Claims for Compensation each alleging cervical disc injury to Claimant with alleged accident dates of May 21, 2001 and November 27, 2001. These two cases may be referred to hereinafter as the first and second cases, respectively. The second case alleges permanent total disability against the Second Injury Fund (hereafter "SIF"). Employer and insurer previously settled their risk of liability regarding the allegations underlying the claimed injuries of May 21, 2001 and of November 27, 2001. Both parties are represented by counsel. Separate awards issue on each Claim.

Issues for Trial

*Second case Only*

1. occurrence of an accident;
2. whether injury arose out of an in the course of employment;
3. medical causation/attribution;

*Both Cases*

4. nature and extent of permanent disability; and
5. liability of the SIF.

FINDINGS OF FACT

*Medical Facts*

1. Claimant commenced treatment in May 2001 for neck and arm symptoms with Dr. Einerston, his chiropractor but within the month, referral to Dr. Emmons occurred who immediately ordered an MRI which was positive for spondylitic changes from C-4 to C-7 without nerve root impingement.
2. Dr. Graven examined Claimant in June 2001, and interpreted an EMG/NCS as positive for C-6 disc radiculopathy.
3. Dr. Graven's office notes from the first examination include a history of "[no] injury."
4. Dr. Graven placed Claimant in epidural injection therapy throughout August 2001 with some symptom relief.
5. In October 2001, Dr. Graven referred Claimant to Dr. Scodary, a neurosurgeon for persistent severe symptoms. Claimant apparently did not consult Dr. Scodary.
6. After returning to work with symptoms, and some missed appointments in October, Claimant underwent a second series of epidural injections on December 10 and 17, 2001. No mention is made in Dr. Graven's treatment record of a new accident or new injury. [\[2\]](#)
7. On December 31, 2001, Claimant presented for the third injection whereupon, prior to injection, an episode of fantastic symptomatology ensued resulting in overnight admission, narcotic intravenous pain medication and in-patient pain management procedures per Dr. Piatkowski.
8. Dr. Terrence Piper dictated another report during the interim period dated January 2, 2002 that included summary of a physical examination reflecting severe upper extremity symptoms relative to multiple cervical disc diagnoses. The note also included patient history of severe arm and leg symptoms surrounding the preparatory injection for the third epidural (second round). Claimant stated he "felt like his arms and legs were on fire." Dr. Piper dictated no diagnoses relative to leg symptoms or absence of sensation; no treatment records parallel this account of leg symptoms.
9. Six weeks later, Claimant underwent a cervical laminectomy and fusion (C3-C7) surgeries, separately, on January 9 and 21, 2002.

*Additional Facts*

10. Regarding degree of permanent disability, Claimant was articulate, ambulated freely into the court room and is under no treatment plan. His upper extremity deficits are evident from the treatment record. His lower extremity complaints are unaccompanied by medical diagnoses or treatment. Employer's expert did not dispute Claimant's inability to return to the same employment. Claimant's high school performance was significantly above average

and his industrial skill set is commensurate with his annual prior income of \$75,000 to \$100,000.

11. The treating physicians did not testify.

12. Claimant testified that while working on the alleged accident date of November 27, 2001, he was installing ten-foot lengths of two-inch stainless steel piping when he felt a shock. Claimant finished the job.

13. Claimant filed a Claim for the May 21, 2001 accident and cervical disc injury which was treated as described. Claimant filed a second Claim for cervical disc injury and alleged November 27, 2001 as an accident date.

#### *Pre-Existing Conditions*

14. In 1980, while at work Claimant sustained a crush injury to his left index and long fingers necessitating surgery. (Ex. B, pp. 92-96). Claimant stated that he lacked strength in his left hand for about one year after the accident but did not have any problems thereafter.

15. In May, 1999, Claimant fell asleep while traveling on a plane with his neck twisted and developed left sided neck pain radiating into his shoulder and elbow. Dr. Perez diagnosed "torticollis." An x-ray of the cervical spine revealed multilevel degenerative change. (Ex. B, pp. 89-91).

#### *Opinion Evidence*

16. Claimant's expert, Dr. Musich testified that the "work trauma of May, 2001 and November, 2001" cause Claimant's cervical pathology and symptomatology.

17. Dr. Musich found the work injury of May 2001 caused forty-five percent PPD and the work trauma of November 2001 caused thirty-five percent PPD.

18. Dr. Musich found Claimant permanently and totally disabled "due to the combination of all of his disabilities."

19. Claimant vocational expert, Mr. Israel saw Claimant once in 2003 and stated he relied on the conclusion of "physicians" and quoted Dr. Graven regarding Claimant's current status as permanently disabled.

