

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

Injury No.: 00-076098

Employee: Charles Roy Bennett
Employer: Gardner Denver, Inc.
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: June 27, 2000

Place and County of Accident: Sedalia, Pettis County, 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 September 19, 2006. The award and decision of Administrative Law Judge Carl Mueller, issued September 19, 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 15th day of June 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Charles Roy Bennett

Injury No: 00-076098

Dependents: N/A
Employer: Gardner Denver, Inc.
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Insurer: Self-Insured
Hearing Date: July 18, 2006
Briefs Filed: August 1, 2006
Checked by: RCM/rm

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: June 27, 2000
5. State location where accident occurred or occupational disease was contracted: Sedalia, Pettis County, 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 fell while performing routine maintenance on a horizontal milling machine.
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: Body as a whole
14. Nature and extent of any permanent disability: Seventeen and one-half percent (17½%) whole body disability.
15. Compensation paid to-date for temporary disability: The Employer paid twenty-two and four-sevenths (22 4/7s) weeks of temporary total disability (TTD) compensation from June 28, 2000 to December 3, 2000, at a rate of \$578.48 per week for compensation totaling \$12,993.53.
16. Value necessary medical aid paid to date by employer/insurer? \$57,255.89
17. Value necessary medical aid not furnished by employer/insurer? \$0.00
18. Employee's average weekly wages: \$867.72
19. Weekly compensation rate: \$578.48 for TTD and \$303.01 for PPD
20. Method wages computation: By stipulation.
21. Amount of compensation payable:

Permanent Partial Disability
17.5 % whole body disability (.175 x 400 weeks) x \$303.01/week..... \$21,210.70
22. Second Injury Fund liability: None.
23. Future requirements awarded: None

Said payments to begin as of date of this award 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 twenty-five percent (25%) lien totaling \$5,302.68 in favor of Boyd and Kenter, Attorneys, for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Charles Roy Bennett Injury No: 00-076098
Dependents: N/A
Employer: Gardner Denver, Inc.
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Insurer: Self-Insured
Hearing Date: July 18, 2006
Briefs Filed: August 1, 2006 Checked by: RCM/rm

On July 18, 2006 the Employee and Employer appeared for final hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110 (R.S.Mo.). The Employee, Charles Bennett, appeared in person and with his counsel J. R. Boyd. The Employer appeared through attorney Brian Fowler; in addition, Mr. Randy Lee appeared as corporate representative. The State Treasurer as Custodian of the Second Injury Fund ("Fund") appeared through attorney Maureen Shine. The Court heard three claims together involving Mr. Bennett and this Award deals with the first claim for a June 27, 2000 injury. The primary issues the parties requested the Court to determine are whether Mr. Bennett sustained any permanent disability and whether he is entitled to additional medical care. For the reasons noted below, I find that Mr. Bennett sustained seventeen and one-half percent (17½%) whole body disability. However, I find that he did not sustain his burden of proof regarding his future medical claim.

STIPULATIONS

The parties stipulated that:

1. On or about June 27, 2000 Gardner Denver, Inc. was an employer operating subject to Missouri's Workers' Compensation law with its liability fully self-insured;
2. Mr. Bennett was its employee working subject to the law in Sedalia, Pettis County,

Missouri;

3. Mr. Bennett sustained an accident, arising out of and in the course of employment on June 27, 2000;
4. Mr. Bennett complied with the notice requirement of §287.420;
5. Mr. Bennett filed his claim within the time allowed by law;
6. Gardner Denver provided Claimant with medical care costing \$57,255.89; and,
7. Gardner Denver paid Mr. Bennett twenty-two and four-sevenths (22 4/7s) weeks of temporary total disability (TTD) compensation from June 28, 2000 to December 3, 2000, at a rate of \$578.48 per week for compensation totaling \$12,993.53.

ISSUES

The parties requested the Division to determine:

1. Whether Mr. Bennett suffered any disability and, if so, the nature and extent of his disability? And,
2. Whether Gardner Denver must provide Mr. Bennett with additional medical care?

FINDINGS OF FACT

Mr. Bennett testified in his own behalf and presented multiple exhibits for this claim (as well as the two other claims tried) consisting of Exhibits A through CCCC. The exhibits all were admitted into evidence. Claimant also called Mr. Carey Walk to testify. The Employer offered Exhibits 1 through 17 (after having withdrawn Exhibits 4 and 7), all of which also were admitted without objection. In addition, the Employer called Randy Joseph Lee to testify regarding Exhibit 16, a video depicting the activity Mr. Bennett alleges injured him with reference to his alleged injury on January 28, 2003 addressed by the Award on Injury Number 03-013474. Finally, the Second Injury Fund offered a rating report from Dr. Koprivica dated April 18, 2002 as its sole exhibit. Based on a review of the exhibits and the testimony of the witnesses I make the following findings.

Charles Roy Bennett (Employee) is a 48-year-old male who lives with his wife in Sedalia Missouri. He received a High School degree from Smith Cotton High School in 1977. He attended Linn Technical College and earned an associate's degree in machine tool technology. He took electronics courses at State Fair College as well as with Gardner Denver. In addition, Mr. Bennett completed a 12,000-hour certification course at Gardner Denver over a five-year period, which familiarized him with the machine tools, which Gardner Denver used in its factory. With regard to his work history, he was employed for two years with Westinghouse as a welder, using an arc as well as a mig welder, which he described as heavy exertion level work. He was next employed with Ohio Rubber for one year as a die maker and repair, making rubber industrial hose for industry and for heated air transfer and for ductwork for the auto industry. He described this work as skilled labor, medium exertion. He was next employed at Goshen Mold for a year and a half as a mold maker making molds for the rubber industry, which he described as skilled work at medium exertion level. He next worked for Interstate Studios in 1982 as a maintenance technician on color printers which processed film for schools, which included maintenance on all the machines. He described this work as skilled at the light exertion level.

His final employer was Gardner Denver where he started on February 1, 1984 as a Grade 3 Machine Operator, in which he operated and set up multiple machines, which produced industrial air compressors for heavy industry. His duties were to keep the machine clean and included making parts using measuring instruments, calipers, and depth gauges. This was classified as skilled work at the heavy exertion level. He worked 40 to 60 hours per week for the last 15 years of his employment, which ended March 25, 2003. He eventually progressed into maintenance, with the classification of Maintenance General Grade 6. After he completed 12,000 hours of

training, he was promoted to Computer Numerical Control (CNC) Technician in 1987 and worked in that position until 2003. His duties in that position were to trouble shoot electronic components of machine tools and make sure the machine tools came within certain specifications. He used electronic monitoring and leveling devices, laser alignment, and laptops to control the computers. He filled out a written report every day after finishing with each machine. He classified this work as highly skilled, heavy exertion level. He classified this work as highly skilled, heavy exertion level. Mr. Bennett clearly has developed great expertise and experience in repair and knowledge concerning machinery. He also testified to various computer skills he has developed.

