

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

Injury No.: 01-161842

Employee: William Bea
Employer: Irvinbilt Company
Insurer: Transcontinental Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: November 26, 2001
Place and County of Accident: Boonville, 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 July 23, 2007. The award and decision of Administrative Law Judge Ronald F. Harris, issued July 23, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 16th day of January 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Billy Bea

Injury No. 01-161842

Dependents: N/A

Before the

Employer: Irvinbilt Company

Additional Party: Second Injury Fund

Insurer: Transcontinental Insurance Company

Hearing Date: June 7, 2007

**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: RFH/tmh

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: November 26, 2001.
5. State location where accident occurred or occupational disease was contracted: Boonville, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was reaching to pick up some 2x4's to hand down to a co-worker and felt immediate pain in his lower back.
12. Did accident or occupational disease cause death? No Date of death? N/a
13. Part(s) of body injured by accident or occupational disease: BAW/Back.
14. Nature and extent of any permanent disability: See award.
15. Compensation paid to-date for temporary disability: \$61,048.85.
16. Value necessary medical aid paid to date by employer/insurer? \$79,108.08.
17. Value necessary medical aid not furnished by employer/insurer? See award.
18. Employee's average weekly wages: \$317.72614.00.
19. Weekly compensation rate: \$211.82409.33/\$329.42.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

| | |
|--|---|
| 21. Amount of compensation payable: TTD | \$18,653.58 (5-14-04 through 3-29-05) |
| | - <u>9,882.60</u> (Advance to Employee) |
| | 8,770.98 (Net) |
| MEDICAL | <u>+ 68,881.35</u> |

TOTAL: \$77,652.33

22. Second Injury Fund liability: None.

23. Future requirements awarded: Employer/Insurer ordered to pay PERMANENT TOTAL DISABILITY benefits in the amount of \$409.33 a week beginning March 30, 2005, and continuing for so long as Employee remains permanently and totally disabled.

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: Jonathan McQuilkin

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Billy Bea

Injury No: 01-161842

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Irvinbilt Company

Additional Party: Second Injury Fund

Insurer: Transcontinental Insurance Company

Checked by: RFH/tmh

AWARD

FINDINGS OF FACT and RULINGS OF LAW:

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on June 7, 2007. Post-trial briefs were received from all parties. Attorney Jonathan McQuilkin represented Billy Bea ("Employee"). Irvinbilt Company ("Employer") and Transcontinental Insurance Company ("Insurer") were represented by Attorney James Hess. Assistant Attorney General Christine Kiefer represented the Second Injury Fund ("SIF" or the

“Fund”). Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers’ Compensation.

The parties stipulated to the following:

1. Employee filed a timely Claim for Compensation and both the Employer/Insurer and the SIF filed timely answers.
2. On November 26, 2001, both the employee and the employer were operating under the provisions of the Workers’ Compensation Act.
3. Employer was insured for workers’ compensation.
4. Employee sustained an injury by way of an accident arising out of and in the course of employment.
5. Employee’s average weekly wage was \$614.00 equating to a rate of \$409.33 for both temporary total disability (TTD) and permanent total disability (PTD) and a rate of \$329.42 for permanent partial disability (PPD).
6. Employer/Insurer has paid TTD benefits in the amount of \$61,048.85 representing a time period of November 27, 2001 through May 13, 2004.
7. Employer/Insurer has provided medical aid in the amount of \$79,108.08.
8. Employer/Insurer has paid employee an advance in the amount of \$9,882.60 to be credited against future benefits.

The following were identified as disputed issues to be resolved:

1. Is Employee entitled to TTD benefits from May 14, 2004, through March 29, 2005?
2. Liability for medical expenses pertaining to a second back surgery;
3. Nature and extent of disability PTD v. PPD; and
4. Second Injury Fund liability

Employee’s Exhibits A, B, C, and D were admitted into evidence. Employer/Insurer Exhibits 1 and 3 were admitted without objection. Employee objected to Employer/Insurer Exhibit 2, not on the basis that it did not meet the complete medical report requirement of 287.210, but rather on content arguing that the doctor allegedly did not apply the appropriate statutory standard when giving his opinion on whether the second back surgery was the result of the work related injury. Employee’s objection goes to the weight to be given the evidence rather than to its admissibility, therefore the objection is overruled.

Certain exhibits offered into evidence contained handwritten markings, underlining and/or highlighting on portions of the documents. Any extraneous markings on the exhibits were present when offered into evidence and were not made by the undersigned. Further, any such notes, markings and or/highlights were ignored by the undersigned in arriving at a decision.