20. Mr. Israel quoted Claimant' non-treating expert regarding causation and combination between the two claims for permanent total disability,

21. Claimant "read and interpreted blueprints, sketches and product specifications to determine sequence and methods of fabricating, assembling and installing sheet metal products." Mr. Israel identified inspector and tester, supervisor of assembly department, unit assembler and metal hanger as positions for which Claimant "has acquired significant knowledge or skills transferable to other types of related work[.]" Further, "[h]e had shown good capacity to learn or adapt to work that he has been previously unaccustomed to performing."

22. Mr. Israel stated alternative employments "generally do not afford the degree of latitude and work site accommodations that [Claimant's] physical disabilities would now necessitate." Mr. Israel offered no specific history for Claimant's re-employment efforts.

23. Mr. Israel, found Claimant unemployable on the open labor market. Mr. Israel referenced "medical guidelines" and "limitations" but identified none.

24. Dr. Wayne, Employer's expert, found no work related disability stating that the condition was chronic and degenerative as reflected in the radiological studies.

### **RULINGS OF LAW**

#### *First Case*

## Nature & Extent of Permanent Disability

Claimant present medical records evidencing a cervical disc pathology that included radicular symptoms soon after the reported accident that was treated with two rounds of epidural injections and, ultimately cervical fusion surgeries. Claimant has not returned to work and presented additional evidence of his inability to return to the same job. Claimant has significant strength deficits in the upper extremities, including diminished endurance, and apparently, very deficient manual dexterity of the hands. He ambulates freely and experiences no sleeplessness. PTD usually entails involuntary sedentariness; it is this quality that the constrains employability so significantly.

Claimant offered less credible evidence through expert testimony that he was unemployable in the open labor market. Dr. Musich's testimony, detailed below under the causation issues for the second claim, is fundamentally flawed with a lack of foundation for his assertion of the occurrence of a second accident and injury and, separately, his admission that no MMI plateau may be identified relative to the alleged accident date of November 2, 2001.

Claimant's vocational expert, Mr. Israel, is similarly flawed because of his express admission that he relied on the conclusion of physicians, primarily Dr. Musich judging by the quotes, who, in addition to the above deficits, is not a treating physician and speaks from a purely forensic viewpoint. Mr. Israel's comments and opinions were unexplained in great part and quite speculative rather than a derivative of Claimant's re-employment experiences. He made no mention of claimant's supervisory experience, job application efforts and failed to predicate a specific model of disabling pain. Claimant apparently has not treated in two years.

Each of these experts tied his testimony to a theory of combination of the May 21, 2001 injury and the alleged second accident and injury which was denied for lack of evidence. Accordingly, without proper foundation and a reconciliation with the treatment record, these opinions by claimant's experts lack the facts and reasoning required to give the opinions probative value. Claimant's age, lack of ongoing treatment, education, industrial fabrication skills, supervisory experience and ability to ambulate do not suggest permanent total disability but rather, very significant upper extremity deficits that preclude returning to his exceptionally high-paying prior employment.

## Liability of the SIF

Where an employee has a preexisting permanent partial disability, whether from a work injury or otherwise, which combines with the current work injury to create an increased overall disability, that employee is entitle to such additional benefits. Section 287.220.1 RSMo (2000). Here, insufficient evidence was presented that the SIF allegations manifested as hindrances or obstacles to employment. Section 287.220.1 RSMo (2000).

According to Claimant's testimony, the prior injury to his left hand caused decreased strength or approximately one year. There was no evidence that the prior hand injury caused a hindrance or obstacle to his employment. Similarly, there was no evidence that Claimant's prior neck injury caused a hindrance or obstacle to his employment. Accordingly, there existed no significant preexisting disability which combined with the primary disability to create and make the SIF responsible for greater overall disability.

### *Second Case*

#### Accident, Injury and Medical Causation

The essential inquiry here, in the second case, is whether one or two accidents with injury occurred. Claimant failed to prove the occurrence of a second accident and injury. Claimant offered his testimony and that of his expert as proof of a second accident and injury. Claimant's testimony is completely uncorroborated by medical treatment records or other evidence. Claimant's expert opinion relies on hearsay evidence from Claimant. The expert, however, had no date for this asserted second accident. On the other hand, Claimant's cervical disc pathology is documented from May 21, 2001 through surgeries in January 2002 which period is characterized by severe recurring persistent symptoms of neck pain, headaches and upper extremity radiculopathy.

Missouri courts hold that where the facts support two opposing theories of injury no presumption of an occurrence of an accident applies. Kinney v. City of St. Louis, 654 S.W.2d 342 (Mo.App. 1983). An employee bears the burden of

proving that not only did an accident occur, but it also resulted in an injury. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman, supra. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Id. Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra.

Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman, supra at 175, 176. This requires Claimant's medical expert to establish the probability claimant's injuries were caused by the work accident. McGrath, supra.

