

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

Injury No.: 02-129044

Employee: Joseph Becherer  
Employer: David Sherman Corporation  
Insurer: Clarendon National Insurance  
c/o North American Risk  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: September 16, 2002  
Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 26, 2006. The award and decision of Administrative Law Judge Suzette Carlisle, issued July 26, 2006, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 3<sup>rd</sup> day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Joseph Becherer

Injury No.: 02-129044

Dependents:	N/A	Before the
Employer:	David Sherman Corporation	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	Clarendon National Insurance c/o North American Risk	Department of Labor and Industrial
Hearing Date:	April 12, 2006	Relations of Missouri
		Jefferson City, Missouri
		Checked by: SC:tr

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: September 16, 2002.
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
While using a pipe wrench, Employee applied pressure to release plumbing and felt a burning sensation in his right groin.
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: Right groin and aggravation of pre-existing psychiatric condition.
14. Nature and extent of any permanent disability: 20% body as a whole for the right groin injury, 4% body as a whole for psychiatric injury.
15. Compensation paid to-date for temporary disability: \$29,055.24.
16. Value necessary medical aid paid to date by employer/insurer? \$27,948.70.

Employee:	Joseph Becherer	Injury No.:	02-129044
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17. Value necessary medical aid not furnished by employer/insurer? \$415.00
18. Employee's average weekly wages: \$876.22
19. Weekly compensation rate: \$584.15/\$340.12
20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:  
Unpaid medical bills owed by Employer: \$ 415.00

96 weeks of permanent partial disability from Employer \$32,651.52

22. Second Injury Fund liability: Yes

22 weeks of permanent partial disability from Second Injury Fund \$7,482.64

**TOTAL: \$40, 549.16**

Said payments to begin 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: William K. Meehan.

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

Employee:	Joseph Becherer	Injury No.:	02-129044
Dependents:	N/A	Before the	
Employer:	David Sherman Corporation	<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:	Clarendon National Insurance C/o North American Risk	Checked by:	SC:tr

### **PRELIMINARY MATTERS**

A hearing was held on April 12, 2006 in the Missouri Division of Workers' Compensation St. Louis Office at the request of Joseph Becherer (Claimant) pursuant to Section 287.450. Attorney William K. Meehan represented Claimant. Attorney Loretta Simon represented David Sherman Corporation (Employer), and Clarendon National Insurance Company c/o North American Risk (Insurer). Assistant Attorney General Kareitha Osborne represented the Second Injury Fund (SIF). The record remained open for the deposition testimony of Dr. Sandra Tate, which was received on April 28, 2006, and the record closed on that date. Venue is proper and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

### **STIPULATIONS**

1. On or about September 16, 2002, Claimant, while in the employment of Employer, sustained an accident arising out of and in the course of employment occurring in the City of St. Louis.
2. The Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. The Employer's liability was fully insured by Clarendon National Insurance Company.

4. The Employer had notice of the injury.
5. A Claim for Compensation was filed within the time prescribed by law.

### ISSUES

1. Is Claimant permanently and totally disabled (PTD) or permanently and partially disabled (PPD) following the work injury and if so, to what extent?
2. Is Employer responsible to pay \$1,538.00 in past medical expenses?
3. Is Employer responsible to pay for future medical care for Claimant?
4. Is the SIF responsible to pay Claimant either PTD or PPD benefits, and if so to what degree?

### SUMMARY OF EVIDENCE

Only evidence supporting this award will be summarized. Any objections not expressly ruled on in this award are overruled. Claimant offered Exhibits A-O, which were admitted into evidence without objection. Employer offered Exhibits 1-10. Claimant objected to the admission of Exhibits 7 and 8 under Section 287.215 RSMo 2000. A ruling was reserved on Exhibits 7-8 until the evidence has been reviewed and the issue has been briefed by the parties. The SIF offered no exhibits.

### LIVE TESTIMONY

**James Becherer:** Claimant is 46 years old, married with two children ages 6 and 21 and three stepchildren. Claimant quit school after ninth grade and later obtained a GED at age 18. His wife works the early shift for Employer.

Claimant's early jobs include managing a trailer park, operating a forklift, performing manual jobs, and carpentry. He has no office experience, minimal computer or clerical skills, and he is able to use the Internet after taking a one-day class.

Claimant worked for Employer, an alcohol bottling company, from 1982 until February 2004. After performing plumbing, carpentry, electrical, machine change over and repair work for Employer, Claimant progressed to a maintenance position a few years ago where he climbed ladders, installed 10,000 feet of pipe, crawled, carried items and built offices.

On September 16, 2002, Claimant was forcefully using a pipe wrench to remove plumbing when he injured his right groin. He immediately felt pain. He noticed a lump that evening, reported it the next day to his supervisor, and was sent to the doctor. A short time later, he was referred to Dr. Pruitt who diagnosed a hernia and repaired it with mesh in his right groin area, resulting in a 4-inch long scar. Immediately after surgery, he experienced a burning sensation to the touch. His thigh and abdomen were normal, but the line to his mid thigh was numb. Dr. Pruitt referred him to Dr. Tate who provided a nerve block, which lasted 24 hours. He was referred to Dr. Mackinnon who referred him to Dr. Swarm for pain management. Dr. Swarm prescribed Neurontin, which caused grogginess and difficulty making decisions.