Employee’s attorney requests a 25% fee on any benefits awarded. Any objections not specifically addressed are overruled.

SUMMARY OF EVIDENCE

Only testimony necessary to support this award will be reviewed and summarized.

On November 26, 2001, Employee was working on a construction project at a water treatment plant in Boonville, Missouri. Just prior to the Thanksgiving holiday, the employer had poured concrete and on November 26 the employee and some co-workers were taking apart the wooden forms which had been holding the concrete while it set up or hardened. Employee was on top of a wall, approximately 17 feet in the air, when he reached over and out to pick up some 2x4’s to hand down to a co-worker. He felt an immediate onset of pain in his lower back and called over a co-worker to assist him in getting down off the wall. The incident was reported to the supervisor and he was taken to the Boone County Hospital emergency room.

Employee presented to the emergency room with complaints of pain in his left lower back, with pain radiating down into his left leg. He was referred to Dr. Tate who treated him from November 30, 2001, to January 16, 2002. Dr. Tate recommended physical therapy, ordered an MRI on December 28, 2001, and an epidural steroid injection on January 11, 2002. Due to continuing back pain with radiation, Dr. Tate then referred employee to Dr. Blake Rodgers for an orthopedic consultation. Following review of x-rays and the MRI, Dr. Rodgers concluded the findings on the MRI were more impressive than the report indicated. He noted the disk herniation was bigger, central, and that it did contact the neural elements, even though the radiologist did not think so. The doctor recommended surgery and discussed the procedures for a discectomy and an in situ fusion. He also explained to the employee that a certain percentage of people did not improve following surgery and might require further surgery in the future, perhaps in the form of a revision to an instrumented fusion (Employer/Insurer Exhibit 2, tab 3 report dated 2-16-02). In a letter to the insurance company dated October 24, 2003, in response to a request for a disability rating, Dr. Rodgers noted that the in situ fusion was an attempt to avoid any type of large instrumented fusion.

On February 22, 2002, Dr. Rodgers performed an L5-S1 discectomy with in situ fusion using left iliac crest marrow

harvest (Employee's Exhibit A, St. Mary's Health Center Records). The leg pain seemed to improve following the surgery, but no improvement was noted with respect to either the back pain or the right foot numbness. Employee attended follow-up visits with Dr. Rodgers on March 7, April 9, May 30, and August 27, 2002. Dr. Rodgers noted employee really was not doing much better and that the doctor "was not quite sure what to make of that," noting at the final visit on August 27, 2002, employee clearly was still having significant limitations. At that visit, employee also complained of shoulder pain, which the doctor suggested should be discussed with the insurance company. Even though there had been little improvement following the back surgery, Dr. Rodgers released the employee at MMI as of August 27, 2002.

Employee then was referred to Dr. Garth Russell for shoulder complaints that had developed since the injury. Dr. Russell opined that the left shoulder problems were secondary to the use of a cane following the injury and back surgery. Employee was then referred to Dr. Snyder who, following injections and physical therapy, performed a closed manipulation and arthroscopy of the left shoulder on March 4, 2003. After little improvement, Dr. Snyder again performed a closed manipulation with a cortisone injection on October 3, 2003. Again little improvement was noted and Dr. Snyder referred the employee to Dr. Spezia for a second opinion.

Dr. Spezia saw employee on February 25, 2004, and recommended additional surgery to the shoulder. Employer/insurer authorized the surgery and on March 25, 2004, Dr. Spezia performed a manipulation with arthroscopy and debridement. Following another course of physical therapy, the doctor released employee at MMI for the left shoulder on May 12, 2004, at which time treatment and benefits ceased.

Employee continued to experience ongoing problems with back pain and right foot numbness following his release from treatment for the back in August 2002 and returned to see Dr. Rodgers on August 17, 2004. Dr. Rodgers recommended additional surgery to the back and on September 29, 2004, performed a revision surgery, this time fusing L4-S1 with cages and rods. Dr. Rodgers assessed a 10% permanent partial disability to the body as a whole following the first back surgery. On September 1, 2005, the doctor increased that to 12% permanent partial disability to the body as a whole and imposed permanent restrictions of not lifting more than 10 pounds, frequent sitting and no significant bending or lifting. However, the doctor indicated that he could not with a reasonable degree of medical certainty say that the second back surgery was directly related to the November 2001 injury. Employee continues to follow up annually with Dr. Rodgers for union disability certification.

Employee's testimony

Employee is a 52-year-old high school graduate. Upon graduating from high school, he enlisted in the navy but received a medical discharge shortly thereafter as the result of having double pneumonia.