An expert's factual assumptions must be those reasonably relied on by experts in field and, second, trial judge must decide if foundational requirements have been met to meet the minimum standard of reliability. Bruflat v. Mister, 993 S.W.2d 829, 833 (Mo.App. 1996). In all events, and with all proofs in complex medical evidence, a medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence. Silman, supra at 176. Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984). Admission of a contrary matter weakens the value of expert opinion. DeLisle v. Cape Mutual Insurance, 675 S.W.2d 97 (Mo.App. 1984).

#### *Claimant's Testimony*

Claimant's testimony was brief and uncorroborated. He testified that he experienced sudden severe episode of symptoms occurring while at work. This testimony does not prove the occurrence of an accident and injury. First, these symptoms were of the same sort previously treated and, in addition, were the pending subject of Dr. Graven's referral to Dr. Scodary, a neurosurgeon. Second, he identified no event or mishap preceding the onset. Third, the symptoms onset required no immediate treatment. Fourth, despite very active treatment in the weeks and months following the alleged accident of November 27, 2001, no provider recorded a patient history of a second accident.

More importantly, cervical disc pathology is a sophisticated condition requiring technical diagnostics, evaluation by specialists and, frequently, surgical intervention. Claimant's condition is further complicated by the chronicity and pre-existing nature of his condition. Thus, his testimony about the occurrence of an accident merely consists of a report of a resumption of severe symptom onset which Dr. Graven notes on December 4, 2001. This is not expert testimony. Silman, supra.

Separately, Claimant's testimony about a report of injury by telephone to his supervisor was not reliable. The testimony lacked convincing details and was uncorroborated by document or witness. The reliability of Claimant's testimony regarding the occurrence of an accident is not sufficiently probative. On the one hand, he admits severe radicular symptoms (including the leg) as early on as July 2001 and, on the other hand, no physician ever diagnosed a condition explaining his unusual accounts of legs symptoms. These questions made it imperative that his expert adhere to conventional methods relied on by experts in the field.

#### *Medical Records and Opinion Reports*

Claimant apparently failed to meet appointments twice in October 2001, and required no visits occurred in November 2001, and despite prescribing the second series of epidural injections in December 2001, and following Claimant's surgeries and, thereafter, throughout 2002, Dr. Graven's notes reflect no new accident occurring in November 2001. This silence takes on more weight when the October referral to Dr. Scodary, a surgeon, is commented upon in the December 4 note without mention of a new accident. One early December note (pasted out of date sequence) records the "resumption" of symptoms. Thus, despite continuous, close monitor by Dr. Graven, no new accident or new injury is noted. Unbroken treatment does not signal an MMI plateau.

From a medical causation standpoint, this disc pathology was still manifesting/resolving on the on the alleged second accident date. It is routine that such cases remain open for a year or more; nothing in the record suggests Dr. Graven was reasonably certain that Claimant had attained MMI. The active symptomatology and treatment plan at the time of the alleged second accident date bears directly on the analysis of whether a new

injury occurred.

On direct examination, the parties permitted Dr. Musich to merely reference his written report regarding accident history. In his report, he mentions no accident date, no patient history from a treatment record, but characterizes same, later in his report, as, alternatively, "additional neck trauma" and "the November 2001, work injury":

"Following the late November 2001, *additional neck trauma* Mr. Argast was reevaluated by Dr. Graven in early December 2001, noting radicular symptoms in the upper extremities. Following the November 2001, work injury Mr. Argast was recommended for epidural steroid injections" (Underline and italics added.)

A fair reading of this text suggests the author intends the reader to discern unfolding, interconnected medical events but without ever establishing an accident date, or a new injury.

Elsewhere during cross-examination, Dr. Musich purports to assure the examiner of the "specific history" elicited from Claimant:

Q: And you described the mechanics of [the] May 2001, injury while he was drilling one-inch holes in a 17-inch brick wall at Mallinckrodt and he was drilling at an elevated level off the floor (sic) and his drill was physically jerking his torso and cervical spine, is that correct?  
A: Yes, that was his specific history to me.

Eighteen months after the alleged accident date, Dr. Musich, who is not an accident witness, purports to detail the second accident (second claim) with pipe sizes and the heights of the work platform but did not testify about either an accident mechanism or a date upon which to place this pretension of detail (Exhibit C, pp. 20-21; *Report dated May 22, 2003, p. 3*):

Q: Did he explain to you that he had any jerking or pulling that aggravated his symptoms?  
A: He didn't mention anything to me, *but I'm not saying that it didn't happen.*  
(Italics added.)

