

AWARD ALLOWING COMPENSATION
(Affirming in Part and Reversing in Part
Award and Decision of Administrative Law Judge)

Injury No.: 98-060682

Employee: Jeff Botkins
Employer: Diemakers/Internet
Insurer: Sentry Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: June 4, 1998

Place and County of Accident: Monroe City, Monroe County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, heard oral argument and considered the whole record. Pursuant to §286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated December 28, 2007.

Preliminaries

The issues stipulated at trial were whether employee's right shoulder and low back complaints were medically causally connected to the work-related accident on June 4, 1998; liability for past medical expenses; nature and extent of permanent disability; and second injury fund liability.

The administrative law judge determined and concluded that employee met his burden of proof with respect to his right shoulder and low back complaints pertaining to the June 4, 1998 work-related accident.

The administrative law judge included employee's 2000 claim for injury (Injury Number 00-129558), along with employee's 1998 injury claim. The parties stipulated in the 2000 injury claim that employee sustained an injury by occupational disease on the alleged date of injury, September 22, 2000, while under the employ of employer. The administrative law judge found that employee's bilateral carpal tunnel was a continuation of his June 4, 1998, accident.

A timely Application for Review with the Commission was submitted alleging that the administrative law judge erred in his determination that employee was permanently and totally disabled as a result of a combination of his work-related injuries and conditions that have arisen following the work-related injuries.

Employee argues that: (1) if the injuries under Injury No. 00-129558 were merely a continuation of the complaints of symptoms arising from the June 4, 1998 accident, then the failure to find employee permanently and totally disabled as a result of his work-related injuries is contrary to the evidence; and (2) if the injuries under Injury No. 00-129558 are not a continuation of the June 4, 1998 accident, then failure to find employee permanently and totally disabled as a result of the combination of prior injuries and work-related injuries is against the weight of the evidence.

The Commission affirms the determination of the administrative law judge that employee sustained a 25%

permanent partial disability of the right shoulder and 40% permanent partial disability to the body as a whole referable to the back.

For the reasons set forth in this award and decision, the Commission reverses the administrative law judge's award finding employee's wrist injuries were a continuation of his June 4, 1998 accident.

Summary of Facts

Employee began working for employer in 1978 as a die caster. In 1987 employee injured his hip when he slipped on oil and fell while at work. The bruised portion of his hip developed into a fatty tumor which was removed surgically in June 1987. Employee settled the claim for his hip injury for 5% of the body as a whole. Employee returned to work full-time after his injury. Employee underwent bilateral carpal tunnel releases performed by Dr. Goldberg in 1993. Employee settled his claim for 10% of each hand at the wrist.

On June 4, 1998, employee tripped and fell on his back and right shoulder. Employee was on light duty for one week and then returned to regular duty. The Report of Injury listed the nature of injury as "pain in the middle of back around shoulder blade and left side." On June 23, 1998, employee felt a pop in his back while lifting parts at work. The Report of Injury listed the nature of the injury as "low back pain."

Employee initially underwent physical therapy to alleviate lower back pain. Employee saw Dr. Hertel for an evaluation on October 28, 1998. An MRI of the lumbar spine revealed degenerative disc disease of L3-4 and L4-5, with mild disc bulging and spondylosis at L4-5. On a December 29, 1998 office visit, employee indicated that his right shoulder pain extended into his forearm and complained of pain in his right wrist. Employee believed that it may be a recurrence of his carpal tunnel syndrome. A lumbar myelogram and post myelogram CT scan revealed mild posterior disc bulging at L3-4 and L4-5. Employee underwent physical therapy through March of 1999. Employee received facet injections for his shoulder and back pain from March to July of 1999. In July 1999, Dr. Hertel opined that employee had facet syndrome. On July 27, 1999, Dr. Hertel placed permanent restrictions on employee including no lifting greater than 20 pounds on a repetitive basis and occasional bending and stooping. On August 20, 1999, Dr. Hertel released employee to work without restrictions. Dr. Hertel opined that employee suffered from a 2% permanent partial disability of the back.

Employee was evaluated by Dr. Jolly on May 16, 2000. An MRI revealed a small complete tear of the rotator cuff. On September 15, 2000, employee was seen by Dr. Cunningham for complaints of constant pain in his low back and right shoulder. Dr. Cunningham diagnosed employee with degenerative disc disease at L3-4 and L4-5 with mild central disc bulging; small complete tear of the rotator cuff of the right shoulder; and suspected bilateral carpal tunnel syndrome. On October 11, 2000, Dr. Cunningham recommended that employee undergo surgery for the rotator cuff tear in his right shoulder and to address his bilateral carpal tunnel syndrome. He also recommended epidural steroid injections for employee's back pain. Dr. Cunningham opined that employee's right rotator cuff tear was attributed the June 4, 1998 injury.

On October 17, 2000, employee was evaluated by Dr. Bieniek for bilateral hand numbness. Dr. Bieniek recommended employee continue to use night splints on his wrists and administered injections to both wrists in October 2000. In November, employee was diagnosed with recurrent carpal tunnel syndrome. Dr. Bieniek performed a carpal tunnel release on employee's left wrist on December 18, 2000 and on his right wrist on December 27, 2000. Employee was released by Dr. Bieniek on February 6, 2001.

