

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

Injury No.: 05-101081

Employee: Jamey Blackerby
Employer: Rocky Ridge Construction
Insurer: Missouri Employers Mutual Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 4, 2005
Place and County of Accident: Pulaski 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 21, 2007. The award and decision of Administrative Law Judge Margaret Ellis Holden, issued September 21, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 10th day of March 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jamey Blackerby Injury No. 05-101081
Dependents: N/A
Employer: Rocky Ridge Construction
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund
Insurer: Missouri Employers Mutual Insurance Company
Hearing Date: 6/21/07 Checked by: MEH

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: 8/04/05
5. State location where accident occurred or occupational disease was contracted: PULASKI COUNTY, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
 - Did employer receive proper notice? YES
 - 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 TRYING TO LIFT AND PLACE A BEAM WITH A COWORKER THE COWORKER DROPPED ONE END OF A BEAM WHILE CLAIMANT WAS HOLDING THE OTHER END, CAUSING CLAIMANT TO INJURE HIS BACK.
12. Did accident or occupational disease cause death? NO Date of death? N/A
 - Part(s) of body injured by accident or occupational disease: BODY AS A WHOLE
14. Nature and extent of any permanent disability: PERMENANT AND TOTAL
 - Compensation paid to-date for temporary disability: \$7,040.00

16. Value necessary medical aid paid to date by employer/insurer? \$38,955.25

Employee: JAMEY BLACKERBY

Injury No. 05-101081

- Value necessary medical aid not furnished by employer/insurer? \$11,033.32
- Employee's average weekly wages: \$434.50
- Weekly compensation rate: \$289.77

20. Method wages computation: ACCORDING TO LAW

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$11,033.32

25 1/7 weeks of temporary total disability (or temporary partial disability) AT \$9.77, FOR THE DIFFERENCE BETWEEN AMOUNT PAID OF \$280 AND THE ADJUDICATED RATE OF \$289.77.

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning FEBRUARY 8, 2006, for Claimant's lifetime

22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: 0

Permanent total disability benefits from Second Injury Fund:
weekly differential (0) payable by SIF for 0weeks, beginning N/A
and, thereafter, for Claimant's lifetime

Total: SEE AWARD

23. Future requirements awarded: PERMANENT TOTAL DISABILITY AND FUTURE MEDICAL TREATMENT

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

RANDALL BARNES

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jamey Blackerby

Injury No. 05-101081

Dependents: N/A

Employer: Rocky Ridge Construction

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

Insurer: Missouri Employers Mutual Insurance Company

Hearing Date: 6/21/07

Checked by: MEH

The parties appeared before the undersigned administrative law judge on June 21, 2007, for a final hearing. The record remained open until June 29, 2007. The claimant appeared in person represented by Randall Barnes. The employer and insurer appeared represented by Michael Mayes. The Second Injury Fund appeared represented by Andrew Lykowski. Memorandums of law were filed by July 23, 2007.

The parties stipulated to the following facts. On or about August 4, 2005, Rocky Ridge Construction was an employer operating subject to The Missouri Workers' Compensation Law. The employer's liability was fully insured by Missouri Employers Mutual Insurance Company. On the alleged injury date of August 4, 2005, Jamey Blackerby was an employee of the employer. The claimant was working subject to the Missouri Workers Compensation Law. On or about August 4, 2005, the claimant sustained an accident, which arose out of and in the course and scope of employment. This employment occurred in Pulaski County, Missouri. The claimant notified the employer of his injury as required by Section, 287.420, RSMo. The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo. Temporary disability benefits have been paid to the claimant in the amount of \$7,040, representing 25 1/7 weeks in disability benefits, at the rate of \$280. The employer and insurer have paid medical benefits in the amount of \$38,955.25. The attorney fee being sought is 25%.

ISSUES:

1. Whether the accident caused the injuries and disabilities for which benefits are being claimed; namely, the current physical symptoms and psychological condition.
2. Whether the employer is obligated to pay past medical expenses.
3. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.
4. What is the proper rate.
5. The nature and extent of permanent disabilities, including permanent and total disability from February 8, 2006, the last date temporary total disability was paid.
6. The liability of the Second Injury Fund for permanent total disability.

FINDINGS OF FACT:

The main issues in this case are whether the work injuries caused the claimant's current physical and mental complaints and the nature and extent of his permanent disability, including whether he is permanently and totally disabled, and if he is, whether it is from the last injury alone or from a combination of the last injury and prior disabilities.