In 1974, employee went to work in the construction field, working out of a union hall, and continued to work in construction as a general laborer for some 27 years up to the date of the accident on November 26, 2001. As a general laborer, he performed a lot of physically demanding work such as a lot of lifting and moving 8 foot wooden forms weighing between 30 and 40 pounds; dragging and raking concrete and using hammers, jackhammers and compactors. His job required him to be on his feet pretty much all day with the exception of breaks and lunch. Immediately prior to going to work on the water treatment plant, employee worked at a job on a power plant through the summer of 2001 working up to 80 hours a week.

Employee testified that the first back surgery did resolve the pain radiating down into his leg but did not result in any relief with his back pain or the numbness in his right foot. At the present, he still experiences a lot of pain with his back and finds it difficult to bend. He is only able to sit for about 15 to 20 minutes at a time with similar time restrictions on walking. He has constant pain in his back regardless of whether he is sitting or standing and has to lie down frequently during the day because of the pain. The pain also causes him difficulty sleeping at night. He is unable to perform any chores around the house. He feels he is worse now than before he had the surgery. He has not worked since the first back surgery in February 2002, and does not believe he is able to work. Prior to the accident he enjoyed fishing and hunting but has been unable to do those things since the accident. Additionally, employee states that he still has problems with motion and strength in his left shoulder and has to use both hands to lift a gallon of milk but most of his pain and problems at present are related to his back.

The employee also testified regarding some conditions that existed prior to the 2001 accident. In 1997 he was diagnosed with bilateral carpal tunnel syndrome. Although he would have problems at times with the carpal tunnel he would simply take a break or switch a hammer from one hand to the other. He did not have surgery for the carpal tunnel and denied that he ever needed accommodations, required any assistance or missed any work as the result of the carpal tunnel from 1997 up to the date of the accident in 2001.

In 1999 a piece of plywood hit his right shin resulting in a large scrape and some numbness. Although that caused some problems initially, once it healed he recovered completely with no limitations or restrictions.

Employee acknowledged at the hearing that although he denied any prior back problems in his deposition, he did on occasion over the years have back problems due to the nature of the work but he never had any significant treatment nor did

he miss any work or need to have any accommodations for any back problems prior to November 2001. It should be noted that an early note from Dr. Tate incorrectly makes reference to a prior back surgery but employee denied that and the medical records and opinions confirm there was no back surgery prior to February 2002.

There was also some discussion about a history of migraine headaches and acid reflux neither of which appeared to pose significant issues at the time of the hearing.

Medical Deposition Testimony

Steven L. Hendler, M.D.: Employer/Insurer sent employee to Dr. Hendler on April 27, 2007, for the purpose of conducting an independent medical examination. Dr. Hendler examined employee, took a history and reviewed medical records. The doctor agreed that the November 2001 accident was a substantial factor in the need for the first back surgery but was unable to correlate the second back surgery to the 2001 accident (Employer/Insurer Exhibit 1, p.23), although agreeing it was possible that the 2001 accident was a factor in causing the need for the second back surgery (Employer/Insurer Exhibit 1, ps.47-48). When asked on cross-examination whether the complaints noted by Dr. Rodgers on April 9, 2002, would be what one would expect from a successful in situ fusion, Dr. Hendler responded that he didn't see many in situ fusions as that is not a procedure that is commonly done but that one would hope for resolution of the symptomology (Employer/Insurer Exhibit 1, p.45).

Additionally, the doctor was of the opinion the treatment for the left shoulder was also not related to the work injury, but did assess a 10% permanent partial disability to the shoulder. The doctor also assessed a 10% disability to the body as a whole for the first back surgery and, even though he could not correlate the second back surgery to the 2001 work injury, he increased the disability to 20% of the body as a whole due to the second back surgery. Dr. Hendler imposed no specific work restrictions, except that he stated he would expect the employee to have difficulty with prolonged standing and sitting. The doctor felt employee could perform sedentary to light category physical activity, but stated if a more detailed opinion regarding work capabilities was required, he would recommend an FCE.

Dr. Hendler also referenced prior bilateral carpal tunnel surgeries, as well as the early notation from Dr. Tate indicating the employee had prior back surgery. The testimony and evidence reveal there were no surgeries for the carpal tunnel, nor was there a back surgery prior to February 2002.

Jerome F. Levy, M.D.: Dr. Levy first saw the employee on June 1, 2004, at which time he took a history, performed an evaluation and reviewed medical records available at that point in time. At that time, employee complained of not being able to sit or stand for any period of time without increasing severe pain in his back. He felt deep pressure in his back and sometimes would have a sharp, stabbing pain. He also complained of numbness in his right foot and limited range of motion with his left shoulder. The doctor opined employee had a 35% permanent partial disability to the body as a whole for the back and 30% disability to the left shoulder as a result of the November 2001 accident. Although he did not review any records pertaining to the prior incident to the right knee or the bilateral carpal tunnel syndrome, he also assessed a 15% disability to the right leg at the knee and 15% for each wrist.