Although Gardner Denver stipulated that Mr. Bennett, on or about June 27, 2000, sustained a compensable accident, he nonetheless testified in some detail about the accident. On June 27, 2000, Mr. Bennett fell inside machine number two hundred fifteen (215) which is a horizontal boring machine that “buffs” parts. As he was attempting to repair the 2-alarm, he walked into the machine, stepped on the floor, lost his footing and fell backwards, hitting the metal decking and the indexing table and shuttle. He felt immediate pain in the low back, neck and shoulder. A co-worker, Lloyd Arvin, was a witness who attempted to catch the Claimant as he was falling. Mr. Bennett completed his shift that day, but he continued to experience pain, so Gardner Denver sent him to Dr. Stanley Wilson and Dr. Allison Fisher. The latter referred him to Randal R. Trecha, M.D. on July 14, 2001. See, Claimant’s Exhibit U at 235.

Dr. Trecha initially provided Mr. Bennett with conservative treatment in the form of nerve root injections and physical therapy at Health South from October 16, 2000 to January 4, 2001. Ultimately, Dr. Trecha performed a total decompression laminectomy of L5, foraminotomy at L5-S1 and neurolysis of the bilateral L5-S1 nerve roots and a fusion with Pedicle screw fixation along with intratransverse process fusion on February 8, 2001. *Id.* at 141. The Employee had follow up treatment with Dr. Trecha on February 21, 2001 and May 14, 2001 and underwent physical therapy at Health South, in addition to epidural steroid injections on July 27, 2001 and August 27, 2001. He continued to have right leg pain and therefore, Dr. Trecha referred the Claimant to Dr. Gavrilova, who prescribed Neurontin. *Id.* at 411. The Claimant testified he took Neurontin for 3 months for his right leg pain. He testified that he quit taking the Neurontin in January 2003 as he felt it caused problems with his peripheral vision. When he stopped taking the Neurontin, his vision returned to normal. Dr. Trecha released Mr. Bennett to return to work effective December 13, 2001, with restrictions of light physical demand level pursuant to the Functional Capacity Evaluation of November 28, 2001. See, Claimant’s Exhibit U at 326-331. The restrictions were occasional floor to knuckle lift of 30 lbs., knuckle to shoulder lift of 40 lbs., shoulder to overhead lift of 23 lbs., and carry of 35 lbs. 100 feet with pivoting. *Id.* at 326.

Of note is the fact that Claimant had previously undergone two back surgeries for an injury that occurred in 1991. See, Employer’s Exhibit 2 (report of Dr. Joel Jeffries). Even before that injury and surgery, Claimant admitted to multiple prior injuries involving his low back. See, Employer’s Exhibit 1 and Claimant’s Exhibits Y through HH. Claimant resolved the 1991 back injury claim based upon twenty-two and three-quarters percent (22.75%) whole body permanent partial disability. See, Employer’s Exhibit 3 and Claimant’s Exhibit KK. The late Dr. Andrew I Myers evaluated Mr. Bennett at his attorney’s request for that injury. See, Employer’s Exhibit 15. Dr. Myers felt that Claimant should be on permanent restrictions based upon the 1991 injury and that if he went on to need more surgery in the future, it would be in the nature of a low back fusion. Dr. Myers felt Mr. Bennett would require periodic and intermittent use of analgesic anti-inflammatory and muscle relaxant medications. *Id.* at 11.

In fact, following this June 27, 2000 injury, Claimant underwent a low back fusion by Dr. Trecha on February 8, 2001. See, Claimant’s Exhibit U at 141. Dr. Trecha subsequently assessed Mr. Bennett’s disability at “. . . 25% of the body as a whole with 20% apportioned to his pre-existent degenerative spondylosis and previous lumbar injuries and five percent apportioned to his next injury occurring on . . .” June 27 2000. See, Employer’s Exhibit 14 at 3.

Claimant offered the report and deposition testimony of Dr. Koprivica. Dr. Koprivica opined that Claimant sustained thirty percent (30%) whole body disability as a result of the June 2000 injury. See, Claimant’s Exhibit U at 34:1 and at 84, ¶ 3. Dr. Koprivica opined in his April 18, 2002 report that “At this point, it is my opinion that Second Injury Fund liability does not exist.” *Id.* at 85, ¶ 7 (also Second Injury Fund Exhibit 1). However, on re-direct examination at his October 4, 2004 deposition, Dr. Koprivica reversed himself and found that Mr. Bennett’s June 2000 injury combined with his previous disabilities to enhance his overall disability ten percent (10%) above the “simple arithmetic sum”. *Id.* at 61:20-62:2. Dr. Koprivica thought that Mr. Bennett’s overall disability after his June 2000 injury was “58.5 [percent whole body disability]. Something like that. Whatever it is.” *Id.* at 66:4.

Mr. Bennett's back continued to cause him pain and difficulty even after the fusion. He did have a subsequent injury to his back that occurred on March 11, 2002, which is the subject of the claim filed for Injury Number 02-019743. He never went back to full duty status at Gardner Denver. Following the low back fusion he remained on light duty with permanent restrictions. Those restrictions were reduced to writing between Claimant and Gardner Denver. See, Claimant's Exhibit OO. The back injury did affect Mr. Bennett's social activities as well. He still could hunt and fish but had to limit the occasions he performed those activities. He continued to experience ongoing leg pain even after the back fusion.

Mr. Bennett also called as a witness Mr. Carey Walk, a co-worker. Mr. Walk is a 23-year employee of Gardner Denver and has been a personal friend of Claimant's for 15 years. He testified that there probably were times that he had to assist Mr. Bennett with work duties following his low back injury or injuries. Mr. Bennett offered billings concerning medications he has purchased. However, it is unclear to the Court whether these medications relate to Claimant's current low back injury, his subsequent low back injury, and/or his subsequent alleged neck injury claim for Injury Number 03-013474. Claimant also admitted that he was involved in a motor vehicle accident on March 31, 2001. The latter accident resulted in him receiving treatment at Bothwell Regional Hospital and medical records from that visit show increase in back pain and his receipt of additional medications. See, Employer's Exhibit 6. Separately, Mr. Bennett also admitted he was struck by a car operated by his ex-wife in late 2000 and he was "thrown on the hood of her car".