Claimant's right leg became swollen and painful when walking. Dr. Mackinnon performed surgery and opined a nerve may have been damaged but not severed in the location of the hernia. After surgery, Claimant returned to work light duty working from two to six hours a day with extreme pain, difficulty sitting or standing on concrete, and shooting pain without activity. In December 2003, Dr. Swarm increased Claimant to working eight hours a day, which was difficult for him, so the hours were reduced to four a day and he filed for FMLA.

Claimant experienced some relief with rest. Claimant quit working because Employer would not accommodate a six-hour schedule. He was prescribed Oxycontin three times a day, which caused him to be delirious, incoherent, and experience feelings of uselessness. He has taken up to twelve pills a day for pain.

Dr. Mackinnon referred Claimant to Dr. Swarm who prescribed physical therapy and rehabilitation, medication and a TENS unit. Claimant felt he was crippled and unable to work. Dr. Swarm referred Claimant to a psychotherapist, Dr. Zhang, who prescribed Ambien for sleep in February 2004.

In 2006, Dr. Swarm installed a stimulator into Claimant's groin, which provided some relief, but there were side effects such as shocks, jolts with coughing, and discomfort with sitting. The stimulator was later removed.

Claimant currently complained of right groin pain all day, increased with movement, pain in the testicle and abdomen, inflammation in his back and buttocks with excessive lifting. Claimant's pain level is 10 out of 10. Sitting is uncomfortable. Pressing on the brake pedal causes a shooting pain into his groin; he has difficulty sleeping, and frequent urination during the night. To obtain comfort, Claimant wears loose clothing, sleeps nude and avoids elastic bands.

Intercourse is painful and Claimant is unable to achieve orgasm. He increases medication intake at the end of the day. He thinks about the pain every time he moves and is anxious and fearful. On cross-examination, Claimant testified he has not applied for full or part time work and Dr. Liebhaber was incorrect if he said Claimant had.

Claimant testified he is able to do laundry (three loads twice a week), grocery shop, cook (four to five nights per week), clean, and cut the grass with a self-propelled lawn mower. He trims and fertilizes the lawn with a spreader, feeds and walks the dogs, cares for his young son, wakes him and drives him to and from school, karate class, plays ball with him, spends up to 20 hours per week on the internet, and transfers money on-line.

He started receiving social security in 2004. Pain and side effects from medication prevent him from working forty hours a week. Claimant stops taking medication occasionally because of the side effects. He lies around the house to keep the pain down. The pain is excruciating and causes depression. His right thigh and abdomen have gotten worse. He takes Oxycontin, which is expected to cost \$400 to \$500 a month.

On cross-examination, Claimant admitted he missed two of eight pain management sessions, was late to one and left early for another and sought chiropractic treatment for unexplained arm pain after he moved in April 2005. During the move he lifted, built a fence with the help of eight people and experienced a lot of pain afterwards. Claimant unloaded lumber, worked for two days marking and measuring posts, and dug holes. His son mixed concrete for the holes. Claimant worked on his hands and knees to put each tile in separately. Claimant installed a new sink, dishwasher and cabinets. He denied performing any other work on the house and does not remember if he built a wood playhouse before or after September 2002. He admitted working out at the YMCA for some time after the September 2002 injury, lifting 25-pound weights.

On May 9, 2005, Claimant told Dr. Budd, his primary care physician, that moving, lifting, and overhead work such as painting caused him pain.

Claimant hunts deer, rabbit and squirrel five to six times a year for recreation and gets help skinning deer. He takes his son squirrel hunting but walking aggravates the pain. Claimant owns about four deer stands located on out state property. He admitted he may have built one and climbed a ladder to reach it. He enjoys fishing, and lies down on his pontoon boat. He cannot stand, walk, sit in a car, or lay in the grass for long periods. He enjoys fishing 100 miles away where he lies down in his pontoon boat and lives in a hotel during his stay.

Claimant currently owns two vehicles, a 1995 Crown Victoria and a 2004 GMC Yukon, two ATVs for deer hunting which he drives to Mark Twain Lake by trailer, hooked to the back of the Yukon. He owns twenty guns, and he owns two bows.

He also admitted he occasionally tries to perform physical activity and that he loaded lumber into his car to install his father's windows. He may have purchased materials, but denied doing repair work anywhere. His son planned a basement bedroom, filled it with concrete, built walls, and installed a toilet.

Claimant did not remember hiring an attorney, filing a claim, or receiving a settlement for emotional, psychological and psychiatric damage after being grabbed by a supervisor. He does not remember being seen by Dr. Stillings, or taking the MMPI 2test. However he remembered the incident and being afraid of losing his job. Claimant denied any preexisting psychological problems when seen by Dr. Stillings and Dr. Zhang.

Claimant's father had a history of depression, tried to commit suicide and died in December 2004 from prostate cancer. Claimant grieved and became depressed over his father's death. He was close to his wife's stepfather who died in late 2005. Claimant's wife has Crohn's disease but has not had any episodes since September of 2002.