Employee returned to Dr. Levy on May 10, 2005, some seven to eight months after the second back surgery. At that time, the employee again related difficulty in sitting or standing for very long and complained of constant pain, stating that he was worse than before the surgery. Based on employee's complaints, the examination and review of additional records not previously available, Dr. Levy increased the disability rating for the body as a whole to 50% and the left shoulder to 40% and kept the pre-existing ratings as stated in the earlier report. Considering all the disabilities, Dr. Levy was now of the opinion the employee was permanently and totally disabled.

On November 27, 2006, Dr. Levy issued a third report in response to questions posed by Employee's Attorney. Dr. Levy opined that the work accident of November 26, 2001, was "the substantial contributing factor of the need for surgery on September 29th, '04" (Employee's Exhibit B, p.25). Further, Dr. Levy testified that he was familiar with reasonable and customary amounts charged in the Mid-Missouri area and that the charges represented in deposition exhibit 2 for the second back surgery and related treatment were usual, customary, and reasonable (Employee's Exhibit B, p.26). Additionally, Dr. Levy placed restrictions of lifting to 20 pounds on an occasional basis, limit standing to two hours at a time, and should not work above shoulder level or with his arms totally extended. When asked on cross-examination whether his restrictions would be considered sedentary, he responded, "Pretty much, yes" (Employee's Exhibit B, p.36).

Garth Russell, M.D.: Dr. Russell first saw the employee at the request of the employer/insurer in September 2002, shortly after Dr. Rodgers released employee at MMI following the first back surgery for evaluation of left shoulder complaints. Dr. Russell opined the shoulder complaints were attributable to the use of a cane for support following the back injury and surgery, and employee was referred for treatment of the shoulder.

Dr. Russell next saw employee on October 31, 2006, at which time he obtained a history, performed an examination, and reviewed medical records. Although employee had some improvement in his leg pain, Dr. Russell concluded from a review of Dr. Rodgers records, there was essentially no improvement following the first surgery, as the employee continued to have significant problems with back pain, numbness in his foot, and difficulty walking.

Dr. Russell described the second back surgery as a double fusion, front and back, "which is about as extensive surgery as you can do" (Employee's Exhibit D, p.14). Although the fusion was deemed to be solid, employee never recovered from the second back surgery. When asked whether he had an opinion to a reasonable degree of medical certainty whether the November 26, 2001, work injury was a substantial factor to the need for the second back surgery, the doctor responded:

- A. "Yes, it's my opinion that the surgery that was performed in 2004 was performed because the initial surgery in 2002 was unsuccessful and he had more injury than Dr. Rodgers thought he had and so Dr. Rodgers attempted to do the lesser surgery and that was not successful so he had to go back and do the more massive surgery and that was all because of his injury of November 26th of 2001." (Employee's Exhibit D, p.24).

The doctor also identified the bills from Spine Midwest; Jefferson City Open MRI; and Capital Region Medical Center (attached to Employee's Exhibit D) as being for treatment related to the second back surgery and identified those charges as being usual, customary and reasonable for the services rendered (Employee's Exhibit D, pgs. 25-26).

Dr. Russell opined that considering the amount of scarring and muscle spasm in the back with no motion and chronic pain, plus the loss of one third of the function of the left shoulder, the low back had essentially lost all its function and that he still had carpal tunnel he felt the employee was permanently and totally disabled (Employee's Exhibit D, pgs. 20-21).

Dr. Russell also concluded that employee was temporarily and totally disabled up to March 29, 2005, at which time Dr. Rodgers essentially released employee and ceased treatment (Employee's Exhibit D, pgs. 31-32). Although employee continues to see Dr. Rodgers on an annual basis, it is in follow-up for union disability certification and not for treatment. Dr. Russell further opined employee would be permanently and totally disabled following March 29, 2005 (Employee's Exhibit D, pgs. 27-28).

When posed a question on cross-examination contending that Dr. Rodgers felt the second back surgery was the result of degenerative changes and not connected to the 2001 injury, Dr. Russell responded that he did not see that in Dr. Rodgers' records, but if he had, he would "violently" disagree (Employee's Exhibit D, pgs. 33-34).

Dr. Russell would advise the employee take short walks but otherwise no lifting, bending or twisting, essentially no physical work (Employee's Exhibit D, p.44).