The claimant is a 35 year old male. He is married with two children and two stepchildren. The claimant was born in the State of California. He completed the eighth grade and then attempted to attend high school, but dropped out in the tenth grade. He has not received any subsequent formal or vocational education since that time. He tried and failed to obtain his general education degree in 1998. Claimant has always had difficulty reading and writing. This was the reason he dropped out of school. Claimant has always worked jobs where he was not required to read. He never filled out an application himself. If an employer required an application he would take it home and have his wife fill it out for him.

After quitting school, claimant's step-father and mother moved to Missouri and he remained in California. He quit school because of poor grades and problems reading and writing. His first job was as a laborer in a potato shed. He then worked as a common laborer in the oil fields of California. In 1996 he moved to

Missouri where he worked as a laborer in an engine factory and for several marinas until he ventured into the construction business.

Claimant testified that before the August 4, 2005 incident, he had been injured on two occasions. Once, when he suffered a laceration on his foot, and once when he was shot through the hand with a nail gun. Neither injury resulted in a workers compensation claim, nor did either injury affect his ability to work. Although he has had other injuries, including a carpal tunnel release and an injury suffered in a car wreck, he did not feel that those posed any hindrance to employment.

He began his employment as a general construction laborer with Rocky Ridge Construction Company LLC on or about May 23, 2005.

He worked full-time until August 4, 2005, and his rate of pay was \$12.00 per hour. He testified that he sometimes worked over 40 hours a week. He also said that he worked 3 or 4 Saturdays for which he was paid cash. There is no record of these hours. He started on a Monday and the work week started on Wednesday, so the first week he did not work a full week. The holidays of Memorial Day, Fourth of July, and Labor Day were not regular or scheduled work days. Employer and insurer admitted wage records that covered 12 weeks including the week he was injured and the partial week when he began working. In the other 10 weeks he earned a total of \$4,150.50.

Robin Gower, the bookkeeper for employer, testified. She stated that the wage statement she prepared correctly reflected the timesheets she had, and that she did not find any Saturday's claimant worked.

Craig Gower, the owner of Rocky Ridge Construction, testified. He did not remember the claimant ever working on a Saturday, and he did not remember paying him for working on a Saturday. He did remember giving the claimant \$50 when his truck was broken down and he was short on money.

On the date of injury, August 4, 2005, claimant was assisting another employee in placing a twenty six foot, two inch by twelve inch board onto the roof of a home. Claimant was holding on to one end of the board while kneeling on the third tier of a scaffold. The other employee, who was holding the other end of the board, was on the roof of the home. While lifting the board, the other employee slipped and dropped his end of the board. In an attempt to prevent the board from falling, claimant held onto the board but was twisted downward and sustained the full weight of the board.

Claimant immediately felt pain in his back. He descended from the scaffold and informed his boss of the injury. He remained at work but was unable to perform any subsequent duties and has not returned to any type of employment since that date.

Immediately after the injury, claimant requested his employer to provide medical treatment. That request was denied. On August 8, 2005, after waiting three days for authorized treatment, claimant went to his family physician, Dr. Joseph Rakestraw. He presented with complaints of lower back pain and pain to the right wrist. He was prescribed Vicoden and Flexeril. He was also given samples of Lexapro. On August 9, 2005 an X-ray of the lumbar spine was performed. In addition, a work excuse was given for August 9 until August 14.

On August 20, 2005, claimant presented himself at St. John's Hospital in Lebanon, Missouri as the result of continuing back pain, radicular pain in both legs and the loss of bowel control. The doctors in Lebanon directed that he go to the St. John's facility in Springfield, Missouri. He was immediately transported to that facility and underwent an MRI. The MRI revealed a left S1 radiculopathy secondary to a herniated disk.

Conservative treatment was initiated, commencing with an oral steroid. On August 26 and September 7, 2005, claimant received a translaminar epidural injection. Claimant's pain and other symptoms failed to abate. On October 7, 2005, Dr. Mark Crabtree performed a hemilaminotomy with microdiscectomy at the L5-S1 level. The surgical intervention failed to alleviate claimant's symptoms. He continued to have severe and continued back and lower extremity pain.

The claimant presented to the emergency room three times due to falls he had in the late fall of 2005. On October 11, 2005, claimant went to the emergency room at St. Mary's Hospital in Jefferson City, Missouri, with continuing low back pain. He testified that he had fallen in his living room because his leg had given out. He was treated and released. On October 18, 2005, Dr. Crabtree described claimant's post operative

course as "stormy".

On November 12, 2005, claimant again went to the emergency room at St. Mary's Hospital in Jefferson City, Missouri. His pain was again unbearable. He reported that he had started physical rehabilitation approximately two weeks prior and felt a pop in his back. Since that time, he had suffered from radiating pain to his lower extremities and incontinence. The emergency room doctor recommended an MRI. However, after consultation with a neurosurgeon, it was decided the MRI did not need to be performed on an emergent basis. Claimant was prescribed Valium, Percocet and Amitriptyline for his pain and inability to sleep.

On December 2, 2005, the claimant again went to the emergency room at St. Mary's Hospital in Jefferson City, Missouri. He stated that during physical therapy he had fallen and that he was having numbness and tingling in the perineal area and upper thighs. At this time an MRI was performed. That testing revealed a small left posterolateral anterior epidural defect, which was displacing the left S1 nerve root. Claimant was hospitalized for two days.

On December 6 and 27, 2005, the claimant saw employer's authorized physician, Dr. Crabtree, with continuing complaints of back pain. Dr. Crabtree continued physical therapy, and increased the Neurontin and started Trazodone with a limit of lifting of 5 pounds.

On January 12, 17 and 30, 2006, the claimant reported to Dr. Lennard that his symptoms were no better. He still had back pain radiating down the left lateral leg. He also reported intermittent burning pain which was aggravated by standing and ambulation. On February 8, 2006, Dr. Lennard opined the claimant was at maximum medical improvement. He felt that claimant had all the medical treatment available, and gave him exercises to do at home. He rated him with a permanent partial disability of 10% of the body as a whole and permanent lifting restriction of forty (40) pounds. Claimant testified that when he was released he was having pain, he could not bend or stoop, and was having problems sitting or walking.

Three weeks later, after Dr. Lennard placed him at maximum medical improvement, claimant was again hospitalized with back pain on February 25, 2006. He was complaining of back pain and pneumonia and coughing. He gave a history of feeling a pop when he was picking up a bag. He received another MRI of the lumbar spine. The finding was consistent with the prior diagnosis as there was continued evidence of post surgical scar tissue due to a disk protrusion. Claimant is not requesting reimbursement for the treatment he received related to the pneumonia.

In October 2006, James Stuckmeyer, M.D. offered deposition testimony on behalf of the claimant, and opined that claimant was permanently disabled due to his current condition and found that he might benefit from additional diagnostics. Those diagnostics were needed as the result of persistent symptoms of leg pain. He explained the testing would have to determine whether claimant had a recurrent and/or retained disc fragment or scar tissue. He recommended that future treatment be based on the outcome of those studies. He also opined that claimant would require ongoing medication.

In February 2007, Dr. Lennard again saw the claimant. He referred claimant to Dr. Crabtree for an assessment of whether further surgery was appropriate. On April 4, 2007, an MRI was performed at the direction of Dr. Crabtree. The impressions noted epidural fibrosis surrounding the left S-1 nerve root sleeve. On April 9, 2007, Dr. Crabtree did not recommend any additional surgical intervention or medical treatment, but he did order continued non-surgical treatment.

Dr. Lennard testified that when he saw the claimant in February 2007 his symptoms and complaints were different than when he last saw him in February 2006. He noted claimant's pain in his back and legs was worse and his subjective pain scales were elevated. He said his diagnosis was the same, post L5-S1 microdiscectomy. He also testified that the MRI's did not change between 2006 and 2007. Dr. Lennard said that it is possible that the incident where claimant twisted and went to pick up something could account for the change in intensity and location of the symptoms. He also felt that the objective level of pain the claimant was complaining of did not fit the type of injury he had.

The employer ceased all benefits as of February 25, 2006. After this date, the claimant used his wife's insurance to obtain his medications. He incurred out of pocket expenses for co-pays in the amount of \$882.00 for medications. He also presented unpaid medical bills in the amount of \$9,747.32 from St. Mary's Health Center, and \$404.00 from St. John's Hospital in Lebanon. These total \$11,033.32, for unpaid medical

bills. Claimant testified that part of the billing for treatment on February 26, 2006, concerned his treatment for influenza or pneumonia and that treatment should not be covered by the employer. Claimant has deducted \$2,075.75 from the billing on that date for cost related to the influenza or pneumonia, and the total requested does not include these charges.

On August 1, 2006, Dr. James A. Stuckmeyer, an orthopedic surgeon, performed an examination of the claimant. In forming his opinions, he relied on the medical records generated by the injury and the report of Dr. Halfaker.

Dr. Stuckmeyer found that the injury of August 4, 2005, was the only cause of claimant's current physical condition. He further found all the medical treatment received was necessary and the bills incurred were reasonable and customary. He indicated that all of the diagnostic scans performed after the surgery indicated a left para-central disk protrusion along with granulation tissue and scar tissue. This was explained as a common result of a surgical intervention at the L-5, S-1 level.

At the time of his deposition in October of 2006, he strongly suggested further diagnostic studies. He indicated that the claimant may have a recurrent and/or retained disk fragment and that condition could account for claimant's persistent symptoms. If the fragments were found, the claimant would need more medical treatment, including surgical intervention. However, he suggested that any future treatment be based on the result of those diagnostics. Dr. Stuckmeyer testified that he saw three possibilities for the claimant:

One, he has a recurrent disk herniation or a retained fragment which was never identified at the time of the surgical intervention.... The other possibility is he's got epidural fibrosis, a scar tissue phenomena with intra-neural, in other words damage to the nerve root itself, caused by either the injury, possibly caused by traction at the time of surgery. And the third possibility falls into the wastebasket term which you've all heard, chronic failed back syndrome, chronic laminectomy syndrome, and those patients really have nothing that can be surgically addressed, they have to learn to live with it.

So we have three possibilities: One failed back syndrome; two, scar tissue or intra-neural fibrosis, chronic nerve damage, both of which are chronic, meaning lifelong pain is addressed only by modification of lifestyle and medication; the third one is the one that I have concern about is that there is a possibility that this individual does have some surgically correctable pathology in his back.... And my concern is that this individual may have a problem that is surgically addressable and with additional treatment could resolve a lot of these work-related issues and definitely get him off of his morphine.

He also opined that if a disc fragment was not found, then the persistent pain would be the result of scar tissue forming around the nerve root.

Dr. Stuckmeyer found that if the need for further treatment did not exist, claimant would be limited to lifting 10 to 15 pounds on a very occasional basis with no repetitive torsional stresses to the lumbar spine and should include repetitive lifting, bending, stooping or squatting, and he would be restricted from operating motorized vehicles. Dr. Stuckmeyer also opined claimant would have a continuing need for medications.

Dale Halfaker is a licensed psychologist and neuropsychologist. He evaluated the claimant on May 8, 2006. Dr. Halfaker reviewed the medical records, education records from Arvin High School and Lamont School District, and a Functional Capacity Exam from Physical Therapy Care Center.

Dr. Halfaker did numerous testing to determine claimant's level of intellectual functioning. The results showed that claimant's broad reading, written language skills, academic skills and academic fluency were found to be at the level of the third grade. His written expression was slightly higher, a fourth grade level, while his math skills were at the fifth grade level. While claimant's difficulties with reading and written expression were significant for him, he did not have an actual learning disability. He found that pain was a major factor for the claimant. He also found that the injury had changed claimant's self concept, interfered with his sleep and daily living and, ultimately, caused depression.

Dr. Halfaker found depression to be evident in the test results. He found it was the direct result of claimant's pain, physical limitations and disability created by the work-related injury. Dr. Halfaker found a psychological

impairment in the range of 19% to 29% with a discrete rating of 24% of the body as a whole. He also found a 10% body as a whole impairment due to academic problems.

Michael Jarvis is a psychiatrist employed by Washington University in St. Louis, Missouri. He examined the claimant on May 21, 2007. Mr. Jarvis testified for the employer. He found claimant's history consistent with someone who had a preexisting psychiatric disorder of depression. He testified that claimant was suffering from depression but that it was not the result of his work place injury. Instead, he relied on such indicators as past environmental or social circumstances along with a prior psychiatric history. Dr. Jarvis testified that the antidepressant the claimant received when he was 15 years old and the Lexapro he was prescribed four days after the work injury was the basis for this prior psychiatric history. He also relied on the foundational history consisting of the circumstances of where and how claimant lived in addition to his genetic disposition and prior alleged drug abuse and legal history.

Dr. Jarvis testified that he found the work injury played a minor or insignificant role, if at all, in claimant's psychiatric condition. He felt claimant had a preexisting psychological condition before his work injury. He said that the claimant's depression is not as severe as to impede his ability to work, and that he would have the same level of function with his back injury with or without the depression. Dr. Jarvis agreed on cross-examination that prior to the August 2005 injury, claimant was having no problem maintaining employment or doing his job.

Each of the parties called a vocational expert. Wilbur Swearingin, a certified vocational rehabilitation counselor, testified for the claimant. On August 21, 2006, he met with the claimant for the purpose of performing a vocational evaluation. He reviewed the medical records, including the records and testing results of Dr. Halfaker. After reviewing the records and his evaluation, he concluded that when you combine the claimant's physical condition, his restrictions, his chronic pain, the medications he is taking, his marginal education, and the type of work he has done in the past, he concluded that the claimant was not employable in the open labor market. He testified that because of the morphine he takes due to his chronic pain, he cannot drive, and regardless of the lifting restrictions placed on him, he cannot find a job. Mr. Swearingin also testified that he identified no pre-existing impairment that constituted a hindrance or obstacle to employment, and that claimant was permanently and totally disabled due to the August 2005 injury alone. He also found the claimant did not have a learning disability.

Mr. James England, a certified vocational rehabilitation counselor testified on behalf of the Second Injury Fund. Mr. England noted that there were two opinions, one with a forty pound weight restriction and the second with a ten to fifteen pound restriction in combination with avoidance of repetitive torsional stresses, repetitive lifting, bending, stooping, squatting and with a recommendation against operating motorized vehicles. He also noted that the claimant could not sit more than one half hour at a time. He could not walk more than one hundred yards, has pain across the back, numbness and tingling in his left leg and toes. In addition, the claimant was taking sixty milligrams of morphine twice a day. Mr. England agreed that under Dr. Stuckmeyer's restrictions Mr. Blackerby would be unable to perform any sedentary or light work. He also noted that claimant did not have a GED, and had only completed either the ninth or tenth grade.

Mr. England testified that he if took Dr. Lennard's restrictions, that he felt claimant could work in an entry level job such as an office cleaner. He also indicated that claimant could be a courier delivering mail or a mail distribution clerk, despite the inability to read beyond a fifth grade level. He also opined that claimant could possibly function as a cashier or convenience store clerk. But when quizzed on the physical requirements, England admitted that those jobs would not fit within his long-term sitting or walking problems.

Mr. England found that the combination of intractable pain, morphine, difficulty in prolonged standing, walking, stooping and squatting would prevent claimant from being employed in the open market.

Michael Dreiling, a certified vocational rehabilitation counselor, testified on behalf of the employer. He found the claimant had either a ninth or tenth grade education and a lack of formal academic or vocational training since that time. Mr. Dreiling also acknowledged the lack of a GED. He said the claimant's lack of oral and writing skills affected his past and present ability to be employed. Mr. Dreiling admitted he had not reviewed the school records of the claimant.

He found Dr. Lennard's restrictions would limit claimant's employment options, but they would not knock him

out of the job market. But on cross examination, he admitted that the addition of claimant's prescription morphine to the other factors in the case would make him unemployable.

Mr. Dreiling gave testimony that the combination of Dr. Stuckmeyer's restrictions, Dr. Halfaker's restrictions and claimant's education and work background, along with the morphine and physical requirements of constant changing of positions, would make it very difficult to place claimant in the open labor market. He also acknowledged the evidence of intractable pain, complaints of the inability to withstand prolonged sitting, standing, stooping and/or squatting, and said that these impediments would prevent claimant from being employed in the open market.

The claimant testified that he has ongoing pain and limitations that have been brought about by his injury. He said that at no time has the pain in his back and legs ever gone away since the date of his injury in 2005. Despite the epidural injections, surgical interventions and follow-up physical therapy, nothing has abated his symptoms. He testified that since the surgery he has problems sitting. His standing is limited, and he cannot walk without pain. He cannot stoop or bend. He cannot drive due to taking Morphine.

The claimant received counseling on two separate periods as a child. The first time was when he was 7 years old and again at age 15 when his grandfather died. He also took medications at the time. He did not take any further medications for any psychological issue until he was given samples by his doctor after the work injury in August 2005. He testified that the work injury has caused him to be depressed. He gave several reasons for this including: he cannot care for his children as he did before the injury; he does not want to talk to or be around his family at times; he cannot do work around his house as he did before; and he cannot provide for his family. The medications he is now taking include Morphine, Flexeril, Neurotonin, Cymbalta, Toprol, and Trazodone.

CONCLUSIONS OF LAW:

1. Whether the accident caused the injuries and disabilities for which benefits are being claimed, namely the current physical symptoms and psychological condition.

I find that the claimant's current complaints, both physical and mental, are caused by the work-related injury of August 2005.

This conclusion is based on Dr. Stuckmeyer's opinion that the injury of August 4, 2005, was the only cause of claimant's current physical condition. The employer and insurer argue that the claimant had an intervening injury when he bent to lift a sack and felt a pop and had increased symptoms on February 25, 2006. He received another MRI of the lumbar spine. The finding was consistent with the prior diagnosis as there was continued evidence of post surgical scar tissue due to a disk protrusion. He also had an MRI in April 2007 that showed no new injury. Claimant had several instances of falls and aggravations to his back injury that occurred during physical therapy. Claimant had consistent problems since the date of surgery. I do not find that the instance in late February 2006 constituted an intervening injury, and I find that the work injury of August 2005 is the cause of claimant's condition.

As to the psychological condition, Dr. Halfaker found depression to be evident in the test results. He found it was the direct result of claimant's pain, physical limitations and disability created by the work-related injury. I find Dr. Halfaker very credible. Based on his opinions, I find that the work injury is the cause of the claimant's current injuries and disabilities in the form of depression.

2. Whether the employer is obligated to pay past medical expenses.

I find that based on the testimony of Dr. Stuckmeyer that the medical expenses incurred by the claimant were fair and reasonable and incurred as a result of his work-related injury. Therefore, I find the employer and insurer are liable for past medical expenses in the total amount of \$11,033.32.

3. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.

Dr. Stuckmeyer opined that the claimant would have a continuing need for medications, and, in fact, the claimant has continued to take medications for the pain and continued symptoms, both physical and mental. I find that the claimant will require future medical care in order to cure and relieve him of the effects of the injury, and the employer is ordered to provide future treatment as recommended by a competent physician.

4. What is the proper rate.

Section 287.250.1(4) states:

If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular to scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision;

The claimant only worked for the employer for twelve weeks. He started on a Monday, but the pay period started on Wednesday, therefore, he did not work a full week his first week. Nevertheless, the statute specifically states that the week if the employee starts is counted if it begins at the beginning of a calendar week. Claimant missed a total of 8 days during his first eleven weeks. Excluding the holidays of Memorial Day and Fourth of July, which were not regular or scheduled work days, he missed a net total of 6 days in the first eleven weeks he worked for employer immediately preceding the week he was injured. In the eleven weeks, he earned a total of \$4,346.50. I am excluding the twelfth week, the week he was injured. Based on the statute, since he missed 6 days, one week would be eliminated due to missing at least 5 days of regular or scheduled work. Therefore, I find that the amount he earned of \$4,346.50 should be divided by 10 to give an average weekly wage of \$434.64 and a weekly rate of \$289.77.

Since temporary total disability was paid at a lower rate, \$280 for 25 1/7 weeks, employer and insurer shall pay the claimant an additional \$9.77 per week for these 25 1/7 weeks for a total of \$245.65.

5. The nature and extent of permanent disabilities, including permanent and total disability from February 8, 2006, the last date temporary total disability was paid.

Claimant has not returned to work since the date of this injury. He testified that he has intractable pain, and since the surgery he has problems sitting. His standing is limited, and he cannot walk without pain. He cannot stoop or bend. Due to his pain, he takes Morphine on a regular basis. Since this is a narcotic medication, he cannot drive or operate motor vehicles due to taking Morphine.

Claimant's ability to perform physical functions was limited by doctors. Dr. Lennard gave him a permanent lifting restriction of forty (40) pounds; and Dr. Stuckmeyer, permanent restriction of lifting 10 to 15 pounds on a very occasional basis with no repetitive torsional stresses to the lumbar spine, and should include repetitive lifting, bending, stooping or squatting, and he would be restricted from operating motorized vehicles.

All three vocational experts testified that claimant was unable to compete in the open labor market when his Morphine use was factored in.

After carefully considering all of the evidence, I find that the claimant cannot compete in the open labor market due to the permanent physical limitations he has experienced due to the work-related injury on August 4, 2005, and as a result he is permanently and totally disabled.

The employer and insurer are ordered to pay the claimant past permanent total disability in the amount of \$289.77 per week from the date that temporary total disability was paid, February 8, 2006, to the present and to continue in the future for as long as he is thus disabled.

6. The liability of the Second Injury Fund for permanent total disability.

I find the claimant did not have any prior injuries which reached to a level of constituting a hindrance or obstacle to employment. Although he has serious deficits in his ability to read and write, there is no evidence that he has an actual learning disability. Based on my finding that the claimant's permanent total disability arose from the last injury alone, I find that the Second Injury Fund has no liability in this claim.

Attorney for the claimant, Randall Barnes, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker
Jeffrey W. Buker
Director
Division of Workers' Compensation