Claimant had right knee surgery in 1992 or 1993, which he settled for \$9,131.00. He had a left wrist injury, which he settled for \$11,000.00. He had an earlier right thigh injury as a child during a sledding accident. Prior to September 16, 2002, Claimant had no physical problems completing his job. He testified his right knee and left wrist are affected by weather and working long hours. He did not have problems doing his job after the sledding accident, the September 2002 injury, or from depression, and he worked aggressively for long hours.

**Tracy Ellen Becherer** has been married to Claimant for nine years and they have one child. Claimant used to be outgoing, energetic, positive, and had no health problems before this injury. Now he forgets things, has no energy, is depressed, talks of leaving, is always sore, cries, takes medication, and he stays in bed and is asleep by 7:00 p.m. They lack intimacy and fight. Claimant does a few things and then is back in his chair. He supervised the building of the fence.

**Craig Allen Trundle** is a private investigator employed by Hyperion Risk, Inc., who holds a bachelor's degree in criminal justice. He has worked as a bouncer, security and in construction and served in law enforcement with the Osage Beach police department.

Insurer retained Mr. Trundle's company on November 1, 2005 to conduct surveillance of Claimant over a three-day period. Mr. Trundle testified that during surveillance the camera operated correctly and the video was clear and accurate depiction of the person he identified in the video to be Claimant.

On November 8, 2005, Mr. Trundle received Claimant's description and location. He arrived at Claimant's home, identified him and began surveillance. One minute and thirty two seconds of film was recorded showing Claimant entering and exiting a vehicle with a young child, bending into the trunk, entering the tool rental center at the Home Depot and driving away.

On November 9, 2005, a 35 minute and 44 second video showed Claimant positioning the lawn sprinkler, driving the young child to school, carrying bags of concrete over his left shoulder and loading them into the trunk three times, performing drive through banking, fueling his car, pushing a wheelbarrow to unload concrete bags with the help of another man, using a garden hoe to break open concrete in the wheelbarrow, adding water while bending over to mix it (up to 60 seconds at a time), and pushing the wheelbarrow inside a building. Mr. Trundle observed Claimant clean and vacuum the car. Claimant bent to wash tools, set down dog dishes, leaned against a fence to talk, drove to pick up the child, walked to the mailbox, carried empty dog food bags outside, kneeled to clean the down spout, and rose without apparent distress. On November 12, 2005, the start of hunting season, Claimant's vehicle and trailer were absent from the residence (Exhibit 7).

On April 3, 2006, two hours and forty-six minutes of video showed Claimant dropped off the young child, lifted and emptied a small wading pool, picked up the young child in his arms, and walked to get mail. On April 4 2006, three hours and forty-one seconds of video show Claimant open the rear car door, bend over the back seat, retrieve items from the trunk and drive a distance before Mr. Trundle reported losing him in traffic (Exhibit 8).

## **Medical Records Review and Deposition Testimony**

### *Physical condition*

**Dr. Don S. Pruitt:** Examined Claimant on 9-25-02 for a hernia injury after he was referred by Barnes Care. The next day, Dr. Pruitt repaired right direct and indirect hernias with mesh, including a surgical note that the ilioinguinal nerve could not be found and was presumed severed. After surgery, Claimant reported burning pain and numbness of the right thigh. Examination revealed a bulge on the right inguinal hernia on October 15, 2002, and Dr. Pruitt recommended additional surgery (Exhibit A). On October 21, 2002, Dr. Pruitt acknowledged a small friable ilioinguinal nerve was inadvertently severed during the procedure, and recommended Claimant see Dr. Cantrell for pain management.

Claimant was referred to **Dr. Sandra Tate**, a board certified physiatrist, who examined him on 10-24-02, 10-31-02, 11-7-02 and 12-3-02, provided two injections to the scar, and kept him off work. At the final examination, Claimant reported pain over the anteromedial thigh a third of the way down the right leg, which interrupted sleep and prevented him from working. However, deer hunting did not aggravate walking. Dr. Tate noted Claimant gave an inconsistent vague history of numbness. Claimant reported pain with contact to the right thigh, however, no discomfort was noted when he was unknowingly touched. Dr. Tate found Claimant had improved and did not have significant neuropathy. She noted Claimant had inconsistent symptoms and few objective findings (Exhibit 1). Dr. Tate returned Claimant to work with a 30 pound lifting restriction and no squatting for three months, when full recovery was expected. In deposition, Dr. Tate offered no current opinion regarding Claimant's PPD or PTD status (Exhibit 10).

**Dr. Susan Mackinnon**, aplastic and reconstructive surgeon, examined Claimant on November 22, 2002 and he complained of electric shock pain to the right groin and anterior right thigh to ½ of the proximal thigh increased with tapping and decreased sensation. She recommended conservative management, and referred him for pain management with the possibility of more surgery if Claimant did not improve. Dr. MacKinnon performed a neurectomy on July 2, 2003 of the genitofemoral and ilioinguinal nerves and released him to pain management on July 25, 2003 with complaints of increased pain during the day (Exhibit F).