Vocational Deposition Testimony

Mr. James England: Mr. England, a vocational rehabilitation counselor, testified on behalf of the Employee. Mr. England saw the employee on October 20, 2004, at which time he conducted an interview to obtain vocational and medical histories, and reviewed available medical records and reports. Upon learning the employee had recently undergone a second back surgery, Mr. England delayed issuing his report for some seven months in order to obtain and review additional medical records and reports pertaining to the September 29, 2004, back surgery.

The primary problems Mr. England identified were the back, the shoulder and bilateral carpal tunnel (Employee's Exhibit C, p.9). Based upon information obtained regarding employee's vocational background, Mr. England did not believe the employee would have any transferable skills usable at sedentary or light exertional levels (Employee's Exhibit C, p.20). Vocational testing indicated a 7th grade level on reading and word recognition but only a 4th grade level in math; reading comprehension was at the 6th grade level.

When describing a typical day, employee stated that he had problems sleeping, waking up once or twice during the night to move because of the pain; generally getting maybe five hours of sleep a night. He was not able to do much physical activity, other than if the weather was nice he would try to walk a little outside. He would watch movies or read because he was able to lie down while doing so. About half the daytime hours were spent reclining, due to the back pain. Mr. England indicated that his observation of the employee's appearance, obvious discomfort, and tired look would have a negative effect, as far as presentation to a potential employer and, more importantly, he was not aware of a job that would allow someone to recline periodically during the day.

Mr. England concluded employee was permanently and totally disabled, based on looking at the entire package of the back problems, his hands, not resting well at night, lying down periodically during the day, and limited academic ability (Employee's Exhibit C, pgs.23-24). When asked if the back injury of November 2001 would in and of itself render the employee permanently and totally disabled, Mr. England stated that while the hands are a further limiting factor, if the back was as bad as the employee described and caused him problems sleeping at night and having to recline periodically during the day, then the back would probably disable him regardless of whether he had problems with the hands (Employee's Exhibit C, p.26). If the employee is still having problems sleeping at night and having to recline during the day, then the carpal tunnel would not even come into play (Employee's Exhibit C, p.42).

I find the employee to be a credible witness. Further I find the testimony and opinions of Dr. Russell and Mr. England to be more credible and worthy of belief than testimony or opinions to the contrary.

RULINGS OF LAW

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

Responsibility for medical expenses related to the second back surgery

All statutory references are to the law prior to the 2005 legislative changes.

Section 287.140.1 provides in relevant part: "...the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment...as may reasonably be required after the injury or disability, to cure and relieve of the effects of the injury." Under Missouri Workers' Compensation Law, the employer has the right to direct medical care. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those costs against the employer. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995). Medical care and treatment "must flow from the accident before the employer is to be held responsible." *Modlin v. Sun Mark, Inc.*, 699 S.W.2d 5, 7 (Mo. App. 1985). The employee must show a "medical causal relationship" between the condition and the accident. *Talley v. Runny Meade Estates, Ltd.* 831 S.W.2d 692, 694 (Mo. App. 1992)(overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 229 (Mo. banc 2003)). The legal standard for compensability requires that work must be "a substantial factor" in the cause of the resulting medical condition or disability. 287.020.2 RSMo.

Employer/Insurer rely on the opinions of Drs. Rodgers and Hendler as support for their argument that the second back surgery in September 2004 was not causally related to the 2001 work-related accident.

In a letter dated September 1, 2005, Dr. Rodgers stated that he could not with a reasonable degree of medical certainty say that the second surgery was directly related to the November 2001 work-related injury. A careful and thorough review of Dr. Rodgers' medical records and reports throughout the course of employee's treatment leads one to a different conclusion.

Once the doctor made the recommendation for the first back surgery, he discussed with the employee the procedures for a discectomy and an in situ fusion. The doctor explained that a certain percentage of people did not improve following surgery and might require further surgery in the future, *perhaps in the form of a revision to an instrumented fusion* (Employer/Insurer Exhibit 2, tab 3 report dated 2-16-02) (emphasis added). Further, in a letter to the insurer dated October 24, 2003, Dr. Rodgers stated that he performed the discectomy and limited in situ fusion in an attempt to avoid any type of large instrumented fusion (Employer/Insurer Exhibit 2, Tab 3).

Dr. Rodgers' records indicate the employee continued to have problems and ultimately returned to the doctor in August 2004. Dr. Rodgers recommended additional back surgery and on September 29, 2004, performed a *revision surgery*, this time *fusing L4-S1 with cages and rods*. It appears the September 2004 procedure was precisely what the doctor had cautioned the employee might happen and what the doctor had hoped to avoid by performing the limited in situ fusion in 2002.