RULINGS OF LAW

Based upon a review of all of the evidence I find that Mr. Bennett sustained seventeen and one-half percent (17½%) whole body disability for his low back injury. Claimant admitted to pre-existent disability in his low back (22.75%). In fact, the records from Dr. Trecha show that to perform the low back fusion, he went through the same surgical site and scar that was present from the 1992 and 1993 back surgeries. Although Dr. Koprivica felt Claimant sustained 30% disability from this June 27, 2000 injury alone, I find that 17.5% is an appropriate level of compensation for this injury. Dr. Trecha, the actual treating physician, felt that Claimant had sustained only 5% new or additional disability above his prior disability. Mr. Bennett did testify to an increase in symptoms and additional limitations on work and social activities following this injury. I accept Dr. Koprivica's original opinion that Fund liability does not exist.

On the issue of past medical bills, I find that Claimant has failed to prove that medications he purchased directly related to this injury. Also, Claimant has failed to prove a basis for an award of future medical benefits. As stated, Claimant sustained another on-the-job injury on March 11, 2002 and also was involved in two motor vehicle accidents following this claim. In addition, he underwent a cervical fusion on July 21, 2003. See, Claimant's Exhibit U at 772. Claimant was unable to testify as to what medications he would take specifically for the low back versus any medications he is taking for his cervical spine condition. Thus, he has failed to sustain his burden of proof. Bowers v. Hiland Dairy Co., 188 S.W.3d 79 (Mo.App.S.D. 2006).

J. R. Boyd, Claimant's attorney, requested a fee of 25% of the amounts awarded. I find that such request is fair and reasonable and order a lien attached to the award for \$5,302.68 until paid in full.

Date: _____

Made by: _____

Carl Mueller
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Employee: Charles Roy Bennett
Employer: Gardner Denver, Inc.
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: March 11, 2002
Place and County of Accident: Sedalia, Pettis County, 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 September 19, 2006. The award and decision of Administrative Law Judge Carl Mueller, issued September 19, 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 15th day of June 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Charles Roy Bennett Injury No: 02-019743
Dependents: N/A
Employer: Gardner Denver, Inc.
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Insurer: Self-Insured
Hearing Date: July 18, 2006
Briefs Filed: August 1, 2006

Checked by: RCM/rm

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: March 11, 2002
5. State location where accident occurred or occupational disease was contracted: Sedalia, Pettis County, 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 fell and strained his back while attempting to close a shut off valve on a vacuum tank by kicking the valve.
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: Body as a whole
14. Nature and extent of any permanent disability: Two percent (2%) whole body disability.
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$209.05
17. Value necessary medical aid not furnished by employer/insurer? \$0.00
18. Employee's average weekly wages: \$943.35
19. Weekly compensation rate: \$628.90 for TTD and \$329.42 for PPD
20. Method wages computation: By stipulation.
21. Amount of compensation payable:

Permanent Partial Disability
2% whole body disability (.02 x 400 weeks) x \$329.42/week..... \$2,635.36
22. Second Injury Fund liability: None.
23. Future requirements awarded: None

Said payments to begin as of date of this award 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 twenty-five percent (25%) lien totaling \$658.84 in favor of Boyd and Kenter, Attorneys, for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Charles Roy Bennett Injury No: 02-019743
Dependents: N/A
Employer: Gardner Denver, Inc.
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Insurer: Self-Insured
Hearing Date: July 18, 2006
Briefs Filed: August 1, 2006 Checked by: RCM/rm

On July 18, 2006 the Employee and Employer appeared for final hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110 (R.S.Mo.). The employee, Charles Bennett, appeared in person and with his counsel J. R. Boyd. The Employer appeared through attorney Brian Fowler; in addition, Mr. Randy Lee appeared as corporate representative. The State Treasurer as Custodian of the Second Injury Fund ("Fund") appeared through attorney Maureen Shine. The Court actually tried three claims together involving Mr. Bennett and this Award deals with the second claim for a March 11, 2002 injury. The issue the parties requested the Court to determine is whether Mr. Bennett's injury resulted in any permanent disability. For the reasons noted below, I find that Mr. Bennett sustained two percent (2%) whole body disability.

STIPULATIONS

The parties stipulated that:

8. On or about March 11, 2002 Gardner Denver, Inc. was an employer operating subject to Missouri's Workers' Compensation law with its liability fully self-insured;
9. Mr. Bennett was its employee working subject to the law in Sedalia, Pettis County, Missouri;
10. Mr. Bennett sustained an accident, arising out of and in the course of employment on March 11, 2002;
11. Mr. Bennett complied with the notice requirement of §287.420 and filed his claim

within the time allowed by law; and,

12. Gardner Denver provided Claimant with medical care costing \$209.05.

ISSUE

The parties requested the Division to determine whether Mr. Bennett suffered any disability and, if so, the nature and extent of his disability?

FINDINGS OF FACT

Mr. Bennett testified in his own behalf in this matter which was tried together with Injury Nos. 00-076098 and 03-013474. In addition, he presented multiple exhibits for this claim (as well as the two other claims tried) consisting of Exhibits A through CCCC. The exhibits all were admitted into evidence. Claimant also called Mr. Carey Walk to testify. The Employer offered Exhibits 1 through 17 (after having withdrawn Exhibits 4 and 7), all of which also were admitted without objection. In addition, the Employer called Randy Joseph Lee to testify regarding Exhibit 16, a video depicting the activity Mr. Bennett alleges injured him with reference to his alleged injury on January 28, 2003 addressed by the Award on Injury Number 03-013474. Finally, the Second Injury Fund offered a rating report from Dr. Koprivica dated April 18, 2002 as its sole exhibit. Based on a review of the exhibits and the testimony of the witnesses I make the following findings.

Charles Roy Bennett (Employee) is a 48-year-old male who lives with his wife in Sedalia Missouri. He received a High School degree from Smith Cotton High School in 1977. He attended Linn Technical College and earned an associate's degree in machine tool technology. He took electronics courses at State Fair College as well as with Gardner Denver. In addition, Mr. Bennett completed a 12,000-hour certification course at Gardner Denver over a five-year period, which familiarized him with the machine tools, which Gardner Denver used in its factory. With regard to his work history, he was employed for two years with Westinghouse as a welder, using an arc as well as a mig welder, which he described as heavy exertion level work. He was next employed with Ohio Rubber for one year as a die maker and repair, making rubber industrial hose for industry and for heated air transfer and for ductwork for the auto industry. He described this work as skilled labor, medium exertion. He was next employed at Goshen Mold for a year and a half as a mold maker making molds for the rubber industry, which he described as skilled work at medium exertion level. He next worked for Interstate Studios in 1982 as a maintenance technician on color printers which processed film for schools, which included maintenance on all the machines. He described this work as skilled at the light exertion level.