**Dr. Robert A. Swarm**, a board certified anesthesiologist and pain medicine specialist, examined Claimant November 26, 2002 with complaints of an electric shock sensation, sharp abdominal pains, right leg numbness with burning, tingling, feelings of depression, poor sleep habits, fatigue, crying, anxiety, and decreased sex drive. Examination revealed Claimant moved and walked easily but a slight right leg limp was observed, and tenderness with pressure to medial thigh. Medication was adjusted and Claimant was returned to work with light duty restrictions. Dr. Swarm examined Claimant on the following dates from 2002 to 2005:

- December 12, 2002 (Claimant reported increased pain with activity),
- January 13, 2003 (right nerve block injection),
- January 16, 2003 (second right nerve block),
- February 20, 2003 (Claimant worked 10 hour shifts 4 days a week - third nerve block),
- April 21, 2003 (Second surgery was recommended by several doctors and Claimant requested limited work release to five hours a day),
- June 24, 2003 (low back pain reported),
- July 10, 2003,
- August 6, 2003 (Dr. Swarm found Claimant to be totally disabled),
- October 8, 2003 (significant improvement of groin and anterior thigh pain, but testicle pain persists- return to work four hours per day light duty),
- November 4, 2003(continued improvement),
- December 5, 2003 (depression somewhat improved),

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- December 16, 2003 (escalating pain, walking with a limp-work restrictions – 6 hours per day, no lifting greater than 25 lbs pounds occasionally and no squatting, bending),
- January 16, 2004 (off work – no accommodations available),
- March 5, 2004 (severe right groin, testicle and low back pain no mass found),
- March 22, 2004 (Claimant requested letter stating he can only work part-time after Dr. Crandall opined he was fit for full duty),
- June 8, 2004 (Claimant is approved for social security and resigned from Employer, improved emotional state),
- July 28, 2004, (claimant requests a hunting exemption, approved for social security, resigned job),
- August 30, 2004, (increased activity while caring for son this summer caused Claimant increased pain),
- October 4, 2004 – (pain 3/10, improved ability to exercise, sleep, avoids bending, lifting),
- January 24, 2005(increased abdominal, back, testicle, thigh pain with activity and touch), February 23, 2005,(improving back pain, pain, aggravated with bending, lifting),
- May 31, 2005 ( pain right sided pain in groin, testicle, abdomen, thigh and back – activity with moving caused severe pain),
- September 27, 2005 (no show, rescheduled for November 2005, but no records are in evidence).

Dr. Swarm testified that he relied on Claimant’s subjective complaints and physical examination to determine his condition and did not review reports made by Dr. Cantrell, Dr. Liebhaber, Mr. England, the Functional Capacity Evaluation (FCE) or Claimant’s deposition in rendering an opinion (Exhibit J-54).

Dr. Russell Cantrell, a board certified physiatrist in physical medicine and rehabilitation, examined Claimant at the request of the Employer on February 5, 2004. Examination revealed right abdomen pain with deep pressure, right proximal thigh tingling with pinprick testing, marked hamstring tightness, and pain with resisted right hip flexion. He found inconsistencies between Claimant’s complaints and the September 2002 work injury. He opined Claimant’s pain was due to myofascial tightness based on symptoms reproduced with resisted hip flexion and abduction /adduction. He found no objective findings connecting Claimant’s subjective complaints to the ilioinguinal and iliohypogastric neuropathies. The back complaints were not found to be related to the September 2002 injury or treatment, and no deviation was found in Claimant’s gait.

Dr. Cantrell found Claimant’s “waxing and waning” symptoms of pain inconsistent with typical neuropathic conditions, which persist despite level of activity. No objective findings correlated with Claimant’s subjective complaints of neuropathy. He reviewed Employer’s inspector duties, ordered a FCE; found Claimant had reached MMI, did not require a spinal cord stimulator, and released him to work full time as an inspector on February 5, 2004 (Exhibit 3).

FCE results show Claimant failed 6 of 14 validity criteria, which indicate sub maximal effort. His heart rate did not increase at least 20 beats per minute above resting during the testing, which would have demonstrated good effort. Claimant may have been self-limiting, which may indicate symptom magnification, organic or non-organic causes, and it was recommended the doctor consider this in making a final assessment. Claimant was found to be employable on a full-time basis in at least the medium work demand level, which covered most but not all of his maintenance duties with Employer (Exhibit 2). Based upon these results, a review of Employer’s job description for inspectors, multiple medical records, the FCE and a detailed history, Dr. Cantrell opined Claimant could resume regular duty without restrictions on May 17, 2004 (Exhibit3-3).

Dr. Harvey Liebhaber, a non board certified retired physician, practicing internal medicine part-time, examined Claimant at the request of his attorney on August 22, 2005 and found him to be 54 % PPD for the groin injury which included a conventional and pain related impairment rating (Exhibit O). During deposition, Dr. Liebhaber testified he changed his opinion after reviewing additional records from Dr. Swarm and found Claimant to be totally disabled. He did not review reports by James England, Donna Abrams, Dr. Zhang, Claimant’s deposition, or medical depositions in reaching his conclusion (Exhibit I-21-22).