Although agreeing that the November 2001 accident was a substantial factor in the need for the first back surgery, Dr. Hendler concurred with Dr. Rodgers, in that he was not able to correlate the second back surgery to the 2001 accident. However, the doctor did state that while he had not seen many in situ fusions, since that is a procedure that is not commonly done, one would hope for resolution of the person's symptomology. Since Dr. Hendler appears to at least to some extent have considered an incorrect reference in one of Dr. Tate's records to employee having had a prior back surgery, his opinion is suspect.

Dr. Russell, who had been authorized by the employer/insurer to evaluate employee's shoulder complaints, was adamant in his opinion that the November 26, 2001, work-related injury was a substantial factor in the need for the second back surgery. Dr. Russell indicated that the injury was worse than Dr. Rodgers had thought and when he attempted to do the lesser surgery, it was not successful, resulting in having to go back in and do the more massive surgery in 2004.

Dr. Levy also concurred that the work-related accident of November 26, 2001, was "the substantial contributing factor of the need for surgery on September 29, 2004.

In light of Drs. Russell and Levy's opinions and a careful and thorough review of Dr. Rodgers records throughout the course of treatment, I conclude the employee has met his burden of proving that the November 26, 2001, work-related injury was a substantial factor in the need for the second surgery performed September 29, 2004.

Employee seeks payment for medical bills from Spine Midwest in the amount of \$23,785.70; Jefferson City Open

MRI in the amount of \$3,097.00; and Capital Region Medical Center in the amount of \$41,998.15 (Employee's Exhibit A) for treatment related to the September 29, 2004, back surgery. The employer will be responsible for medical bills if they are incurred for treatment related to the accident and if those bills are fair and reasonable. *Emert v. Ford Motor Co.*, 863 S.W.2d 629 (Mo. App. 1993)(overruled on other grounds by *Hampton* 121 S.W.3d 220).

Both Drs. Levy and Russell testified that those bills represented reasonable and necessary charges for services rendered for treatment of the September 2004 back surgery, which was the result of the November 26, 2001, work-related injury.

NOTE: There appears to be a slight error in the amount employee asserts, with regard to the charges from Spine Midwest, Inc. Employee lists the amount to be \$23,785.70, but my calculations indicate the correct amount to be \$23,786.20.

Employer/Insurer argue employee is not entitled to payment for these medical bills, because he has acknowledged that he does not recall having personally paid any of those bills. Additionally, the employer/insurer have sent correspondence indicating they would hold employee harmless for any of the bills to Spine Midwest, Jefferson City Open MRI, and Capital Region Medical Center in the event employee were to receive a demand for payment (Employer/Insurer's Exhibit 3).

Essentially, the employer/insurer's position is that in the event the health insurance company or a collection agency were to seek reimbursement from the employee, the employer/insurer would then step up to the plate. The implicit argument is that ordering the employer/insurer to pay employee for these medical expenses could result in a windfall to the employee, should the health insurance company not seek reimbursement. However, the reverse could also result in a different windfall.

Relying on the hold harmless agreement could result in a windfall to the workers' compensation carrier, at the expense of the health insurance carrier, in the event the health insurance company did not seek reimbursement. Just as workers' compensation insurance is not intended to be a substitute for health insurance, neither is health insurance intended to be used as a substitute for workers' compensation insurance.

Application of the hold harmless agreement would be similar to the workers' compensation carrier claiming a "credit" for moneys paid by the health insurance carrier. This issue has been addressed both by statute and our courts. Section 287.270 RSMo provides: "No savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder...". "Payments from...any source other than the employer or the employer's insurer for Workmen's Compensation are not to be credited on Workmen's Compensation benefits." *Shaffer v. St. John's Reg'l Health Ctr.*, 943 S.W.2d 803, 807 (Mo. App. 1997).

Additionally, it appears at least some "adjustments" have been made to some of the medical charges, specifically the Spine Midwest charges. That issue has been addressed by our Supreme Court in *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo. banc 2003). In *Farmer-Cummings* the court noted that although some charges appeared to have been "written off" or "adjusted" there was no finding that the employee was no longer liable for those charges. The Court noted that while awarding compensation for expenses for which the employee no longer was liable would result in a windfall, reducing an award when the employee might still have liability would vitiate the policy behind workers' compensation to place upon the shoulders of industry the burden for a workplace injury. *Farmer-Cummings* at 822.