His final employer was Gardner Denver where he started on February 1, 1984 as a Grade 3 Machine Operator, in which he operated and set up multiple machines, which produced industrial air compressors for heavy industry. His duties were to keep the machine clean and included making parts using measuring instruments, calipers, and depth gauges. This was classified as skilled work at the heavy exertion level. He worked 40 to 60 hours per week for the last 15 years of his employment, which ended March 25, 2003. He eventually progressed into maintenance, with the classification of Maintenance General Grade 6. After he completed 12,000 hours of training, he was promoted to Computer Numerical Control (CNC) Technician in 1987 and worked in that position until 2003. His duties in that position were to trouble shoot electronic components of machine tools and make sure the machine tools came within certain specifications. He used electronic monitoring and leveling devices, laser alignment, and laptops to control the computers. He filled out a written report every day after finishing with each machine. He classified this work as highly skilled, heavy exertion level. He classified this work as highly skilled, heavy exertion level. Mr. Bennett clearly has developed great expertise and experience in repair and knowledge concerning machinery. He also testified to various computer skills he has developed.

Mr. Bennett had multiple prior back injuries including back surgeries in 1992, 1993 and a low back fusion February 2001. He testified that he aggravated his back again on March 11, 2002. This occurred as he was attempting to kick a valve arm closed on a machine. He was trying to kick the valve arm because he was on restrictions from his June 2000 injury and tried to limit the times he had to bend and twist. See Employee's Exhibit OO, which lists permanent restrictions as of February 12, 2002. As he attempted to kick the valve closed, he slipped and fell to the floor. He felt an increase in low back pain, pain in his "buttocks" and leg pain. He was referred to Dr. Abernathy for follow up care. He also treated with Dr. Allison Fisher, his own personal physician, and was prescribed ongoing pain medication. Previous to this event, his pain on a scale from 1 to 10 - with 1 being little pain and 10 being the worst pain - had been a "5". Following the March 11, 2002 injury Mr. Bennett felt the pain increased to a "7" and at times even an "8". Mr. Bennett explained that he never fully

recovered from the June 27, 2000 injury (which is the subject of a claim filed for Injury Number 00-076098) and that his March 11, 2002 injury caused him further difficulties and problems with his work and social activities. He could continue to hunt and fish, but had to limit and scale back those activities due to his back and leg pain.

Claimant called Mr. Carey Walk as a witness. Mr. Walk is a 23-year employee of Gardner Denver and has been a personal friend of Claimant's for 15 years. He testified that there probably were occasions where he had to assist Mr. Bennett in performing his work duties due to his low back injury or injuries.

RULINGS OF LAW

Mr. Bennett did not offer direct medical evidence as to the nature and extent of any residual disability for this injury. He did offer extensive medical records and rating reports on disability for his June 27, 2000 injury. I note that Dr. Koprivica - who examined the Employee on April 18, 2002 at the request of Mr. Bennett's attorney - observed only that the Claimant's March 11, 2002 injury "exacerbated" his low back. See, Claimant's Exhibit U at 81. Dr. Koprivica re-evaluated Mr. Bennett on July 8, 2003 and again on March 2, 2004 and did not assign any disability for the Claimant's March 11, 2002 injury in either of the narrative reports for those examinations. *Id.* at 94, 100, 109 and 118-120. This Court has ruled that Mr. Bennett sustained seventeen and one-half percent (17½%) whole body disability for his June 27, 2000 low back injury. In addition, Mr. Bennett had pre-existent whole body disability of twenty-two and three-quarters percent (22.75%) from a 1991 claim. See, Claimant's Exhibit KK. The Court does not believe Mr. Bennett sustained any significant residual disability as a result of this March 11, 2002 injury. Mr. Bennett did testify that the 2002 injury caused him additional symptoms. In addition, it affected his ongoing work activities as well as social activities albeit to a minor degree. Mr. Bennett also testified he required additional pain medication from his personal physician following this accident. Accordingly, the Court finds that Mr. Bennett sustained two percent (2%) whole body disability as a result of this aggravating injury to his lumbar spine. Of course, this level of disability fails even to qualify for consideration of Fund liability. See, Mo.Rev.Stat. §287.220.1. Thus, the whole award due Mr. Bennett for this injury is from Gardner Denver alone and totals \$2,635.36. His attorney, J. R. Boyd, is awarded a lien of \$658.84 against that amount.

Date: _____

Made by: _____

Carl Mueller
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 03-013474

Employee: Charles Roy Bennett

Employer: Gardner Denver, Inc.

Insurer: Self-Insured

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

Date of Accident: January 28, 2003

Place and County of Accident: Sedalia, Pettis County, 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 September 19, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Carl Mueller, issued September 19, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 15th day of June 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

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

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

William F. Ringer, Chairman

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe the administrative law judge erred in concluding that employee's work related accident on January 28, 2003 was not a substantial factor in causing his cervical condition.

The administrative law judge found that employee failed to prove that his cervical condition and fusion were a result of his work related injury. However, competent and substantial evidence shows that employee did suffer a cervical injury on January 28, 2003 and that his later fusion was a direct result of that injury.

The administrative law judge relied too heavily on the video provided by employer in coming to his conclusion that the accident could not have produced the injury alleged by employee. The administrative law judge made assertions based on the content of the video. The video re-enactment was not an exact reproduction of the January 28, 2003 accident and therefore was not an accurate portrayal of the incident and should not have been relied upon. Instead, the focus should have been on the evidence presented by employee as to the actual accident.

A pre-existing but non-disabling condition does not bar recovery of compensation if a job-related injury caused the condition to escalate to the level of disability. *Avery v. City of Columbia*, 966 S.W.2d 315, 322 (Mo.App. W.D. 1998) (overruled on other grounds). Therefore, aggravation of a pre-existing condition is a compensable injury if employee establishes a direct causal link between his job duties and the aggravated condition. *Smith v. Climate Engineering*, 939 S.W.2d 429, 433-34 (Mo.App. E.D. 1996) (overruled on other grounds).

The record shows that employee had pre-existing cervical problems, most notably cervical degenerative disc disease. However, employee's work-related injury clearly caused his established cervical condition to worsen. Employee experienced an immediate onset of pain after his injury, and reported the accident to employer the same day. The symptoms produced as a result of his injury, primarily intense pain, prevented employee from performing the job duties that he had been able to perform prior to his injury. Employee subsequently sought care from multiple physicians for his cervical injury. Employee testified that he had never felt pain similar to that which he experienced following his neck injury and had never sought treatment for neck problems before his injury. The medical record supports employee's assertion as it does not reference any complaints regarding neck problems prior to January 28, 2003.