Mr. James M. England Jr, a rehabilitation counselor, evaluated Claimant at his attorney’s request on November 4, 2004 to determine his employability. He reviewed reports from Drs. Budd III., McCullough, Pruitt, Tate, Mackinnon, Swarm, Pennnell, Zhang, and Cantrell, and obtained background on Claimant’s family, social, and work history.

Claimant complained of spending one third of the day lying down to control pain and becoming depressed and non-functional when he is over active.

Claimant scored 8<sup>th</sup> grade level on the Wide Range Achievement for word recognition, and post high school level on the Adult Basic Learning – Level 3 test in reading. Mr. England concluded Claimant's academics do not prevent him from seeking a variety of jobs; however, his ability to compete in the open labor market depends on which doctors' level of functioning you chose. Dr. Cantrell found Claimant able to perform light duty work. Dr. Swarm found he could not perform regular work activities based upon his complaints (Exhibit M-36).

Ms. Donna Kisslinger Abrams, a vocational counselor and a nationally certified rehabilitation counselor, interviewed Claimant at Employer's request on December 5, 2005. She testified that she obtained information about Claimant's education and work, and medical opinions to develop a profile of his transferable skills, matched skills with the Dictionary of Occupational Titles, and found Claimant's skills met or exceed job classification requirements. Using this, she found jobs that required his education and work history, and determined earning potential for those jobs.

She determined Claimant to be employable based on education, aptitude, and placeability and considering the needs of potential employers in the area that may consider hiring Claimant. Claimant has demonstrated the ability to learn new tasks with on-the-job training. His level of computer experience would not be a hindrance in the job market. Claimant's prior responsibilities show a working knowledge of building construction, equipment and machinery, production and processing, and customer and personal service. She conceded the maintenance job may have been too difficult for him. Ms. Abrams concluded Claimant to be able to access employment in the open labor market in hand tool repair, quality control, hotel desk clerk, security officer, outside courier, and coin machine collector positions among others (Exhibit-2).

### ***Psychological Condition***

Dr. Beverly Field, Ph.D. in clinical psychology, met with Claimant at Dr. Swarm's request for psychological evaluation for chronic right groin pain on June 17, 2004, which was his last day of employment because he ran out of FMLA. Claimant attempted to return to work three times, but could not due to pain. His days were spent with his son, swimming, going to the store, playing miniature golf, driving his son to karate class, and doing household and yard work. He performs these activities much slower than he used to. Dr. Field recommended eight pain management sessions. Claimant missed two of eight sessions, arrived late to one and left early from another.

Dr. Swarm referred Claimant to **Dr. Peter Zhang, Ph.D.**, a licensed psychiatrist, who is not board certified because he failed one of the required tests. He examined Claimant January 4, 2004 with a history of sadness, hopelessness, helplessness, social withdrawal, lack of interest, poor appetite, passiveness and death wishes, but he denied pre-existing depression.

Based upon Dr. Swarm's records, and his own interview and examination, Dr. Zhang diagnosed major depression recurrent episode, moderate severity, without reviewing medical records from Doctors Pruitt, Tate, Mackinnon, Field, Stillings, Liebhaber, or medical depositions. During deposition, Dr. Zhang testified he did not administer the MMPI-2 test but opined Claimant needed additional medical treatment for depression without commenting on whether the treatment was needed as a result of the September 2002 work injury (Exhibit K 1-45).

**Dr. Adam Sky**, a licensed board certified psychiatrist, evaluated Claimant at his attorney's request on February 24, 2006 and rated Claimant 75% PPD of the body as a whole for depression caused by the September 2002 work injury. He testified during deposition that he based his opinion on Claimant's history and Dr. Zhang's report. Dr. Sky did not perform the MMPI-2 test, review medical records from Doctors Stillings, Pruitt, Tate, Mackinnon, Field, Cantrell, Liebhaber, Ms. Abrams, FCE, or Claimant's deposition in reaching his conclusion (Exhibit L-17).

**Dr. Wayne Stillings**, a board certified physician and psychiatrist, examined Claimant at Employer's request on February 16, 2006 and administered the Structured Inventory of Malingering Symptomatology test (SIMS), which showed Claimant over reported depressive symptoms. MMPI 2 test results show Claimant exaggerated responses, which is consistent with exaggerating reported symptoms. Eight of ten scales examined were elevated, indicating chronic psychological maladjustment and exaggeration (Exhibit 5-2).

After a review of twenty medical records, depositions, tests, and in depth interview of Claimant, Dr. Stillings concluded Claimant has preexisting dependent and depressive personality traits, which were aggravated by the September 16, 2002 work injury and subsequent surgical procedures. He found Claimant had reached MMI, suggested he be weaned from the narcotic medication, which contributed to his depressed condition, and rated him 3 to 4 % PPD for the psychiatric injury.

However, he did not review his own record of diagnosed paranoid personality disorder in 1988, which he determined was not related to Claimant's 1987 alleged work injury (Exhibit G).

### FINDINGS OF FACT AND RULING OF LAW

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

#### **Issues related to permanent total disability**

In post hearing briefs, Claimant contends that he is PTD based upon the opinion of four doctors and a vocational expert. Employer contends Claimant is not PTD because he can perform many tasks, which demonstrate his ability to work. SIF contends Claimant is not PTD due to a combination of his primary and pre-existing disabilities.

The Employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury Fund liability. *Meilves v. Morris*, 422, S.W. 2d 335, 339 (Mo. 1968). To determine if a claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition. *Massey v. Missouri Butcher & Café Supply*, 890 S.W. 2d 761, 763 (Mo. App. E.D. 1995). Section 287.020.7 RSMo. defines total disability as the inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. I find Dr. Cantrell's opinion to be more credible than either Dr. Swarm or Dr. Liebhaber regarding Claimant's ability to work.

Dr. Cantrell, a board certified rehabilitation physician, detailed Claimant's history, reviewed medical reports available through January 2004, performed a detailed examination and ordered a FCE. He also provided a well-reasoned explanation about the source of Claimant's symptoms and noted inconsistencies between Claimant's September 2002 work injury and his subjective complaints. Doctors Pruitt, Tate, Stillings and the FCE results also found inconsistencies between Claimant's symptoms and work injury.

Dr. Swarm did not review medical records from other physicians; instead he relied on Claimant's subjective complaints and physical examination to determine his ability to work. In 2003, Claimant was working full time and asked Dr. Swarm to reduce his hours to five per day. Dr. Swarm complied with Claimant's request for an off work slip after Dr. Cantrell released him to full duty as an inspector. Few clinical findings were made during the course of treatment. I find Dr. Swarm's opinion to be based primarily upon Claimant's symptoms.

Dr. Liebhaber is not board certified and he relied on Dr. Swarm's records and a physical examination to conclude Claimant to be 54% PPD and later 100% disabled. The supplemental report is not in evidence. The AMA impairment guidelines used by Dr. Liebhaber are different from the permanent partial disability opinions intended in workers' compensation cases, although Dr. Liebhaber uses AMA guidelines and PPD standards interchangeably. Dr. Liebhaber's conventional and pain related conclusions are not consistent with Section 287.190 RSMo. requirements.

I find Ms. Abrams report to be more credible than Mr. England's regarding Claimant's ability to compete in the open labor market. Ms. Abrams reviewed the medical records, depositions, history and performed a through examination before concluding Claimant had a wide range of occupational opportunities. The occupations included working in hand tool repair, quality control, tool maintenance worker, outside delivery, hotel desk clerk, or security guard to name a few. Within each classification, more than one job title may be found. She also performed a projected growth or loss in job opportunities through 2010 for each classification. Claimant tested with the equivalent of a high school education in reasoning and mathematical development and language usage, and in the skilled level for learning a new job. At age 46, Claimant is considered a younger worker in a workforce that is expected to see an increase in the number of workers between the ages of 48 and 66 in the future.

Mr. England did not review the FCE results, Dr. Cantrell's supplemental report, or Dr. Sky or Liebhaber's reports. He was not aware of many tasks performed by Claimant on a daily basis. Mr. England concluded that academics would not be an obstacle to Claimant's employment but his ability to function depends on whether you believe Dr. Swarm or Dr. Cantrell's assessment.

Claimant objected to the admission of Exhibits 7 and 8, which contain 2005-2006 surveillance of Claimant, as self-serving, duplicative and not produced in a timely manner based on Section 287.215 RSMo. Employer contends the surveillance tapes were produced within the time allowed in Section 287.215 RSMo.

Section 287.215 RSMo provides that "no statement by the injured employee shall be admissible in evidence used or referred to in any manner at any hearing ... unless a copy is furnished to the employee or their attorney, within fifteen days after written request for it by the injured employee directed to the employer ... by certified mail."

Claimant's attorney requested a copy of the 2005 surveillance DVDs on March 30, 2006 and they were produced at

hearing on April 12, 2006 (Exhibit 9). I find Employer complied with Section 287.215 RSMo by furnishing the videotapes and DVDs contained in Exhibits 7 and 8. Claimant's objection is overruled and Exhibits 7 and 8 are admitted. The DVDs provide additional evidence of Claimant's ability to walk without limping, lift bags of concrete and lumber, kneel to clean downspouts, lift a small pool and empty it, carry his son and dog, and push a wheel barrow containing concrete without apparent distress.

In *Keener v. Wilcox Electric, Inc.*, 884 S.W. 2d 744, 747 (Mo. App. W.D. 1994), the court found the appellant's ability to shop, walk, perform housework, run errands, drive, go out for dinner, travel, visit the hairdresser and clean her car were indications she was not PTD although she had not returned to work. I do not find Claimant credible on this point. It is inconsistent that he can cook, do laundry, clean the house, care for his young son (full time in the summer), care for pets, drive hundreds of miles to hunt, run errands, shop, ride an ATV, paint, lay tile, build fences, install sinks, cabinets, carry lumber and bags of concrete, kneel, clean downspouts, bend at the waist and rise with no apparent distress, but he cannot work within the guidelines set by the FCE and Ms. Abrams. He has not attempted to find work within those standards.

I do find Claimant to be able to compete in the open labor market for these reasons.

### **Issues relating to permanent partial disability**

#### ***Employer***

In post hearing briefs, Employer contends Claimant sustained PPD of 17.5% of the body as a whole from the physical and mental work injury on September 16, 2002.

A permanent partial disability award is intended to cover an Employee's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo. App. 1991). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo. App. 1983) (overruled on other grounds).

I find the FCE results, Dr. Cantrell and Ms. Abrams opinions more credible than Dr. Liebhaber. The FCE limits Claimant's ability to work to the medium demand level since the September 2002 work injury. Ms. Abrams conceded Claimant could not perform at his pre-September 2002 level of work but was still able to work. Dr. Cantrell found Claimant sustained 5% PPD of the body as a whole for the groin injury.

I find Dr. Stillings psychological opinion more credible than Dr. Zhangs' or Dr. Skys'. Although Dr. Zhang treated Claimant, he did not provide a causation opinion linking the medical condition to the September 2002 work injury. Dr. Zhang is not board certified, and he based his opinion on Dr. Swarm's incomplete records and Claimant's subjective complaints. He did not perform objective tests or review other medical records, depositions or the 2005-2006 surveillance DVDs or tapes.

Dr. Stillings administered objective testing, reviewed the medical records and depositions, and examined Claimant, including a detailed history. Dr. Stillings found Claimant sustained 3 to 4% PPD of the body as a whole for aggravation of the pre-existing condition due to the September 2002 work injury. Based on the evidence, I find Claimant sustained 20% PPD of the body as a whole for the hernia and related conditions, and 4% PPD of the body as a whole for the aggravation of the pre-existing mental condition.

#### ***Second Injury Fund***

The SIF denied liability as no expert testimony was produced to show the primary injury and pre-existing disabilities combined to produce a substantially greater overall disability than their simple sum.

Once a determination is made that an Employee has been permanently and partially disabled, the inquiry turns to what degree, if any, an individual is permanently partially disabled for purposes of SIF liability. *Leutzing v. Trasurer of the state of Missouri*, 895 S.W.2d 591 (Mo. App. 1995). Section 287.220.1 RSMO., provides the SIF is implicated in all cases of permanent partial disability where there has been pre-existing permanent partial disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and pre-existing conditions must produce additional disability greater than the last injury standing alone.

Medical records contain the following pre-existing conditions sustained by Claimant prior to the September 2002 work injury; 1) A sledding accident to the right thigh during childhood, 2) Left hernia repair - 1978, 3) Psychiatric condition - 1987, 4) Right knee debridement - 1998, and 5) Left wrist tear of the midcarpal capsule and scapholunate ligament- 2001 (Exhibit G).

None of the primary treating physicians found Claimant had pre-existing disability which caused a hindrance or obstacle to his employment. Division of Workers' Compensation records show Claimant settled the psychiatric condition for

\$200.00, the right knee injury under injury number 98-163375 for 20% at the 160 week level on July 26, 1999, and the left wrist injury under injury number 00-175904 for 20% at the 175 week level on November 15, 2001 and the pre-existing right knee injury with the SIF for 20% PPD at the 160 week level on February 6, 2002 (Exhibit G).

Testimony of the claimant, or other lay witnesses, as to a fact within the realm of lay understanding can constitute substantial evidence of the nature, cause and extent of the disability, especially when taken in connection with or where supported by some medical evidence. *Fischer v. Archdiocese of St. Louis*, 793 S.W. 2d 195, 198 (Mo. App. 1990). During the hearing, Claimant testified the right knee and wrist cause discomfort due to weather and lifting. I find competent and substantial evidence to support Claimant's testimony on this point.

Although the SIF is not a party to the agreement between Claimant and Employer, I find Claimant sustained 20% PPD of the right knee from the December 29, 1998 injury and 20% of the left wrist for the August 21, 2000 wrist injury based upon the treatment records and Claimant's testimony. I find the pre-existing injuries to be a hindrance or obstacle to Claimant's employment or reemployment and when combined with the primary injury, create a synergistic effect that is greater than their simple sum. Applying a 13.5% loading factor to the primary and pre-existing disability, I find Claimant is entitled to 22 weeks of PPD from the SIF. I do not find the earlier psychiatric condition or hernia repair to be a hindrance or obstacle to Claimant's employment or reemployment.

### **Issues related to past medical expenses**

Claimant contends that Employer is liable for \$1,583.00 in past medical expenses for treatment and prescriptions provided by Dr. Zhang for Claimant's depression. Employer contends Claimant was not entitled to reimbursement of past medical expenses because Claimant had reached maximum medical improvement (MMI) as of February 5, 2004. Dr. Cantrell recommended no additional treatment.

Section 287.140.1 provides that ... the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

Claimant submitted a bill for a remaining balance owed to Dr. Zhang for \$29.50 for services provided February 11, 2004. The original bill was \$110.00 and \$80.00 has been paid (\$55.00 by Claimant and \$25.50 by primary insurance) (Exhibit D).

Exhibit E contains a receipt for \$250.00 paid by Claimant to Dr. Zhang on January 4, 2004. Dr. Zhang testified that \$250.00 is his initial office fee for one hour and he first examined Claimant on January 4, 2004. Exhibit E also contains a \$30.00 receipt paid by Claimant for prescriptions ordered by Dr. Zhang on January 15, 2004 and a receipt for a \$25.00 payment made by Claimant on February 15, 2004 for medication prescribed by Dr. Zhang.