Employee has met his burden of proving the charges by Spine Midwest in the amount of \$23,786.20 (rather than the \$23,785.70 amount claimed by employee), Jefferson City Open MRI in the amount of \$3,097.00, and Capital Region Medical Center in the amount of \$41,998.15 were reasonable and necessary charges for treatment for the work-related second back surgery. Employer/Insurer is ordered to pay employee the total of \$68,881.35 (\$23,786.20 + \$3,097.00 + \$41,998.15) for those bills (Employee's Exhibit A).

Liability for Temporary Total Disability from May 14, 2004, through March 29, 2005

Employee seeks TTD benefits from May 14, 2004, when he was released from treatment for his left shoulder through March 29, 2005. The employee bears the burden of proving entitlement to temporary total disability to a reasonable probability. *Cooper v. Medical Centers of Independence*, 955 S.W.2d 570 (Mo. App. 1997)(overruled on other grounds by *Hampton* 121 S.W.3d 220).

Total disability is defined by 287.020.6 as the "inability to return to any employment and not merely...(the) inability to return to the employment in which he was engaged at the time of the accident." The test for determining whether one is entitled to temporary total disability is not whether the person is able to do some work, but whether the person is able to compete for work in the open labor market considering the person's current physical condition. *Thorsen v. Sachs Electric Co.*, 52 S.W.3d 611 (Mo. App. 2001)(overruled on other grounds by *Hampton*).

Employee was paid temporary total disability throughout the course of treatment for his back injury and first surgery as well as his treatment and surgeries for the left shoulder up through May 13, 2004, at which time he was released from treatment for the left shoulder.

Although Dr. Rodgers released the employee from treatment for the back on August 27, 2002, his records indicate the employee was not doing much better, had significant limitations and the doctor "was not quite sure what to make of that". Employee continued to have problems and complaints with the back throughout his treatment for the left shoulder. Very shortly after being released for the left shoulder, employee returned to Dr. Rodgers, which in short order, resulted in the second back surgery.

Dr. Russell has testified that in his opinion, the employee was temporarily totally disabled from the time of the first back surgery (Employee's Exhibit D, p.32) through March 29, 2005, at which time Dr. Rodgers released employee as being at MMI, with respect to treatment for the second back surgery (Employee's Exhibit D, pgs. 31-32). Additionally, employee has testified that he was not able to work during that time.

Based upon a review of the medical records and the testimony of the employee and Dr. Russell, I find the employee has met his burden of proving that he was temporarily and totally disabled and entitled to benefits from May 14, 2004, through March 29, 2005, at which time he was deemed at MMI from the second back surgery. That amounts to 45 4/7ths weeks of compensation at the agreed upon rate of \$409.33 for a total of \$18,653.58. As noted earlier, the parties agreed that the employer/insurer has previously advanced the employee \$9,882.60, which was to be credited against future benefits.

Employer/Insurer is hereby ordered to pay employee \$8,770.98 (\$18,653.58 – the advance of \$9,882.60), which represents the net amount owed for TTD benefits after having deducted the prior advance.

Nature and extent of disability; PTD v. PPD

Employee seeks an award of permanent total disability against either the employer/insurer or the Second Injury Fund. Before addressing whether the Fund has any liability, there must first be a determination as to the degree of disability from the last injury. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000). If the employee's last injury in and of itself rendered the employee permanently and totally disabled, then any preexisting disabilities are irrelevant and the Second Injury Fund has no liability as the employer would be responsible for the entire amount.

Dr. Rodgers assessed a disability rating of 12% of the body as a whole, but noted permanent restrictions of not lifting more than 10 lbs, the need for frequent sitting, and no significant bending or lifting (Employer/Insurer's Exhibit 2, tab 3, letter dated September 1, 2005).

Dr. Hendler, who performed an IME for the employer/insurer, assessed a 10% disability to the left shoulder; 10% disability to the body as a whole for the first back surgery increasing to 20% following the second back surgery, but did not find either the second back surgery or the two shoulder surgeries to be related to the November 26, 2001, work-related injury. The doctor imposed no specific restrictions and felt employee would be capable of performing sedentary to light work but did state that he would expect the employee to have difficulty with prolonged sitting or standing. He also stated if a more detailed opinion regarding the employee's work capabilities was required he would recommend an FCE.

Dr. Levy first saw employee on June 1, 2004 (after the first back surgery and the shoulder surgeries but prior to the second back surgery), and noted employee was not able to sit or stand for any period of time without severe pain, as well as numbness in right foot and limited range of motion in the left shoulder. The doctor assessed 35% disability to the body as a whole for the back and 30% for the left shoulder as a result of the November 26, 2001, work-related injury. He also, without reviewing any records relating to the right leg or the hands, also assessed pre-existing disabilities of 15% to the right leg and 15% to each hand for carpal tunnel.