This is unreliable hearsay from Claimant because Claimant's statement came during a forensic medical evaluation. Only on cross-examination, preliminary to inquiry about whether MMI had been attained, did defense counsel supply the alleged date(s) by leading questions which the expert readily acknowledged. (The gratuitous remark italicized evidences how his advocacy strays too far from the treatment record, or other business records, that might permit an expert to comment on something personally unwitnessed.)

### *Pathology and MMI*

"[A] subsequent incident or injury may be of such a character that its consequences are the natural result of the original injury and may thus warrant [the award of additional] compensation..., on the other hand, the facts and circumstances of the second injury may constitute an independent, intervening cause..." This is a fact question determined by the evidence. Hall v. Spot Martin, 304 S.W.2d 844, 852 (Mo. 1957). Here, Claimant fails to establish resolution of the original pathology (first case) and fails to identify a new pathology underlying a new injury. Rather, the second claim contemplates the same disabling condition.

Dr. Musich admitted at deposition that prior to the second alleged accident of "November 2001," the treating physician, Dr. Graven, had not found Claimant at MMI, had not released Claimant from treatment and had just referred Claimant to a neurosurgeon, Dr. Scodary:

Q: Now as I read your report, it would appear he had some kind of event in May of '01 and then underwent a course of treatment through the offices of Dr. Graven, correct?  
A: Yes.  
Q: And Dr. Graven was continuing to treat him up through the November event, correct?

A: Correct.

Q: He had not found him to be at maximum medical improvement with regard to the May event at the time of the traumatic event in November of '01?

A: Correct.

Q: In fact, Dr. Graven had placed a referral in October of '01 to Dr. Scodary, correct?

A: Yes, he did.

Thus, the same disabling condition of cervical disc pathology, without attainment of MMI, was essentially admitted following the leading questions on specific accident dates (pp. 10, 12-13). *DeLisle, supra*. Neither Dr. Musich's report nor his deposition testimony about a second injury contains specifics that integrate with the undisputed medical facts of unbroken treatment from May 2001 through the surgeries in January 2002. Dr. Musich also overlooked a diagnosis for the July 2001 and December 2001 severe leg complaints.

This admission undercuts Dr. Musich's opinion that:

"... the work trauma of May, 2001 and November, 2001 are substantial factors in the development of severe cervical pathology and subsequent myelopathy that required extensive surgical treatment and have resulted in significant posts-traumatic symptomatology."

Claimant's expert could only say that *both injuries* produced the cervical pathology and symptomatology. Indeed, without an accident date (from any source), the witness simply cannot assert that a second injury occurred. Subsequently, and although not found in the narrative report, PPD opinions for the first and second claims were given, without objection, as forty-five and thirty-five percent, respectively. Regardless of the lack of causation evidence on the second claim, the suggestion of a forty-five percent PPD of the neck prior to a surgery strains credulity.

In a discussion of liability for medical bills in two separate claims, the Commission reviewed the parties' experts' causation testimony and found Claimant's expert failed to show that the need for medical bills is the result of [one of two separate injuries]. See *Bowers v. Hiland Dairy Company*, Injury No. 99-069528 (March 10, 2005) citing *Pemberton v. 3M Co.*, 992 S.W.2d 365, 368-369 (Mo.App. 1999). Here, the opposing expert, Dr. Wayne did not find MMI in his narrative report and did not acknowledge a second injury in his deposition. These findings are reconcilable with the balance of the record and, accordingly, are more persuasive.

At deposition, Dr. Wayne, did not find MMI or any MMI plateau. His testimony was consistent with an unbroken treatment record. His written report of November 12, 2001 expressly states he does not know if Claimant has attained MMI. The alleged date of the second accident and injury is just two weeks later.

Claimant's symptom onset in May 2001 steadily progressed, including two rounds of injection therapy, until culminating with surgery in January 2002 with partial relief. Claimant has severe permanent limitations as a result of the first case. These events do not permit an inference of an MMI plateau in November 2001. The medical service dates are in evidence for these eight months and the continuum belies a new injury. While the unbroken treatment record is sufficient in itself, Dr. Musich's admission makes inescapable the conclusion that no new injury occurred on November 2, 2001.

#### Conclusion

Claimant pled a second claim which is the natural result of the original claim. Accordingly, on the basis of the substantial and competent evidence contained within the whole record, Claimant is found, in the second case, to have failed to prove the occurrence of a second cervical disc injury. The second claim contemplates the same disabling condition. Claim denied. The other issues are moot.

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

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

Joseph E. Denigan  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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

Employee: Charles Argast

Injury No.:

01-156947

\_\_\_\_\_  
[\[1\]](#) No provider notes, i.e. hospital, etc., reflect a past history of a November 27, 2001 accident, or any new injury.

[\[2\]](#) No provider notes, i.e. hospital, etc., reflect a past history of a November 27, 2001 accident, or any new injury.