In post-hearing briefs, Employer acknowledged Claimant received authorized treatment until his examination by Dr. Cantrell on February 5, 2004. However, Dr. Cantrell addressed Claimant's physical, not psychiatric recovery. Dr. Stillings placed Claimant at MMI for his psychiatric condition related to the September 2002 work injury on February 16, 2004. As of February 16, 2004, competent and substantial evidence shows Claimant had attained MMI for both physical and mental effects from the September 2002 work injury.

Claimant has not met his burden to show that the medical care provided by Dr. Zhang after February 16, 2004 was reasonable and necessary to cure and relieve him from the effects of the September 2002 work injury. Claimant had the right to continue to receive treatment on his own and at his own expense after February 16, 2004. However, I do not find Employer liable for medical expenses incurred after February 16, 2004. I find Employer liable for unpaid medical expenses for treatment provided by Dr. Zhang through February 16, 2004, totaling \$415.00.

### **Issues related to future medical care**

Claimant seeks future medical treatment for pain management and depression based upon the opinions of Doctors Swarm, Zhang, Sky and Liebhaber. Employer contends no additional treatment is needed to cure and relieve Claimant from the effects of the September 2002 work injury.

Under the Missouri Workers' Compensation Act, employers are to furnish compensation ... for personal injury of employees due to accidents arising out of and in the course of employment... § 287.140.1. *Supra*.

Where future medical benefits are to be awarded, the medical care must of necessity flow from the accident, via evidence of a "medical causal relationship" between the injury from the condition and the compensable injury, before the employer is to be responsible. *Modlin v. Sun Mark, Inc.* 699 S.W. 2d 5, 7 (Mo.App. 1985). It is sufficient for the claimant to show his need for additional medical care and treatment by a reasonable probability. *Rana v. Landstar TLC*, 46 S.W. 3d 614, 622 (Mo. App. W.D. 2001). Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt. *Id.*

Claimant has not met his burden to show that the need for future medical benefits is related to the September 2002 work injury. I find Dr. Cantrell's opinion to be more credible than Dr. Swarm's. Dr. Cantrell opined that Claimant needed no further treatment for physical injuries sustained from the September 2002 work injury, and his symptoms were more consistent with myofascial tightness which is not related to the work injury. He opined that treating Claimant's pain complaints may lead to protracted treatment and less than adequate results. Dr. Cantrell is the only medical expert in this case that reviewed the relevant medical records including ordering a FCE before reaching a conclusion. The FCE results show sub maximal effort and exertion by Claimant during testing. Doctors Pruitt, Tate and Stillings also found inconsistencies between Claimant's symptoms and the September 2002 work injury.

Dr. Swarm's opinion was not based upon a complete understanding of Claimant's activities or abilities after the September 2002 work injury. Dr. Swarm did not review the FCE or records of Mr. England, Dr. Cantrell or Dr. Liebhaber, although he acknowledged this may have been helpful in assessing Claimant's condition. Dr. Swarm based Claimant's treatment on his subjective complaints and physical examination. The examinations contained minimal findings. I do not find Dr. Swarm's opinion credible. Dr. Swarm took Claimant off work at his request after Dr. Cantrell released him to full duty. The record does not indicate a change of condition to explain Dr. Swarm's termination of his four hour per day work release. Claimant testified that Dr. Swarm inserted a stimulator into Claimant's groin earlier this year; however, no evidence was presented connecting the need for the stimulator to the September 2002 work injury.

Dr. Stillings, a board certified psychiatrist, performed the MMPI-2 test, obtained a mental status examination, a detailed history and reviewed medical records and depositions from twenty-five providers before reaching the conclusion that Claimant reached MMI for the September 2002 work injury and specifically stated no further treatment was needed. He recommended "weaning" Claimant from narcotic pain medications, which contributed to his depression and impaired cognitive ability. Test results reflect Claimant exaggerated in eight of ten areas on the MMPI -2 test, making it difficult to assess his condition or future needs.

Future care should not be denied simply because a claimant may have achieved maximum medical improvement, a finding not inconsistent with the need for future medical treatment. *Rana* at 624. However, Dr. Zhang is not board certified and relied on Dr. Swarm's incomplete medical records and Claimant's history. He only reviewed Dr. Swarm's progress notes, not the complete record. Dr. Zhang did not review records from any of the doctors related to this case. He did not perform any objective tests. Dr. Zhang was also unaware of other stressors in Claimant's life.

For these reasons, I find that Claimant has not met his burden to show the need for additional medical treatment is due to the injury he sustained at work on September 16, 2002; therefore, his request for future medical treatment is denied.

### **CONCLUSION**

In summary, the Claimant is not permanently and totally disabled as a result of the September 16, 2002 work related injury. Claimant is awarded 20% permanent partial disability of the body as a whole for the groin injury, 4% permanent partial psychiatric disability of the body as a whole, unpaid medical benefits totaling \$415.00, and \$7,482.64 from the Second Injury Fund. No future medical benefits are awarded. This award is subject to a lien of 25% in favor of Attorney William K. Meehan for legal services rendered.

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

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

Suzette Carlisle  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

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