Some seven or eight months after the second back surgery, Dr. Levy again saw the employee on May 10, 2005. Employee again related difficulty sitting or standing for any period of time, complained of constant pain, and stated that he was worse than he was before the surgery. The doctor then increased his ratings to 50% of the body as a whole for the back and 40% for the left shoulder, kept the pre-existing disability ratings as per the prior report, but now opined the employee was permanently and totally disabled.

On November 27, 2006, Dr. Levy issued a third report, this time in response to questions posed by the employee's attorney and did so without seeing the employee again. In that report, the doctor addressed the charges for the second back surgery and also indicated he would limit the employee to lifting up to 20 lbs on an occasional basis, limit standing to two hours at a time, and that he should not work above shoulder level or with his arms totally extended.

Dr. Russell first saw the employee at the request of the employer/insurer for evaluation of the left shoulder complaints and later saw the employee in October 2006. Dr. Russell described the first back surgery as being "unsuccessful," which in turn ultimately lead to the second more "massive" back surgery in 2004, which he described as a double fusion, front and back, "which is about as extensive surgery as you can do" (Employee's Exhibit D, p.14). Dr. Russell opined that considering the amount of scarring and spasm in the back with essentially no motion and chronic pain, plus the loss of one third of the function of the left shoulder, and that the employee still had carpal tunnel, he felt the employee was permanently and totally disabled.

Mr. England was the only vocational expert to testify. Unfortunately, Mr. England saw the employee some three

weeks post the second back surgery, but upon learning of the surgery waited for some seven months to review additional medical records before issuing his report. The primary problems Mr. England noted at that time were the back, the shoulder and the carpal tunnel. Employee stated that he had problems sleeping, waking once or twice a night because of the pain, and getting maybe five hours of sleep a night. He would spend approximately half of the day reclining to try to relieve the pain. About the only physical activity he would do is if the weather was nice, he would try to walk a little outside. Based on his appearance, obvious discomfort, tired look, and having to spend so much of the day reclining, Mr. England was unaware of a job employee would be able to handle.

When asked if the back injury of November 2001 would in and of itself render the employee permanently and totally disabled, Mr. England stated that while the hands were a further limiting factor, if the back was as bad as described, causing problems with sleeping and having to recline periodically during the day, then the back would probably disable the employee regardless of any problems with the hands.

Although Mr. England saw the employee relatively soon after the second back surgery, it is worth noting he did review later medical records and waited for several months prior to issuing his report. It is also significant that the employee's condition has not changed significantly since he saw Mr. England. He still has difficulty sleeping, has to recline frequently during the day, still has considerable pain in his back, essentially performs no physical activity and feels he is worse than before the surgery.

While both Dr. Russell and Mr. England mention the bilateral carpal tunnel syndrome, it is worth noting that although he did experience complaints and symptoms from the diagnosis in 1997 up to the November 26, 2001, injury, he did not lose any time, was not unable to perform the duties of his hand-intensive job (indeed during the summer just prior to the accident he was working up to 80 hours a week performing hand intensive duties), nor did he ask for any accommodations at work because of his hands. While the hands may have been as Mr. England described a "further limiting factor," they did not seem to pose any problems, with respect to performing his job duties.

Considering the significant permanent restrictions imposed by Dr. Rodgers, the testimony of the Employee, as well as Dr. Russell and Mr. England, I conclude the evidence warrants a finding that the employee is permanently and totally disabled as the result of the injuries and multiple surgeries resulting from the work related accident of November 26, 2001, alone.

Employer/Insurer is hereby ordered to pay employee permanent total disability benefits in the amount \$409.33 a week beginning March 30, 2005, and continuing for so long as the employee remains permanently and totally disabled.

Second Injury Fund Liability

Since the employee is found to be permanently and totally disabled as the result of the last injury alone, the Second Injury Fund has no liability.

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CONCLUSION

In summary, the employee has met his burden of proving that the second back surgery was a result of the work related injury of November 26, 2001. Employer/Insurer is ordered to pay to employee \$68,881.35 for the medical expenses incurred as a result of that surgery and treatment; TTD benefits in the net amount of \$8,770.98 (\$18,653.58 – prior advance of \$9,882.60) and to pay permanent total disability benefits in the amount of \$409.33 a week beginning March 30, 2005, and continuing for so long as the Employee remains permanently and totally disabled. The SIF has no liability. Employee's attorney requests and is awarded a 25% lien on all benefits awarded.

Date: _____

Made by: _____

Ronald F. Harris
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Acting Director
Division of Workers' Compensation