Dr. Miles opined that the work incident was only temporarily related to the onset of employee's symptoms and that his cervical degenerative disc disease was so pronounced that employee would have become symptomatic even without any inciting event. This may be true, but employee was able to show the January 28, 2003 accident clearly aggravated his cervical condition. The fact that he could have become symptomatic at some later point does not change the fact that his asymptomatic condition was clearly aggravated by his work accident. Disability sustained by the aggravation of a pre-existing non-disabling condition caused by a work-related accident is compensable even though the accident would not have caused the injury in a person without the condition. *Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999).

Furthermore, Dr. Koprivica testified that he believed employee's work incident on January 28, 2003 was a substantial factor in causing his cervical condition. The administrative law judge faulted Dr. Koprivica for relying on statements made to him by employee to render his opinion; however, it is reasonable for a medical expert to use the history provided by employee when coming to a conclusion. The administrative law judge also noted that Dr. Koprivica failed to review the video re-enactment of the alleged accident. Once again, the administrative law judge is placing too much credence in the reliability of the video.

In addition, prior to his work-related injury on January 28, 2003, employee's condition was not severe enough to require surgery. It was only after his work-related injury that surgery was medically necessary. Employee was asymptomatic prior to his injury and was able to perform his job duties up and until his injury on January 28, 2003. This supports a finding that employee's pre-existing cervical condition was neither disabling nor an impediment to his performance. Competent and substantial evidence supports the fact that employee was suffering from a pre-existing non-disabling condition that was aggravated by his January 28th work injury.

Therefore, employee has met his burden by establishing that he suffered a work-related injury on January 28,

2003, and that his cervical condition is medically causally related to the work-related injury. Accordingly, I would reverse the decision of the administrative law judge and award compensation.

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

John J. Hickey, Member

FINAL AWARD

Employee: Charles Roy Bennett Injury No: 03-013474
Dependents: N/A
Employer: Gardner Denver, Inc.
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Insurer: Self-Insured
Hearing Date: July 18, 2006
Briefs Filed: August 1, 2006 Checked by: RCM/rm

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged January 28, 2003
5. State location where accident occurred or occupational disease was contracted: Alleged Sedalia, Pettis County, 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? No
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 alleged that he injured his cervical spine while lifting a fifteen (15) pound variable speed motor while seated.
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: None; no compensable injury.
14. Nature and extent of any permanent disability: None; no compensable injury.
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$4,684.25 while claim was under investigation.
17. Value necessary medical aid not furnished by employer/insurer? Employee sought reimbursement of \$60,517.15 in medical expenses allegedly

related to this claimed injury.

18. Employee's average weekly wages: \$812.04
19. Weekly compensation rate: \$541.36 for TTD and \$340.12 for PPD
20. Method wages computation: By stipulation.
21. Amount of compensation payable: None; no compensable injury.
22. Second Injury Fund liability: None; no compensable injury.
23. Future requirements awarded: None; no compensable injury.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Charles Roy Bennett Injury No: 03-013474
Dependents: N/A
Employer: Gardner Denver, Inc.
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Insurer: Self-Insured
Hearing Date: July 18, 2006
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On July 18, 2006 the Employee and Employer appeared for final hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110 (R.S.Mo.). The Employee, Charles Bennett, appeared in person and with his counsel J. R. Boyd. The Employer appeared through attorney Brian Fowler; in addition, Mr. Randy Lee appeared as corporate

representative. The State Treasurer as Custodian of the Second Injury Fund ("Fund") appeared through attorney Maureen Shine. The Court actually tried three claims together involving Mr. Bennett and this Award deals with the third claim for an alleged January 28, 2003 injury. The primary issue the parties requested the Court to determine was whether Mr. Bennett sustained an accident arising out of and in the course of employment. For the reasons noted below, I find that Mr. Bennett did not sustain an accident and deny his request for all benefits.

STIPULATIONS

The parties stipulated that:

13. On or about January 28, 2003 Gardner Denver, Inc. was an employer operating subject to Missouri's Workers' Compensation law with its liability fully self-insured;
14. Mr. Bennett was its employee working subject to the law in Sedalia, Pettis County, Missouri;
15. Mr. Bennett complied with the notice requirement of §287.420;
16. Mr. Bennett filed his claim within the time allowed by law; and,
17. Gardner Denver provided Claimant with medical care costing \$4,684.25 while this claim was under investigation.

ISSUES

The parties requested the Division to determine:

1. Whether Mr. Bennett sustained an accident rising out of and in the course of employment on January 28, 2003?
2. Whether Mr. Bennett is entitled to total disability benefits in the amount of \$541.36 per week from March 25, 2003 through the hearing date representing one hundred seventy-three (173) weeks for compensation totaling \$93,655.28 less a credit for short term disability benefits paid totaling \$12,667.20, for a net amount claimed of \$80,988.08?
3. Whether Gardner Denver must reimburse Mr. Bennett for medical expenses totaling \$60,517.15 (which includes \$9,492.93 in medication expenses)?
4. Whether Gardner Denver must provide Mr. Bennett with additional medical care?
5. Whether Mr. Bennett suffered any disability and, if so, the nature and extent of the Employee's disability and whether the Employee is permanently and totally disabled? And,
6. Whether the Fund is liable to Mr. Bennett for any disability compensation?

FINDINGS OF FACT

Mr. Bennett testified in his own behalf in this matter which was tried together with Injury Nos. 00-076098 and 02-019743. In addition, he presented multiple exhibits for this claim (as well as the two other claims tried) consisting of Exhibits A through CCCC. The exhibits all were admitted into evidence. Claimant also called Mr. Carey Walk to testify. The Employer offered Exhibits 1 through 17 (after having withdrawn Exhibits 4 and 7), all of which also were admitted without objection. In addition, the Employer called Mr. Randy Joseph Lee to testify regarding Exhibit 16, a video depicting the activity Mr. Bennett alleges injured him on January 28, 2003. Finally, the Second Injury Fund offered a rating report from Dr. Koprivica dated April 18, 2002 as its sole exhibit. Based on a review of the exhibits and the testimony of the witnesses I make the following findings.

Charles Roy Bennett (Employee) is a 48-year-old male who lives with his wife in Sedalia Missouri. He received a High School degree from Smith Cotton High School in 1977. He attended Linn Technical College and earned an associate's degree in machine tool technology. He took electronics courses at State Fair College as well as with Gardner Denver. In addition, Mr. Bennett completed a 12,000-hour certification course at Gardner

Denver over a five-year period, which familiarized him with the machine tools, which Gardner Denver used in its factory. With regard to his work history, he was employed for two years with Westinghouse as a welder, using an arc as well as a mig welder, which he described as heavy exertion level work. He was next employed with Ohio Rubber for one year as a die maker and repair, making rubber industrial hose for industry and for heated air transfer and for ductwork for the auto industry. He described this work as skilled labor, medium exertion. He was next employed at Goshen Mold for a year and a half as a mold maker making molds for the rubber industry, which he described as skilled work at medium exertion level. He next worked for Interstate Studios in 1982 as a maintenance technician on color printers which processed film for schools, which included maintenance on all the machines. He described this work as skilled at the light exertion level.