On February 1, 2001, Dr. Peter Mirkin performed an independent medical examination (IME) at the request of employer/insurer. Dr. Mirkin rated employee as having a 4% permanent partial disability secondary to the work incidents in June 1998; half of this due to each incident. Dr. Mirkin found employee to suffer a 4% permanent partial disability of the shoulder as a result of the June 4, 1998 incident; and a preexisting 5% permanent partial disability regarding his spine.

An MRI on March 27, 2001 of employee's lumbar spine revealed a central disc herniation at L4-5. Employee was

re-examined by Dr. Bieniek on April 11, 2001 for right shoulder and low back pain. Dr. Bieniek recommended shoulder surgery. On May 2, 2001, Dr. Bieniek performed an arthroscopy, arthroscopic acromioplasty and bursectomy, and mini rotator cuff repair on employee's right shoulder. Employee underwent physical therapy from May until August 2001.

Employee underwent discograms in June 2001, which were abnormal. Employee did not return to work after June 20, 2001. On September 4, 2001, Dr. Burton performed a posterior lumbar fusion at L3-4 and L4-5 and placement of pedicle screws.

Employee returned to Dr. Bieniek on August 24, 2001 for left arm pain and numbness. On October 26, 2001, employee returned to Dr. Bieniek with complaints of chronic numbness in his left thumb and index finger with intermittent numbness in his right hand. On January 22, 2002, employee continued to complain of numbness in both hands.

At the request of employer on July 11, 2002, Dr. Coin performed an IME on employee to address bilateral upper extremity complaints. On November 22, 2002, employee underwent a third carpal tunnel release on the left. Employee had physical therapy from December to January 2003. Employee complained that his pain was worse after the surgery, and Dr. Coin recommended pain management.

On March 24, 2003, Dr. Jolly performed surgery on employee's back to remove the hardware, place a bone stimulator, and augment the fusion. The bone stimulator was later removed on June 25, 2004. Dr. Jolly recommended employee avoid repetitive activity with his hands, change positions often, and not lift more than very limited amounts of weight.

Employee saw Dr. Stephen Schmidt on April 24, 2003 for a pain management evaluation. Employee was placed on pain medication for neuralgia/neuritis involving the median nerve. Dr. Schmidt opined that employee would need these medications on an ongoing basis.

On November 11, 2003, Dr. Coin opined that employee had reached maximum medical improvement (MMI) for injuries to his bilateral upper extremities. Dr. Coin found employee to have a 15% permanent partial disability at the level of the left wrist and 12% permanent partial disability at the level of the right wrist. Dr. Coin released employee without restrictions with respect to his wrists.

On August 4, 2005, employee was examined by Dr. Shekhani. Dr. Shekhani opined that employee had a 30% permanent partial disability of the upper left extremity at the wrist; 25% permanent partial disability of the right upper extremity at the wrist; 50% permanent partial disability of the right upper extremity at the shoulder; 50% permanent partial disability of the body as a whole secondary to the back surgeries; and an additional 10% permanent partial disability of the body as a whole referable to obesity. Dr. Shekhani opined that due to preexisting disabilities, employee suffered a 15% permanent partial disability of the left upper extremity at the wrist and 12% permanent partial disability of the right upper extremity at the wrist, both due to the 1994 carpal tunnel releases. Dr. Shekhani stated that employee's carpal tunnel syndrome could have been caused by the 1998 fall, the repetitive nature of employee's job, or the combination of both.

Dr. Shekhani found employee to be permanently and totally disabled due to the combination of employee's work-related injuries. Dr. Shekhani made reference to employee's bilateral carpal tunnel releases, shoulder surgery, and two back surgeries; and opined that it was a combination of all things that made it difficult for employee to work. Dr. Shekhani opined that employee was not able to engage in any substantial gainful activity nor would he expect employee to be able to perform full-time work on an ongoing basis. Dr. Shekhani recommended to avoid repetitive lifting, uneven surfaces, prolonged walking or standing; to take appropriate pain medication; and limit the amount of weight he lifted. Dr. Shekhani believed employee would need continued medical care for his work-related conditions including doctor's visits, physical therapy, and oral medication.

Mr. England, vocational expert, examined employee on January 26, 2006. Mr. England opined the combination of employee's upper extremity problems along with his back problems would negate his ability to sustain any type of

work activity, on a consistent, day to day basis.

On December 29, 2006, Dr. Mirkin performed another IME at the request of employer. Dr. Mirkin was not requested to evaluate employee's complaints referable to his hands or wrists. Dr. Mirkin opined that employee suffered a 6% permanent partial disability of his right upper extremity at the shoulder; 30% permanent partial disability secondary to his back surgeries.