His final employer was Gardner Denver where he started on February 1, 1984 as a Grade 3 Machine Operator, in which he operated and set up multiple machines, which produced industrial air compressors for heavy industry. His duties were to keep the machine clean and included making parts using measuring instruments, calipers, and depth gauges. This was classified as skilled work at the heavy exertion level. He worked 40 to 60 hours per week for the last 15 years of his employment, which ended March 25, 2003. He eventually progressed into maintenance, with the classification of Maintenance General Grade 6. After he completed 12,000 hours of training, he was promoted to Computer Numerical Control (CNC) Technician in 1987 and worked in that position until 2003. His duties in that position were to trouble shoot electronic components of machine tools and make sure the machine tools came within certain specifications. He used electronic monitoring and leveling devices, laser alignment, and laptops to control the computers. He filled out a written report every day after finishing with each machine. He classified this work as highly skilled, heavy exertion level. He classified this work as highly skilled, heavy exertion level. Mr. Bennett clearly has developed great expertise and experience in repair and knowledge concerning machinery. He also testified to various computer skills he has developed.

Mr. Bennett claims he was injured on January 28, 2003. Specifically, he was removing a fifteen (15) pound variable speed motor control box to repair a machine. As Mr. Bennett described, to complete this he was seated and working at knee level or below. The motor actually was unhooked from the machine and as he was holding the motor it started to slip from his hand. He reached down to catch the motor and in doing so alleges he sustained injury to his neck. The motor was between his legs at the time it slipped from his hand. Mr. Bennett reported this several hours after it occurred. Initially he was referred to Dr. Stanley Wilson and then referral was made to Dr. John D. Miles. Treatment by Dr. Miles included a neck fusion that was performed on July 21, 2003. *See*, Claimant's Exhibit U at 772. Mr. Bennett last received treatment from Dr. Miles on November 13, 2003. *Id.* at 814. He is still taking pain medicine for his neck as well as low back injuries; his personal physician, Dr. Allison Fisher, prescribes the medications.

Mr. Bennett claims that he is totally disabled as a result of this injury or as a result of this injury combined with his multiple prior back injuries. He also suffers from pre-existent depression, which he claims was aggravated by this injury. Mr. Bennett developed "hoarseness" following the neck surgery by Dr. Miles. He contends this affects his ability to project vocally. Dr. Miles noted, "if his voice does not return to his satisfaction . . . he may wish to consider having some operative correction of the vocal cord paralysis." *Id.* at 814. Dr. Miles also noted that Mr. Bennett's disability from this event was ". . . approximately 20 to 25% of a man as a whole." *Id.* While I did note at trial that Mr. Bennett's voice was hoarse, he was on the witness stand for almost three hours and was able to converse clearly with the attorneys and Court in a normal fashion. Mr. Bennett also concedes he still smokes one pack of cigarettes a day and was advised by physicians as early as 1993 (Dr. Jeffries) that he should stop using tobacco.

Mr. Bennett testified at length concerning his prior medical conditions and injuries affecting his low back. As a result of all his prior back injuries (including the June 27, 2000 injury and the March 11, 2002 injury) his back has become a "mess". He has pain as he tries to get out of bed each morning and it takes a while for him to be able to stretch out and stand erect. Mr. Bennett still limps and states he has been limping even after his back fusion, which took place on February 8, 2001. *Id.* at 141. Although he continued to work after the back injury, he was on restricted duty with significant limitations on bending, stooping, as well as the weight of materials he could lift. *See*, Employee's Exhibit OO. Normally at the end of a workday in 2001 and 2002 he would come home and just want to lie down. This is also reflected in various medical exhibits, i.e., that Claimant was still having significant low back pain in 2002 and early 2003. In fact, Claimant returned to see Dr. Trecha on January 8, 2003, just two weeks before his claimed neck injury. *See*, Claimant's Exhibit X at 67. The prior back injuries caused Claimant to limit his social activities such as hunting and fishing. His low back pain and leg pain has remained since his June 27, 2000 injury.

Of note is the fact that Claimant had previously undergone two back surgeries for an injury that occurred in 1991. *See*, Employer's Exhibit 2 (report of Dr. Joel Jeffries). Even before that injury and surgery, Claimant admitted to multiple

prior injuries involving his low back. *See*, Employer's Exhibit 1 and Claimant's Exhibits Y through HH. Claimant resolved the 1991 back injury claim based upon twenty-two and three-quarters percent (22.75%) whole body permanent partial disability. *See*, Employer's Exhibit 3 and Claimant's Exhibit KK. The late Dr. Andrew I Myers evaluated Mr. Bennett at his attorney's request for that injury. *See*, Employer's Exhibit 15. Dr. Myers felt that Claimant should be on permanent restrictions based upon the 1991 injury and that if he went on to need more surgery in the future, it would be in the nature of a low back fusion. Dr. Myers felt Mr. Bennett would require periodic and intermittent use of analgesic anti-inflammatory and muscle relaxant medications. *Id.* at 11.

In fact, following the June 27, 2000 injury, as previously noted, Mr. Bennett did undergo a low back fusion by Dr. Trecha on February 8, 2001. Dr. Trecha subsequently issued a report assessing Mr. Bennett's disability at ". . . 25% of the body as a whole with 20% apportioned to his pre-existent degenerative spondylosis and previous lumbar injuries and five percent apportioned to his next injury occurring on . . ." June 27, 2000. *See*, Employer's Exhibit 14 at 3.

Claimant called Carey Walk as a witness. Mr. Walk is a 23-year employee of Gardner Denver and has been a personal friend of Claimant's for fifteen (15) years. Following Mr. Bennett's June 27, 2000 back injury, Walk would occasionally assist him in performing work activities. Mr. Walk also demonstrated the work involved in removing the variable speed motor control box. *See*, Employer's Exhibit 16. Mr. Walk weighed the motor, which he confirmed was fifteen (15) pounds.

Mr. Bennett presented multiple medical records and several depositions concerning his claim. P. Brent Koprivica, M.D. evaluated him on three separate occasions and prepared separate reports documenting his exams; in addition, Dr. Koprivica testified by deposition. Dr. Koprivica's first report is dated April 18, 2002. At that time he felt that Claimant had significant work restrictions. In fact, but for the Gardner Denver employment, Dr. Koprivica did not believe Mr. Bennett would be able to find employment in the open labor market. *See*, Claimant's Exhibit U at 45:12-18. He would have considered Claimant totally and permanently disabled as of April 2002 if he lost the Gardner Denver job. Dr. Koprivica testified that Mr. Bennett had "profound disability" prior to the alleged January 28, 2003 injury. *Id.* at 46:11-13. In fact, Dr. Koprivica thought that Mr. Bennett's overall disability after his June 27, 2000 injury was "58.5 [percent whole body disability]. Something like that. Whatever it is." *Id.* at 66:4.

Claimant also offered the deposition testimony of John D. Miles, M.D. He is a Fellow in the America Academy of Orthopaedic Surgery and a Diplomate in the America Board of Orthopaedic Surgery. *See*, Claimant's Exhibit X at 52. He is an orthopedic surgeon at the Columbia Spine Center at Columbia Orthopedic Group. Clearly, given the fact that he is a board certified and practicing orthopedic surgeon, his opinions about Mr. Bennett's condition hold much greater weight than those offered by Dr. Koprivica who not only does not treat patients but, also, has no orthopedic expertise. Dr. Miles testified that Mr. Bennett had very significant osteoarthritis in his cervical spine, and that it had taken years and years to develop. *Id.* at 9 – 10. He was well aware of Mr. Bennett's alleged January 28, 2003 injury. However, Dr. Miles testified that Mr. Bennett's action of holding a motor control box and then attempting to grab the box did not place any type of load on the cervical spine. *Id.* at 18. Dr. Miles consistently and persuasively opined that Mr. Bennett's January 28, 2003 event did not cause his cervical condition, and was no more than simply a "triggering event". *Id.* at 18: 11-21. Dr. Miles opined that Mr. Bennett's underlying degenerative cervical spine disease was so pronounced that Claimant at some point would have become symptomatic *even absent any inciting event*. *Id.* at 8:11-19. As Dr. Miles described, Claimant had a "bad genetic card" for osteoarthritis. *Id.* at 42. Dr. Miles repeated multiple times during his testimony that the activity described by Mr. Bennett on January 28, 2003 was a triggering event only and not a substantial cause for his treatment and resulting disability. In describing the alleged work injury, Dr. Miles testified:

I would say [it was] an event that was temporally related to the onset of his symptoms, but not fundamentally a substantial contributing factor to their development, but temporally related.

See, Claimant's Exhibit X at 38.

Mr. Bennett suffered from the natural progression of a degenerative condition. The alleged January 28, 2003 occurrence involved the soft tissue only, and there was no change in the disc condition. On cross-examination Dr. Miles again confirmed that the alleged work event was a triggering event and not a substantial factor in causing his condition. *Id.* at 43.

Dr. Miles felt Claimant was capable of work as of September 25, 2003, or roughly two months after the surgical procedure. *Id.* at 44: 9-12. As far as any allegation that he cannot work, Dr. Miles stated if that were true,

it would be from the totality of everything, including his neck, back, shoulder, etc. *Id.* at 47-48.

Claimant also offered the deposition of Dr. Pro, a psychiatrist. Mr. Bennett alleges that he not only had sustained physical injury, but also psychological injury as a result of his various claims. Dr. Pro testified that Claimant had psychiatric impairment, pre-existent to his current work injuries. *See*, Claimant's Exhibit W at 25:14-17 and 29:1-5. In fact, the Employer produced records from Cynthia Kneibert, a social worker. *See*, Employer's Exhibit 11. She counseled Mr. Bennett as early as 1999 for conditions including depression and anxiety. Ms. Kneibert noted many non-work stressors affecting Mr. Bennett at her September 28, 1999 session with him including, but not limited to:

- "marital separation since June 1999"
- "major depression episode symptoms"
- "wife has lover(s)"
- "kids acting out, disrespectful"
- "two bankruptcies"

Id. at 6

Dr. Pro admitted that Mr. Bennett remains active. He works at home on his computer on which he maintains the "family books". *See*, Claimant's Exhibit W at 19:18-24. He still enjoys being outside and is able to fish, although he no longer hunts. *Id.* Mr. Bennett still is quite involved in the Moose Lodge. *Id.* Claimant admitted this fact although claims he now is limited to assisting with the orientation meeting for new members. He has traveled out of town for meetings with the Moose Lodge, including a trip to the Inn at the Grand Glaize at Lake of the Ozarks after his alleged January 28, 2003 injury. Ultimately, Dr. Pro opined that the Employee is permanently and totally disabled. *Id.* at 30:6-19. However, Dr. Pro based this opinion, in part, on Mr. Bennett's "orthopedic impairments". *Id.* at 30:11. I note that Dr. Pro's curriculum vitae does not list any orthopedic training or credentials. *Id.* at 74-78. And, he conceded that he was not an orthopedic surgeon or neurosurgeon and had never performed cervical surgery. *Id.* at 49:9-15. Dr. Pro even admitted under cross-examination "I don't feel qualified to make an answer about just his orthopedic problems." *Id.* at 72:1-2. However, Dr. Pro necessarily is assessing Mr. Bennett's "orthopedic problems" when he relies on them to make his total disability opinion. I find Dr. Pro's disability opinions to lack credibility given his reliance on assessing Mr. Bennett's orthopedic condition, as Dr. Pro possesses absolutely no credentials for evaluating orthopedic problems.

Mr. Bennett admitted that he has not looked for one job since March 2003. Although he has "slowed down" his social activities, he still does some fishing. In fact, he purchased a \$2,500 bass boat in 2004; he noted, though, that he recently (in May 2006) sold the boat. However, he still fishes "once or twice" a week. He is able to use a riding lawn mower on his property. He can drive an automobile, but after 45 minutes to an hour needs to get up due to his low back discomfort. Following his alleged neck injury he received twenty-six (26) weeks of short-term disability pay. He is now receiving long-term disability and Social Security Disability. Mr. Bennett admitted that he completed disability claim forms that indicate he cannot work due to his *neck and low back conditions*. *See*, Employer's Exhibits 12 and 13.

Mr. Bennett submitted the deposition testimony of vocational expert Mary Titterington. She discussed his significant pre-existent work restrictions from his low back injuries. *See*, Claimant's Exhibit V at 37 - 40. Ms. Titterington testified that Mr. Bennett's entire condition - i.e., his back, neck and all of his restrictions - totally disable him from employment. *Id.* at 48:1-11. However, this opinion is of value to Mr. Bennett largely only if his alleged January 28, 2003 cervical condition were found to be work-related.