Findings of Fact and Conclusions of Law

September 22, 2000 Injury Claim

We reverse the administrative law judge's finding that employee's September 22, 2000 claim, with respect to his bilateral carpal tunnel syndrome, was merely a continuation of employee's 1998 injuries. The administrative law judge incorrectly encompassed employee's 2000 injury claim under his 1998 injury claim. The parties stipulated to the fact that employee sustained an occupational disease on September 22, 2000. As such, the 2000 injury claim will be separately analyzed under Injury No. 00-129558. Furthermore, the record supports the finding that employee's bilateral carpal tunnel syndrome was not a continuation of employee's June 4, 1998 injuries. Therefore, the administrative law judge's finding that employee's bilateral carpal tunnel syndrome was a continuation of his June 4, 1998, accident, is not supported by the record.

June 4, 1998 Injury Claim

We agree with the administrative law judge's determination that employee has met his burden of proof with respect to employee's back and shoulder injuries; and find that a 50% permanent partial disability to the body as a whole referable to the back and 25% permanent partial disability of the right shoulder is supported by the record.

We further agree with the administrative law judge's finding that employee is entitled to past medical expenses and future medical care and treatment. Although future medical care and treatment was not stipulated as an issue in this case, §287.140.1 RSMo. 2000, provides:

[T]he employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

The need for future medical care need not be established as a certainty, but it must be established as being reasonably probable through competent, medical testimony. *Bowers v. Highland Dairy Company*, 132 S.W.3d 260, 270 (Mo. App. S.D. 2004). An employer may be required to provide future medical care where there is evidence to a reasonable degree of medical certainty that the need for treatment is caused by the work injury even if the treatment will also provide treatment for a non-compensable condition. *Id.*

A sufficient factual basis to award past medical expenses exists when employee identifies all of the medical bills as being related to and the product of his work related injury and the medical bills are shown to relate to the professional services rendered by medical records in evidence. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989).

Employee is entitled to reimbursement for unpaid expenses related to his June 4, 1998 injuries including those from Dr. Jolly (\$1,765.25); Pain Management Services (\$385.00); Columbia Orthopedic Group (\$244.00); Audrain Medical Center (\$271.62) and Gosney Pharmacy (\$3,889.94). Employee is entitled to unpaid expenses totaling \$6,555.81.

Employee has demonstrated a need for future medical care and treatment related to his June 4, 1998 work injuries. Employee's need for continued pain management is confirmed by employee's treating doctors. Dr.

Shekhani and Dr. Schmidt opined that employee would need ongoing care and treatment for his work-related injuries, including pain medication.

Conclusion

The Commission concludes that the competent and substantial evidence supports a finding that as a result of employee's work injury of June 4, 1998, employer is liable for 40% permanent partial disability to the body as a whole referable to the back and 25% permanent partial disability of the right shoulder. Employee has failed to show that he is permanently and totally disabled based on his June 4, 1998 injuries. Employer is directed to pay employee permanent partial disability benefits in the amount of \$60,695.56 (\$278.42 x 218 weeks).

Employer is liable to employee for past medical expenses in the amount of \$6,555.81.

We award future medical care and treatment to cure and relieve employee from the residuals and effects of his injuries related to his right shoulder and back, pursuant to the provisions of §287.140 RSMo.

The award and decision of Administrative Law Judge Ronald F. Harris, issued December 28, 2007, as modified, 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.

Given at Jefferson City, State of Missouri, this 22nd day of December 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING
William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jeff Botkins

Injury No. 98-060682

Dependents: N/A

the Employer: Diemakers/Internet

Before
DIVISION OF WORKERS'
COMPENSATION

Additional Party: Second Injury Fund

Insurer: Sentry Insurance Company

Hearing Date: October 29, 2007

Checked by: RFH/tmh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: June 4, 1998.
5. State location where accident occurred or occupational disease was contracted: Monroe City, Monroe 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:
Walking in production area when tripped and fell.
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: Hands, right shoulder, and back.
14. Nature and extent of any permanent disability: 25% right shoulder; 40% BAW (back); 15% left wrist; 13% right wrist; + 10% multiplicity.
15. Compensation paid to-date for temporary disability: \$21,024.12; 65 2/7 weeks, 6/22/01-7/15/01 and 8/13/01-10/20/02.
16. Value necessary medical aid paid to date by employer/insurer? \$71,986.20.
17. Value necessary medical aid not furnished by employer/insurer? See award.
18. Employee's average weekly wages: \$481.99.

19. Weekly compensation rate: \$321.33 PTD/\$278.42 PPD.

20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Medical expenses: Per award \$ 8,249.33

PPD: Right shoulder 232 x 25% = 58 weeks of compensation
BAW 400 x 40% = 160 weeks of compensation
Left wrist 175 x 15% = 26.25 weeks of compensation
Right wrist 175 x 13% = 22.75 weeks of compensation

267 weeks of compensation
+ 10% multiplicity 26.7

Total: 293.7 x \$278.42 = 81,771.95

TOTAL: \$90,021.28

22. Future Requirements Awarded: Treatment as recommended by Dr. Schmidt (see award).

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: Stephen Thurmer

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jeff Botkins

Injury No: 98-060682

Dependents: N/A

Employer: Diemakers/Intermet

Additional Party: Second Injury Fund

Insurer: Sentry Insurance Company

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

Checked by: RFH/tmh

FINAL AWARD

PRELIMINARIES

On October 29, 2007, Jeff Botkins ("Employee") appeared in person and by his attorney Stephen Thurmer, for a hearing for a final award on his claim against Diemakers/Internet ("Employer") and its insurer Sentry Insurance Company ("Insurer"). The employer and insurer were represented at the hearing by attorney Robert Bidstrup. The Second Injury Fund ("SIF") was represented by Assistant Attorneys General Mike Finneran and Amber Jordan. At the same time this case was heard, evidence was also taken on Employee's two other claims with Injury Numbers of 98-081543 and 00-129558. Separate awards will be issued for those claims. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS

1. At all relevant times the Employee and Employer were operating under the provisions of the Workers' Compensation Law;
2. The Employer was insured for workers' compensation;
3. The Employee sustained an accident that arose out of and in the course of employment with the Employer;
4. Timely notice of the accident was provided to the employer;
5. Employee filed a timely Claim for Compensation;
6. Employee's average weekly wage at the time of the accident was \$481.99;
7. Employee's compensation rate for both TTD and PTD is \$321.33 and PPD is \$278.42;
8. Employer has paid TTD benefits in the amount of \$21,024.12 representing 65 2/7th weeks from 6-22-01 through 7-15-01 and 8-13-01 through 10-20-02;
10. Employer has provided medical aid in the amount of \$71,986.20.

ISSUES TO BE RESOLVED

The parties requested the Division to determine:

1. Whether Employee's right shoulder and low back complaints are medically causally connected to the work related accident of June 4, 1998;
2. Liability for past medical expenses;
3. Nature and extent of permanent disability PTD v. PPD; and
4. Second Injury Fund Liability.

Initially, reimbursement for unpaid mileage was an issue but the parties resolved that issue prior to commencement of the hearing. A lien has been submitted from a prior attorney and employee's attorney indicated that was being resolved.

EXHIBITS

Employee Exhibit's A through Z and AA through KK were offered and admitted into evidence. Employer/Insurer Exhibits 1, 2, and 5 were offered and admitted into evidence. The SIF offered no exhibits.

As noted earlier, evidence was taken on three claims and while separate awards will be issued for each, there is some overlap, so the following summary may prove helpful.

This case, Injury Number 98-060682, involves a claim for an accident occurring on June 4, 1998. The Claim for Compensation alleges the employee fell and injured his low back^[1].

Injury Number 98-081543 involves a claim for an accident occurring on June 23, 1998. The Claim for Compensation alleges the employee was lifting a box and felt his back "pop".

Injury Number 00-129558 involves a claim for bilateral carpal tunnel syndrome arising on or about September 22, 2000^[2].

Any exhibits containing markings, highlighting, etc., were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled. Only evidence necessary to support this award will be summarized.

FINDINGS OF FACT

Employee testified at the hearing on his own behalf. He testified that he is 47 years of age, born on March 23, 1960. He completed the twelfth grade at Monroe City High School in 1978 and has had no additional vocational training nor completed any college courses. Employee testified that in 1978 he began working for employer as a Dye Caster. Employee's last day of work for the employer was June 20, 2001.

Employee testified that in 1987, while at work, he slipped on oil on the floor and fell injuring his left hip. He testified that the bruised portion of his left hip turned into a fatty tumor and was subsequently surgically removed in June of 1987. He testified that this work related injury settled for 5% of the body as a whole. On cross-examination, he acknowledged that after the injury of 1987, he was able to work full-time, full duty and also worked overtime. He further stated that he was able to perform all of his job duties without any problems up until his injury of June 4, 1998.

Employee further testified that he underwent bilateral carpal tunnel releases performed by Dr. Goldberg in 1993. A claim for compensation was filed regarding the carpal tunnel syndrome and that claim settled for 10% of each hand at the wrist. On cross-examination, employee testified that after his bilateral carpal tunnel release surgeries in 1993, he went back to work full-time, full duty and worked overtime. He also testified that his wrists did not present him with any problems and that his wrists were fine up until his injury of June 4, 1998. Further, Jim England, vocational rehabilitation specialist, testified during his deposition that employee did not mention missing any days of work prior to June of 1998 due to any kind of physical injury or condition. (Employee's Exhibit A, pg. 12).

Employee testified that on June 4, 1998, he was going to get water and tripped and fell over binding on the floor. He testified that as a result of this trip and fall incident, he injured his right shoulder, and lower back. On cross-examination, he also testified that as a result of this incident, he injured his wrists as well. On cross-examination, employee also testified that he experienced pain in his wrists from the time of the June 4, 1998, accident until the time of his second and third carpal tunnel release surgeries. When employee was examined by Dr. Shekhani on February 6, 2006, he also told the doctor that he injured his wrists, shoulders, and back during the June 4, 1998, accident. (Employee's Exhibit F pg. 1). In addition, employee also told James England that he injured his wrists, shoulders, and back during his accident in June

of 1998. (Employee's Exhibit C pg. 14).

Mr. Botkins testified that on June 23, 1998, he was lifting or placing parts into a box and felt something pop in his lower back and immediately notified his supervisor. On cross-examination by the employer, the employee stated that "he viewed the two accidents in June as one event and thought that the accidents would be on one report." From June 1998 until December 1998, Mr. Botkins underwent physical therapy. (Employee's Exhibit C). An MRI of the cervical spine was performed on December 12, 1998, and was negative. An MRI of the lumbar spine was also performed and revealed degenerative disc disease at L3-L4 and L4-5 with mild disc bulging and spondylosis at L4-5. Additionally, an MRI of the thoracic spine was negative. (Employee's Exhibit C pg. 3). Employee was seen for physical therapy approximately nine times. (Employee's Exhibit C pg. 3). He underwent conservative treatment (including but not limited to injections) for his shoulder and back injuries from March of 1999 until July of 1999. On July 27, 1999, Dr. Hertel placed Mr. Botkins on a permanent restriction of no lifting greater than 20 pounds on a repetitive basis and of occasional bending and stooping. (Employer/Insurer Exhibit 5). On August 20, 1999, after re-examining employee, Dr. Hertel released the employee to work without any further restrictions. (Employer/Insurer Exhibit 5).

On November 19, 1999, Dr. Hertel found that employee suffered from 2% permanent partial disability of the right shoulder and 5% permanent partial disability of the back. (Employer/Insurer Exhibit 5). On September 15, 2000, employee saw Dr. Cunningham for complaints of constant pain in his low back and right shoulder pain. (Employee's Exhibit T). Dr. Cunningham found that there was a small complete tear of the rotator cuff of the right shoulder and attributed the tear to the job injury of June 4, 1998, which was aggravated by the incident on June 23, 1998. (Employee's Exhibit T and Employee's Exhibit C pg 4). On April 11, 2001, Dr. Beiniek examined employee for right shoulder and low back pain and diagnosed him as having a right rotator cuff tear, supraspinatus tendon, disc herniation at L4-5 and a disc bulge at L3-4. (Employee's Exhibit O). On May 2, 2001, employee underwent right shoulder arthroscopy, arthroscopic acromioplasty and bursectomy and a mini rotator cuff repair by Dr. Beiniek at Northeast Missouri Ambulatory Center. (Employee's Exhibit O).

On September 4, 2001, employee underwent posterior lumbar fusion L3-4, L4-5 and had pedicle screws placed in his back by Dr. Burton. (Employee's Exhibit C pg. 7). Employee testified that after this back surgery, he continued to have pain in his back. He testified that he told Dr. Burton about the continual pain and that he felt Dr. Burton was unresponsive to his complaints. Employee testified that he later saw Dr. Abernathy and that Dr. Abernathy said that he could not help him. He eventually saw Dr. Jolly who performed a subsequent back surgery on March 24, 2003. He testified that Dr. Jolly removed the hardware from his back, performed a fusion and placed a stimulator in his back. After the second surgery, employee testified that he experienced a different type of pain.

In September 2000, employee filed a claim alleging that he experienced tingling and numbness running down his hands and wrists due to his job duties of running the dye casting machine and trimming parts. He testified on cross-examination that he had experienced pain in his hands and wrists since his injury of June 4, 1998. He testified that he notified his supervisor and that he was sent to Dr. Bieniek. Employee testified Dr. Bieniek performed a left carpal tunnel release on December 18, 2000, and a right carpal tunnel release on December 27, 2000. Employee testified that he continued to experience the numbing and tingling feeling in his hands/wrists after these surgeries. Employee testified that the employer/insurer then sent him to Dr. Coin who performed another carpal tunnel release on his left wrist. He testified that he did not have an additional carpal tunnel release performed on his right wrist because the result of the surgery on his left wrist was unsuccessful. Employee testified after this surgery on his left wrist, that his left wrist felt worse than it did before the surgery. On November 11, 2003, Dr. Coin evaluated employee and determined that he had reached maximum medical improvement and assigned permanent partial disability ratings of 15% at the level of the left wrist and 12% at the level of the right wrist. Dr. Coin

released employee to full and regular duties without restrictions with respect to his wrists.

Employee obtained a rating on August 4, 2005 from Dr. Shekhani. (Employee's Exhibit F). Dr. Shekhani opined to 30% permanent partial disability of the left upper extremity at the wrist; 25% permanent partial disability of the right upper extremity at the wrist; 50% permanent partial disability of the right upper extremity at the shoulder; 50% permanent partial disability of the body as a whole; and 10% permanent partial disability of the body as a whole referable to obesity. (Employee's Exhibit F). Dr. Shekhani opined the pre-existing injuries as follows: 15% permanent partial disability of the left upper extremity at the wrist and 12% permanent partial disability of the right upper extremity at the wrist. (Employee's Exhibit F).

Dr. Peter Mirkin, an orthopedic surgeon, performed an Independent Medical Examination of employee on 2/2/01. (Employee's Exhibit S). Dr. Mirkin evaluated employee's back and shoulder issues, but not the carpal tunnel syndrome. Dr. Mirkin would not have recommended the initial back surgery but noted that the second back surgery was necessary to remove the hardware (pedicle screw) placed in the first surgery.

At the hearing, employee testified that he continues to have pain in both hands, right shoulder and lower back.

Additionally, employee acknowledged that subsequent to the work accident he has also had surgery to his left shoulder and both knees, which were unrelated to work. He also testified he would have to have at least one additional knee surgery in the near future.

Following a thorough review of the extensive medical records, depositions, and testimony, I find employee's testimony at times to be inconsistent and contradictory.

RULINGS OF LAW

Based upon a comprehensive review of the substantial and competent evidence, including Employee's testimony, the expert medical opinions and depositions, the medical records, my personal observations at the hearing, and the relevant statutory and case law, I find the following:

Whether Employee's right shoulder and low back complaints are medically causally connected to the work related injury of June 4, 1998.

Employer/Insurer does not deny that a work related accident occurred on June 4, 1998, but instead argues that since the employee has filed a second claim alleging an additional incident (also which employer does not deny) on June 23, 1998, they have no additional liability for benefits, since no doctor is able to state precisely what is attributable to each alleged incident.

It should be noted the Missouri Workers' Compensation Act requires an employee who believes he/she has been hurt at work to report that to the employer, who in turn is then required to report that to the Division of Workers' Compensation. It is not uncommon that once a person experiences a work related injury, there will be days that person will have more or less pain, and so long as he or she continues to work, will also run the risk of work activities aggravating an injury. In the event that does occur and either the employee or the employer does not so report it, that party could find themselves in violation of the law. Consequently, it makes sense to err on the side of caution and report any potential work related "accident". Doing so should not allow an employer to avoid liability for an admitted work related injury.

Having said that, a careful and thorough review of the evidence leads to the conclusion that regardless of how many "injuries" or "accidents" were reported or "claims" filed, rather than having three separate "accidents" the evidence indicates everything relates back to the original event of June 4, 1998.

The medical records indicate, and employee's testimony confirms, that he hurt his back, shoulder and hands in the original event, the fall on June 4, 1998. Employee testified that he thought both June incidents would be reported and handled under the June 4, 1998, accident. He also testified that he did hurt his hands as well in that accident, "but did not complain about it". Dr. Shekhani stated that the employee only discussed the June 4, 1998, accident with him. Mr. England also testified that the employee stated he had hurt his wrists, shoulder, and back in the June 4, 1998, accident.

The only medical opinion, out of numerous medical opinions, raising any issue as to whether the back or shoulder complaints were causally related to the work accident appears to be Dr. Mirkin's opinion following an IME performed in 2006, several years after the accident, indicating that he would question whether the first back surgery was necessary. None of the treating doctors questioned causation of the back and shoulder complaints.

Employee has met his burden of proving medical causation, with respect to his low back and right shoulder complaints arising from the June 4, 1998, accident.

Liability for unpaid medical bills

An employer is responsible for medical care flowing from a work-related accident. *Modlin v. Sun Mark Inc.*, 699 S.W. 2d 5, 7 (Mo. App. 1985). In addition, Section 287.140.1 RSMo provides in part the following: "In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."

Employee has outstanding medical bills in the total of: \$8,249.33. (Employee Exhibit GG, Dr. Jolly's unpaid bill of \$1,765.28; Employee Exhibit HH, Pain Management Service's unpaid bill of \$385.00; Employee Exhibit II, Columbia Orthopaedic Group's unpaid bill of \$244.00; Employee Exhibit JJ, Audrain Medical Center's unpaid bill of \$271.62; and Employee Exhibit KK, Gosney Pharmacy's unpaid bill of \$5,583.43). Prior to commencement of the hearing, Employer/Insurer acknowledged liability for payment of Employee Exhibit HH as well as any charges associated with Dr. Schmidt, pain management, contained within Employee Exhibit KK.

Employee testified that the charges set out in Employee Exhibits GG, HH, II, JJ, and KK were for treatment for his work related injuries. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with the treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 112 (Mo. banc 1989).

I find the employer is responsible for payment of these bills in the total amount of \$8,249.33.

Permanent Total Disability

Employee asserts he is permanently and totally disabled either as a result of the work related injuries alone or in combination with prior disabilities.

The term "total disability" refers to the "ability to return to any employment and not merely [an] inability to return to employment in which the employee was engaged at the time of the accident." Section 287.020.6 RSMo.

The legal standard for permanent total disability is as follows: (1) Whether the person able to compete in the open job market and (2) Whether an employer, in the usual course of business would employ this person in his present condition with the reasonable expectation he can successfully perform the work. *Forshee v. Landmark Excavating and Equipment*, 165 S.W. 3d 533, 537 (Mo. App. 2005).

A thorough review of the medical evidence, the depositions and the live testimony at the hearing lends itself to only one possible conclusion, that being the employee is permanently and totally disabled. The question is where the responsibility for that permanent total disability lies.

Dr. Shekhani, employee's medical expert, opined employee had a 30% permanent partial disability of the left wrist; 25% permanent partial disability of the right wrist; 50% permanent partial disability of the right shoulder; 50% permanent partial disability of the body as a whole with respect to the back; and 10% permanent partial disability of the body as a whole referable to obesity. The doctor further opined employee had pre-existing disabilities of 15% permanent partial disability of the left wrist and 12% permanent partial disability of the right wrist. As noted earlier in this decision, employee previously settled a workers' compensation claim for 10% permanent partial disability of each wrist. Dr. Shekhani thought employee was permanently and totally disabled and that was due to a "combination of all the things he has" (Employee Exhibit D, p.14).

However, in his deposition Dr. Shekhani acknowledged that when he saw the employee, the employee did not mention anything about a left shoulder problem or problems with his knees. The employee would some five months later tell Mr. England he would be having surgery on both knees. Even though he was not aware of those problems at the time of the exam, the doctor did note employee was having difficulty and pain with walking and had decreased knee strength, which he attributed to the back problems. He also noted a limited range of motion with both shoulders, not just the right. During his deposition, when the doctor was informed the employee had told Mr. England the inability to squat or kneel was due to his knee problems, the doctor still attempted to attribute those problems to the back rather than the knees. One of the limitations imposed by Dr. Shekhani was no prolonged walking or standing, which again he attributed to the back.

Employee was evaluated by Mr. England some five months after seeing Dr. Shekhani. At that time, Mr. England noted employee was unable to kneel or squat because of knee problems (not the back as noted by Dr. Shekhani) and further noted the employee would be having surgery on both knees. Mr. England noted employee walked with a limp and that the employee mentioned he had difficulty with stairs but Mr. England did not know whether that was because of the back or the problems with the knees. All of the information regarding the knees was volunteered by the employee, as Mr. England had informed the employee he would only be gathering information about any work injuries the employee had experienced over the past few years and any prior health issues. Mr. England noted the employee said he could only stand for about 30 minutes and walk only about two blocks. Mr. England attributed those limitations to the employee's back complaints. Mr. England noted the employee had undergone surgery on both shoulders but that employee didn't mention any problems with the left shoulder.

Additionally, the employee informed Mr. England that he had to recline about a third of the day because of the back pain (the employee did not mention that to Dr. Shekhani). Mr. England ultimately concluded that if the employee's back was as bad as he said it was, the employee was unemployable due to a combination of his back and upper extremity complaints.

When asked at the hearing if the problems with his knees caused a problem with walking, the employee first responded by saying "yes" but then immediately said "no". However, he did acknowledge having surgery on each knee, that the knees still "ache" and "pop" and that he was going to have to have "at least" one more knee surgery. When asked later if he had been walking lately, the employee responded that

he had not been able to walk because of problems with his knees.

Although Dr. Shekhani had noted a limited range of motion with the left shoulder, the employee denied at the hearing that he had any problems with the left shoulder. However, when asked to demonstrate his range of motion with the left shoulder, it was obvious he did have a restricted range of motion.

Observation of the employee at the hearing did not reveal that he was in any significant discomfort with respect to his back and indeed employee demonstrated a better than expected range of motion when he stood up and bent over in order to show the scar from the back surgery.

It is apparent that Dr. Shekhani was not initially aware of the rather serious problems employee was experiencing with his knees when he opined as to the cause for employee's permanent total disability. When he was confronted at the deposition with information regarding the knee problems, he stood by his earlier opinion thereby bringing into question the credibility and reliability of his opinion.

Further, it appears Mr. England also did not factor in the knee problems, or the left shoulder, prior to arriving at his conclusion because he was limiting his inquiry into work injuries and *prior* health issues without considering the impact of conditions that had arisen after, but unrelated to, the work injury. Mr. England did preface his findings on employee's back being as bad as employee asserted, implying that if that were not the case it might change his opinion.

It is apparent the employee attempted to downplay the seriousness of the problems with the left shoulder and more specifically both knees. The credibility and reliability of Dr. Shekhani's opinion is diminished because he clearly was not aware of the significance of the left shoulder and knee problems. Additionally, Mr. England's opinion was admittedly largely based upon what the employee related to him, which is not entirely consistent with employee's testimony at the hearing. The evidence and the testimony lead to a conclusion that some of the problems both Dr. Shekhani and Mr. England attributed to the employee's back were really more accurately attributable to the knees, which became problematic after and unrelated to the work injury of June 4, 1998.

As stated earlier, the evidence does support a finding that the employee is indeed permanently and totally disabled but that total disability is the result of a combination of the injuries sustained from the work accident of June 4, 1998, and conditions that have arisen following the work related accident. Neither the Employer nor the Fund is liable for conditions that arise after and unrelated to the work accident. Consequently, neither the Employer nor the Fund is liable for compensating the employee for permanent total disability.

Nature and extent of Permanent Partial Disability

A "permanent partial disability" refers to a disability that is "permanent in nature and partial in degree." Section 287.190.6 RSMo. Employee suffered injuries to his right shoulder, back and both hands in the June 4, 1998 accident which are "permanent in nature and partial in degree" to which he is entitled to compensation. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo. App. 1983) (overruled on other grounds).

Based upon the restrictions and limitations noted in the medical records and taking into consideration the employee's testimony, I find the employee has the following permanent partial disabilities: 25% of the right shoulder; 40% of the body as a whole as relates to the back; 15% of the left wrist and 13% of the right wrist. Additionally, I assess a 10% multiplicity factor in recognition of the enhanced disability due to the number of body parts injured. Employer is directed to pay Employee \$81,771.95 as compensation for his

permanent partial disability as calculated below:

Right shoulder:	232 weeks x 25% = 58 weeks of compensation
BAW (back):	400 weeks x 40% = 160 weeks of compensation
Left wrist:	175 weeks x 15% = 26.25 weeks of compensation
Right wrist:	175 weeks x 13% = <u>22.75</u> weeks of compensation
Total number weeks:	267
Plus 10% multiplicity	<u>26.7</u>
	293.7 x \$278.42= \$81,771.95.

In the post-hearing brief Employee also seeks compensation for disfigurement for the scarring to the right and left wrists. However, disfigurement was not identified at the hearing as being a contested issue. The scope of this award is confined to the issues stipulated by the parties at the hearing as being contested. *Boyer v. National Express Company*, 49 S.W.3d 700 (Mo. App. 2001). Consequently, disfigurement will not be addressed in this award.

Second Injury Fund Liability

The Second Injury Fund is a creature of statute, and benefits from the Second Injury Fund are awarded only if Employee proves that under 287.220.1 RSMo., he is entitled to such benefits. Employee has the burden of proving all essential elements of his workers' compensation claim. *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793 (Mo. App. S.D. 1992). Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a disability greater than the simple sums of disabilities. 287.220.1 RSMo. 2000. When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990).

In order to receive compensation from the Second Injury Fund for a permanent partial disability, specific requirements as to the pre-existing disability and the disability from the work-related injury must be satisfied. Specifically, the pre-existing permanent partial disability must be of such seriousness as to constitute a hindrance or obstacle to employment (or to obtaining reemployment if the employee has become unemployed following the work-related injury). Section 287.220.1 RSMo. Additionally, the percentage of disability attributable to a pre-existing disability must equal a minimum of fifty weeks of compensation for pre-existing disabilities of the body as a whole or be at least 15% of a major extremity.

Employee's pre-existing injuries are a 1987 back injury which settled for 5% of the body as a whole and 1993 carpal tunnel syndrome which settled for 10% of each wrist. Employee testified that after both the 1987 and 1993 injuries he healed, returned to work and had no problems performing his duties. Based upon employee's testimony, which was consistent with what he told Mr. England, employee's pre-existing conditions do not constitute a disability of such degree as to create a hindrance or obstacle to employment. Consequently, the Second Injury Fund has no liability for permanent partial disability.

Future medical treatment

Future medical treatment was not specifically identified as a disputed issue with respect to the June 4, 1998, injury. However, employee did identify that as a disputed issue with respect to the wrists which were filed under injury number 00-129558. Since I am finding employee's injuries all relate back to the June 4, 1998, accident rather than three separate accidents, future medical treatment necessarily becomes a disputed issue to be addressed in this award.

An employer is responsible for medical care flowing from a work-related accident. *Modlin v. Sun Mark*

Inc., 699 S.W. 2d 5, 7 (Mo. App. 1985). In addition, Section 287.140.1 RSMo provides in part the following: "In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."

Dr. Schmidt, the pain management specialist, has recommended continued medical care, including medication, pertaining to Employee's work related medical conditions. Prior to the hearing, Employer acknowledged liability for medical bills associated with Dr. Schmidt. Employee has provided evidence of a reasonable probability of future medical care. The employer is directed to provide and pay for medical care and treatment as recommended by Dr. Schmidt to cure and relieve the employee of the effects of the injury.

CONCLUSION

Employee has met his burden of proving a medical causal connection with respect to his right shoulder and low back complaints to the June 4, 1998, work related accident. Employer is directed to pay the unpaid medical bills totaling \$8,249.33. Employee has failed to meet his burden of proving either the Employer or the Second Injury Fund is liable for compensation for permanent total disability. Employee has established he is entitled to compensation from the employer for the following permanent partial disability: 25% right shoulder; 40% BAW (back); 15% left wrist; 13% right wrist and an additional 10% for multiplicity. Employer is directed to pay Employee the sum of \$81,771.95 as compensation for his permanent partial disabilities. Employer is directed to provide and pay for treatment as recommended by Dr. Schmidt to cure and relieve the employee of the effects of the injury.

Employee's attorney requests and is awarded a fee of 25% of all benefits awarded for necessary legal services rendered.

Date: _____

Made by: _____

RONALD F. HARRIS
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker
Director
Division of Workers' Compensation

[1] It should be noted that on the Claim for Compensation on Injury Number 00-129558, employee lists as pre-existing conditions right shoulder and lumbar (back) with respect to the June 4, 1998, accident.

[2] The insurer on both 1998 cases was Sentry Insurance Company, but on the 2000 case, it is Liberty Mutual Fire Insurance Company. The employer is the same on all three cases, and attorney Bob Bidstrup represented the employer/insurer on all three cases.