The Employer offered and the Court received into evidence a CD-ROM video. *See*, Employer's Exhibit 16. Randy Lee also testified concerning the foundation of the video, i.e. that he prepared the video showing Carey Walk performing the work activities Mr. Bennett claims caused his January 28, 2003 cervical injury. Mr. Lee testified that the video was made either the day, or the day after, Mr. Bennett reported the alleged January 28, 2003 injury. The video was reviewed at trial and shows Mr. Walk seated and performing work activities at or below the knee level. The only difference between the activities depicted on the video and the activities Mr. Bennett described at hearing is that Mr. Bennett claims that the motor box was completely loose at the time he held it. However, Bennett makes no claim that the work required any above waist activity or put any specific strain or pressure on the shoulder joint or neck area. Bennett's allegation is that he tried to grab the motor box as it was falling from his knee level to the ground. At trial he claimed that he jerked his neck back as he grabbed for the motor box. However, the video shows nothing directly in front of the seated worker's chest or head which would

have required him to “jerk back” as he reached for the motor box. In fact, if Claimant jerked back, he would have been pulling away from the motor box instead of reaching down for the motor box as he alleged.

RULINGS OF LAW

Based upon review of all the trial evidence including the various medical depositions and medical records, I find and believe that Claimant did not sustain an accident or injury on January 28, 2003. It is Mr. Bennett’s burden to prove that he sustained an accident, i.e., that the alleged work related event was a substantial factor in causing his resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor. Mo.Rev.Stat. §287.020.2. Mr. Bennett failed in his burden of proof as the most competent medical evidence and testimony indicates that he simply suffered an ordinary gradual deterioration and progressive degeneration of the cervical spine. I find this was the cause of his cervical condition and need for treatment. Such conditions only are compensable if they “follow as an incident of employment.” MO.REV.STAT. §287.020.3(1). I find that they clearly did not follow as an incident of Mr. Bennett’s employment.

Mr. Bennett offered hundreds of pages of exhibits and medical records. Only the testimony of Dr. Koprivica and Dr. Miles directly address the accident issue. And, as previously noted, I find Dr. Miles’ opinions to carry much greater weight than Dr. Koprivica’s opinions. Dr. Miles actually treats patients with orthopedic injuries - not just examine them solely for the purpose of offering medical opinions and testimony as is true for Dr. Koprivica. While Dr. Koprivica has maintained his emergency medicine certifications, his practice since 1992 has been based completely on providing disability evaluations and ratings. *See*, Claimant’s Exhibit U at 72. There definitely is utility in the role he plays in workers’ compensation proceedings. However, in a matter such as Mr. Bennett’s involving complex causation questions, what is needed is not a rehearsed rendition of disability assessments, but, instead, a qualified medical opinion by an orthopedic specialist. Only Dr. Miles satisfies that requirement in this case.

Dr. Koprivica testified that he felt that Mr. Bennett’s work activity on January 28, 2003 was a substantial factor in causing Claimant’s cervical condition. *Id.* at 22:7-14. However, Dr. Koprivica admitted that his opinion was based upon statements to him from Mr. Bennett. *Id.* at 47: 7-11. He did not view the video of Mr. Bennett’s job activity. *Id.* at 47:15-17. *He did not even know the weight of the small motor that Mr. Bennett worked with that he claimed caused his injury.* *Id.* at 47:18-20. To his credit, Dr. Koprivica did concede that what Mr. Bennett described would be a “minor type of physical trauma”. *Id.* at 48:1-5. And, Dr. Koprivica agreed that Mr. Bennett had cervical degenerative disc disease and spondylosis that pre-existed the alleged January 2003 event. *Id.* at 48:11.

But, surpassing the limits of credulity, Dr. Koprivica testified that Mr. Bennett was totally disabled as a result of the January 28, 2003 incident *alone*. *Id.* at 36:10-13 and 51:2-20. Dr. Koprivica’s own testimony in this case that Claimant had disability pre-existing the alleged January 28, 2003 injury totaling over fifty-eight percent (58%) from his three prior back surgeries makes his opinion that this accident alone totally disabled him highly suspect if not patently unbelievable. In addition, Dr. Koprivica opined, as previously noted, that he would have considered Claimant totally and permanently disabled as of April 2002 *but for* Gardner Denver’s accommodations. Dr. Koprivica also testified that Mr. Bennett was “clearly totally disabled if we then add in the additional disability that predated” his January 28, 2003 incident. *Id.* at 38:17-19. So, Dr. Koprivica’s opinions in this case can be summed up as follows:

1. Mr. Bennett was totally disabled *before* his alleged January 28, 2003 injury;
2. Mr. Bennett was totally disabled *by* his alleged January 28, 2003 injury alone; and
3. Mr. Bennett was totally disabled by his alleged January 28, 2003 injury *in combination* with his previous injuries.

If nothing else, Dr. Koprivica certainly was thorough in covering all potential options.

In contrast, in addition to his stellar credentials, Dr. Miles also had the advantage of reviewing the video of Mr. Bennett’s work activity. *See*, Employer’s Exhibit X at 21-22. More importantly, Dr. Miles also had the benefit of actually treating Mr. Bennett over a period of many months. Clearly Dr. Miles had more information and was vastly more qualified than Dr. Koprivica to offer credible opinions in this case. For all of these reasons, I adopt the causation opinions of Dr. Miles and disregard those of Dr. Koprivica.

During his initial treatment Dr. Miles found no injury to the disc itself, only a soft tissue injury from the events described by Mr. Bennett. He testified Claimant had very significant pre-existent osteoarthritis, and had a “bad genetic card” for development of osteoarthritis. As Dr. Miles explained, the work Mr. Bennett was performing on January 28, 2003 did not load the cervical spine. If anything, it may have loaded the lumbar spine. Dr. Miles explained time and time again during

examination by Claimant's counsel that the activity described by Bennett was a triggering event only, i.e., clearly outside of the definition of accident as provided for in Section 287.020. The simple fact that an event occurs at work does not create a compensable claim. *See, Abel v. Mike Russell's Standard Service*, 924 S.W.2d 502 (Mo banc 1996). This Court also had the opportunity to review the video of Mr. Bennett's job of removing the control box. The physical activity involved does not support or explain how Mr. Bennett could have injured his cervical spine and how such an event could have caused the need for a cervical fusion. The video depicted light and sedentary work. Again, citing to Dr. Miles, the fusion relates to the severe degenerative osteoarthritis condition Mr. Bennett had in his cervical spine. This would fall outside the definition of accident and, instead, resulted from the progressive degeneration and deterioration of Mr. Bennett's cervical spine. Accordingly, the claim for compensation is denied and no benefits are awarded. And, even if it were believed that Mr. Bennett suffered a compensable accident on January 28, 2003, the overwhelming evidence would support a finding of permanent total disability only as to the Second Injury Fund. However, in light of the denial of accident, the issue of Second Injury Fund liability is moot.

Date: _____

Made by: _____

Carl Mueller
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation