

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

Injury No.: 00-163235

Employee: Stanley Cain
Employer: The Boeing Company (fka McDonnell Douglas)
Insurer: Insurance Company of the State of Pennsylvania
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: December 8, 2000

Place and County of Accident: St. Louis 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 August 23, 2005. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued August 23, 2005, 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 28th day of December 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Stanley Cain

Injury No.: 00-163235

December 9, 2000, for Claimant's lifetime:

Indeterminate

22. Second Injury Fund liability: No.

TOTAL:

Indeterminate

23. Future requirements awarded: Ongoing medical as per award.

*Includes a period of temporary total disability benefits during Claimant's healing period through January 29, 2002, which are paid at the same rate as permanent total disability benefits.

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Stanley Cain	Injury No.:	00-163235
Dependents:	N/A		
Employer:	The Boeing Company (fka McDonnell Douglas)		Before the Division of Workers' Compensation
Additional Party:	The Second Injury Fund		Department of Labor and Industrial Relations of Missouri
Insurer:	Insurance Company of the State of Pennsylvania		Jefferson City, Missouri

PRELIMINARIES

The matter of Stanley Cain ("Claimant") proceeded to hearing to determine whether Claimant was entitled to workers' compensation benefits on account his back disability. Attorneys Ronald Edelman, with Jeff Estes, represented Claimant. Attorney David Reynolds represented The Boeing Company f/k/a McDonnell Douglas Company ("Employer") and its insurer. Assistant Attorney General Kevin Nelson represented the Second Injury Fund.

The parties stipulated that on December 8, 2000, the last day he worked for Employer, Claimant earned an average weekly wage that corresponds to a rate of compensation of \$314.26 for permanent partial disability benefits. The parties could not agree on the rate of compensation for total disability benefits. The parties did not place venue, notice, or timeliness of the claim at issue. Employer denied the claim, and has paid no benefits.

ISSUES

1. Does Claimant have an occupational disease arising out of and in the course of employment;
2. Is Claimant's back condition medically causally related to the requirements of his work;
3. Is Employer responsible for paying past medical benefits, and future medical care to cure and relieve the effects of his injury;
4. Is Claimant entitled to temporary total disability benefits;
5. What is the nature and extent of Claimant's disability;
6. What is the liability of the Second Injury Fund; and
7. What is the appropriate rate of compensation for permanent total disability benefits?

Claimant seeks permanent total disability benefits. Objections made in the depositions that are not specifically ruled

upon in this award are hereby overruled.

SUMMARY OF THE EVIDENCE

Claimant's Testimony

Claimant is a 53-year-old man who lives in Franklin County, approximately 75 miles away from his former place of employment. He is currently divorced, but lives with 25-year-old son and ex-wife, who drove him to the Division of Workers' Compensation. For the hearing, Claimant did not take his pain medication in order to be clear-headed.

Vocational History

Claimant stopped attending school in ninth grade because his family moved frequently, and he was tired of starting new schools. He has had no other education or training, other than on the job training. His prior work history includes several jobs with tree trimming services, including that of a working supervisor, and working assembly positions for a ladder company. He also worked several machinist positions prior to his work for Employer, all of which included lifting, bending, squatting, twisting, and heavy lifting.

On August 25, 1975, Claimant started working for Employer as a full-time milling machinist, specializing in making parts of different sizes, shapes, weights, and uses. Claimant testified in great detail about the machinist positions he held in various departments during his 25-year career with Employer. His titles included set up man, machine operator, and machinist. He worked in the NC department, the tooling department, and the jig bore department. His jobs all required a great deal of often fast paced, physical activity, including: lifting and carrying heavy tools and parts; maneuvering large fixtures; using pry bars to position parts; climbing ladders or on tabletops; jumping down from tables onto concrete; operating a power wrench; working in awkward, overhead positions; stoning off parts to remove burrs; and shoveling or sweeping metal chips into the dumpster. His jobs always required bending, lifting, and stooping. Most of his tasks jarred his body and back.

Primary Injury/Occupational Disease

Claimant testified that four or five years after he started working for Employer, he began to notice fluctuating symptoms of pain and stiffness in his legs and back which got progressively worse over the employment. At first, Claimant recovered quickly from leg and back symptoms, especially if he took it easy. He estimated he had missed work ten times over the years because of back and leg pain. However, the episodes got longer and more frequent over the years. All activity that jarred his back made his back and legs sore.

Over the last two years of his employment, he still had some good days, but his symptoms became more constant, he was constantly stiff and aching, and he began to limp. During the last two months, Claimant was suffering from unbearable pain radiating to his feet in the right leg. His foot felt as if it were in a vice. He reported this to his supervisors, but they did not accept the claim or direct him to obtain treatment.

Beginning December 4, 2000, Claimant took three days off because of back and leg pain. As it had helped him get better in the past, he rested. When Claimant returned to his normal job on Thursday the 7th, he was functioning, but on Friday, things got worse. Claimant experienced no sudden or unexpected events, injuries, or accidents. However, his pain became unbearable. Co-workers offered to call 911, but Claimant declined, because he wanted medical care closer to home. That morning and the next day, Claimant's leg and back pain were unbearable, and he assumed the fetal position in an attempt to sleep. On Saturday he rested, but on Sunday, his wife took him to the emergency room, where he received shots of Demerol. He told hospital personnel that he was having back problems, but he did not know why. He did not understand his problems were related to work at the time.

Claimant returned to the hospital the next day. Eventually, Claimant's family doctor sent him to Missouri Baptist Hospital in St. Louis for an MRI, which showed a disc that "blew out." Upon referral to Dr. Bailey, Claimant understood that he needed immediate surgery. On December 18, he filled out paperwork with Employer indicating he did not know his injuries were work related (Exhibit 6). He had surgery with Dr. Bailey on the 19th. Based on his discussions with Dr. Bailey, Claimant came to understand that the type of job he does causes the kind of back problems he had. This was the first time he became aware of the job connection between his work and his back. Claimant then reported to Employer's workers' compensation department before January 24, 2001 that he had a work related injury (Exhibit 9). Employer did not offer benefits. Claimant applied for short-term disability, but the benefits were denied on January 31, 2001 because the injury was work related (Exhibit 7).

Claimant has come under the care of Dr. Gahn for pain management following his surgery. He has had epidural shots and physical therapy. Following a successful trial, he had a spinal cord stimulator permanently implanted. He takes several medications for his pain control, including Naproxen, Welbutrin, Ambien, and Amitriptylene. Currently, Dr. Elkey maintains his medication. He is aware that his spinal cord stimulator needs new batteries on occasion, but cannot testify as to how often.

In November 2001, Employer placed Claimant on retirement. Employer never offered him light duty work, although

he is aware of several light duty jobs on campus.

Impact of Back Injury

Currently, Claimant has several problems he attributes to his back injury. He hurts constantly, although medication and his stimulator offer temporary control. He testified his current pain was a 5 or a 6. His right leg hurts all the time and occasionally causes him to limp. His left leg is bad, but not nearly as severe as the right. His ability to sit without shifting varies, but is limited. He cannot stand in one spot and has a limited ability to walk. He has to lie down to relieve pain, but eventually that also causes pain so he has to get up. The pain in his legs and back keep him from sleeping through the night, which causes him to be sleepy during the day. Claimant testified he cannot do any of his old jobs, and because he is on narcotics and has sleep problems as well as physical limitations, he cannot do light duty jobs either.

Claimant's life has been impacted by his back injury. As a result, he cannot hunt, fish, play ball, or go to games because it is too painful to sit and move. Although he has rental properties, he cannot take care of them. He has his younger son do the work or it is hired out. Claimant can't drive because narcotics make him dizzy, drowsy, and slow thinking.

Claimant is seeking temporary total disability benefits. Claimant testified that December 2000 through the fall of 2001, he was kept off of work because of his back and accompanying surgery. He started to draw a disability retirement benefit from Employer on November 30, 2001. From December 2001 through January 29, 2002, Dr. Gahn kept Claimant off of work when he was undergoing treatment with a stimulator. Claimant returned to Dr. Gahn on a follow-up basis to maintain and program the stimulator. During his follow-up visits, he has never been told to go back to work. Dr. Gahn released Claimant from care, except for maintenance, on January 29, 2002.

Claimant testified that all treatment reflected in the bills, Exhibits Q through W, and medical records are due to and a product of his primary back claim, and the charges relate to services shown in the records. Claimant's insurance company, United Healthcare, apparently paid the bills, because he is not receiving any medical bills.

Prior Injuries

In 1993, Claimant had a motor vehicle accident in which he injured his neck. He was diagnosed with a cervical herniated disc, but did not undergo surgery. He was off work for about six months. He treated with Dr. Kretteck. As a result of his car accident, Claimant has a limited ability to move his neck, has trouble doing overhead work or using the overhead hoist, and has low back complaints. Lifting overhead aggravates his neck, and his arms often go to sleep. He has to rely on mirrors in order to be able to drive because he cannot turn his neck. He takes muscle relaxants for the neck as well as Excedrin.

Over the years, Claimant had injuries at work, including cuts, bumps and contusions. Claimant had a right hand injury when he had a mass removed at the base of his palm. Claimant also hurt his hand when he hit it at the edge of a part and required stitches. This affects his grip and interferes with his work because when he hammers a lot the injured area becomes bruised and sore. Claimant testified that he had back problems as well before his last back injury. In approximately 1969, he had a cyst removed from his low back. In 1995, Claimant had a right knee contusion.

Claimant said he treated with Dr. Repaso for anxiety and panic attacks since the 1980s. Claimant gets nervous, feels like falling apart, cannot take the pressure, and experiences chest pains. Claimant testified that he missed five to ten days a year from work, and was written up several times for excessive absenteeism, because of his panic attacks. He left fairs in the past because of the anxiety, and has had to pull over in congested traffic. Claimant testified Dr. Repaso limited his work to forty hours per week due to physical and mental problems.

Claimant's podiatrist, Dr. Grouse, prescribed molded insoles for foot and leg pain in 2000. In October 2000, Claimant broke his right wrist. In February 2003, Claimant underwent right knee surgery. He also has had right hand arthritis since the summer of 2003 and takes Bextra. Claimant takes a variety of medications to control pain, blood pressure, provide for sleep, and control his panic attacks. He obtained a handicap sticker after his last back surgery.

On cross-examination, Employer's attorney challenged several points. First, he pointed out the record of Missouri Baptist dated December 11, 2000 indicates that Claimant had back pain following a stretching incident. Claimant disputes this. Claimant also claimed he did not know that his back injury was work related, and therefore he charged all expenses through his group plan. Claimant applied for but did not receive short-term disability through Met Life. Claimant has not seen Dr. Bailey since 2001, nor has he seen Dr. Gahn since 2003.

Claimant shares a 28-acre plot with his parents. He cuts his small lawn one time a week, but has yet to finish the entire area at one time. Claimant's rental properties have never turned a profit. The only work Claimant does is collect rent, and performs paperwork. Although Claimant owns a car he only drives it a few times a week and does not use it to travel.

Ex-Wife's Testimony

Claimant's ex-wife, Mrs. Cheryl Lynn Cain, resides with Claimant and testified on his behalf. She testified Claimant had been complaining about his back for a long time before the emergency room visits of December 2002. On December 8, 9 and 10, 2000, Claimant had trouble sleeping. Claimant had panic attacks many times over the past ten years. Claimant had

neck complaints on a continuing basis and used a traction device at home in order to alleviate the pain. Since his accident, Claimant's duties around the house have decreased. Mrs. Cain testified that her ex-husband does "not have a life anymore". Claimant's back, legs, and feet have been painful for many years and have gotten worse. Mrs. Cain explained that the battery located near his buttocks makes it awkward for Claimant to drive far.

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Dr. George Bailey

When Dr. Bailey first examined Claimant on December 18, 2000, he recorded complaints of severe right leg and foot pain with numbness and weakness, and diagnosed an extruded L5-S1 disc with upward migration affection the L5 nerve root. Concerned with Claimant's weakness and to prevent death of the motor nerves, Dr. Bailey took Claimant to surgery the very next day, performed a microlumbar discectomy, and found "a lot of disc material in the spinal canal markedly compressing the nerve root." Over the next several months, Claimant progressed slowly in therapy. In March, Dr. Bailey's nurse practitioner anticipated Claimant would return to work on April 2, 2001, but that was not viable due to an increase in symptoms. Dr. Bailey last saw Claimant on August 13, 2001, at which time he was still not able to return to work. Having exhausted treatment options, he referred Claimant to Dr. Gahn for a spinal cord stimulator. As of September 25, 2001, Dr. Gahn had Claimant off work for an unknown period of time.

Dr. Bailey explained how the heavy, jarring labor in which Claimant engaged at work, along with other factors such as genes, weight, smoking and bad luck, contributes to his back condition; the type of work Claimant did over a long period of time will accelerate underlying disc degeneration and back problems; and, the "total story" of Claimant's back condition does not indicate his condition was caused by an acute event such as stretching in bed, but rather indicates a chronic condition, of which work is a major, not a triggering, factor (Exhibits C&F).

Dr. Raymond Cohen

Dr. Cohen reviewed records, took a history, and performed a medical examination of Claimant. He then issued a report dated April 1, 2002, as well as several follow-up reports or letters addressing limited issues. Although he was not provided with the precise details of Claimant's job, he did have an accurate understanding of the heavy physical labor involved. He concluded that Claimant suffers from an overuse disorder or repetitive trauma of the lumbar spine, and has corresponding permanent partial disability of 60% of the body as a whole. Despite having undergone an L5-S1 discectomy and placement of a spinal cord stimulator, Claimant still has severe right lumbar radiculopathy. It is Dr. Cohen's opinion, within a reasonable degree of medical certainty, that Claimant's "work is the substantial factor in his disability up through 12/8/2000 from this overuse disorder," the treatment he received was medically necessary and reasonable, and he needs to continue his ongoing pain management and maintenance of the implanted stimulator. He explained that the nerve damage found by the operating surgeon was inconsistent with an acute event like stretching, but was indicative of chronic damage sustained over time. He assigned restrictions that severely limited Claimant's physical activities.

Dr. Cohen also evaluated Claimant's preexisting injuries, assigning a diagnosis and disability as follows: cervical herniated disc (25% body as a whole); right palmer mass subsequent to laceration (30% of the hand); and panic attacks (30% of the body as a whole). In his initial report, Dr. Cohen stated Claimant was permanently and totally disabled as a result of the combination of his primary and preexisting injuries. However, when asked to isolate the last injury alone, Dr. Cohen clarified that Claimant's total disability is due to the limitations and symptoms of his work-related overuse or cumulative trauma disorder alone.

Dr. David Lange

Dr. Lange is an orthopedic surgeon who evaluated Claimant on Employer's behalf, issuing a report on November 5, 2002, and a follow up letter of April 7, 2003. He diagnosed S1 radiculopathy, an abnormality associated with a herniated disc at L5/S1 on the right side, and assigned restrictions of lifting no more than 15 pounds frequently, avoid bending at the waist and torso rotation, and intermittent sitting, walking and standing. He felt the past treatment Claimant received was reasonable and necessary for his condition, and in the future, Claimant would require ongoing medication and maintenance of his stimulator. Although Claimant was disabled as a machinist, Dr. Lange felt he was not totally disabled for other occupations.

It was Dr. Lange's opinion that Claimant's back condition was not causally related to employment. He testified that there was no single traumatic event, and the activities described at Claimant's work are not associated with hastening degenerative changes or herniations. According to Dr. Lange, there are only two factors scientifically known to influence disc degenerations: genetics and nicotine exposure. Dr. Lange agreed that stretching in bed on or about September 10, 2001 did not cause Claimant's herniated disc.

Vocational Experts

There are two equally qualified vocational experts who reached different conclusions regarding Claimant's ability to compete in the open labor market. Testifying for Claimant, Mr. James England is of the opinion that Claimant is unable to compete for and maintain employment in the open labor market due to the combination of the restrictions and limitations resulting from the combination of his preexisting conditions and the primary and final injury: his obvious physical

difficulties, need to lie down periodically since his back injury, and his panic attacks all contribute to his inability to compete in the open labor market.^[1] Mr. England relied primarily on the restrictions assigned by Dr. Cohen, and admitted that if Claimant could function on a daily basis within restrictions suggested by Dr. Lange or Dr. Gahn, he would be employable. In reaching his conclusions, Mr. England had little or no understanding of the nature and extent of the occurrence, or prior treatment, of Claimant's panic attacks.

Presenting the opposing view on behalf of Employer, Donna Kisslinger Abram testified Claimant had transferable skills that could be used in lighter jobs, and therefore was employable in the open labor market. Using a computer program and relying on the restrictions of Dr. Lange, Ms. Abram identified many jobs within Claimant's restrictions and available in the St. Louis job market. Of the two vocational experts, Mr. England was the only one to have personally interviewed Claimant.

Other Medical Records

The medical records indicate Claimant had severe residual nerve damage following the attempt to surgically correct his spine problem. The Missouri Baptist Hospital of Sullivan records (Exhibits H, M & 10) show emergency room visits on December 10 and 11, 2000 for back pain. The brief intake notes indicate a recent onset of severe pain upon awaking a few days prior to hospitalization. Diagnostic tests indicated a surgical lesion. Dr. Repaso, Claimant's family physician, made a referral for surgery (Exhibit I).^[2]

Dr. Bailey performed surgery at St. Mary's Health Center and provided treatment as described above, but Claimant continued to have complaints following surgery. Dr. Richard Gahn (Advanced Pain Control) administered steroid injections, which only provided transient relief. Post-surgical nerve tests show relatively severe chronic right L5-S1 radiculopathy (Neurology Associates)(Exhibit J). In the fall of 2001, Dr. Gahn placed a spinal cord neurostimulator, which provided some relief after adjustments. The last record of a Dr. Gahn visit is January 9, 2003 (Exhibit K). Dr. Eljaiek provided primary care and prescription refills.

Claimant had a prior herniated cervical disc in the early 1990's, from which he recovered well (Exhibits L, M & 10). On June 16, 1990, Claimant's primary care physician ordered that Claimant could not work any overtime for one month due to fatigue, which was consistent with a medical release completed by Dr. Hardin, a neurologist, who diagnosed vertigo (Exhibit P). Claimant had at least two knee contusion-type injuries in the early 1990's (Exhibits 4 & 5).

FINDINGS OF FACT AND RULINGS OF LAW

Based on a comprehensive review of the evidence, and applying the Workers' Compensation Law of Missouri, I find that Claimant has met his burden of establishing his right to benefits. I specifically find as follows:

I. Claimant has an occupational disease that arose out of and in the course of employment and is causally related to his work.

Under Missouri law, it is well settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); *Shelton v. City of Springfield*, 130 S.W.3d 30, 38 (Mo.App. S.D. 2004). Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. *McGrath v. Satellite Sprinkler Systems*, 877 S.W.2d 704, 708 (Mo.App. 1994). Proper opinion testimony as to causal connection is competent and can constitute substantial evidence. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 279 (Mo.App. E.D.1997).

Claimant asserts he suffers from an occupational disease of the back due to his heavy work. It is undisputed that Claimant's work involved heavy lifting, frequent bending and stooping, fast paced efforts, jumping from tables, and other body-jarring activities. An occupational disease is defined as "an identifiable disease arising with or without human fault out of and in the course of the employment." § 287.067.1, RSMo. Subsection 2 of Mo.Rev.Stat. § 287.067 adopts the causation standard for occupational disease claims as stated in § 287.020.2; the employee's work must be "a substantial factor" in causing the medical condition. Thus, for an injury to be compensable under the Missouri Workers' Compensation Act, the work performed must have been a substantial factor in causing the medical condition or disability. *Kent v. Goodyear Tire and Rubber Co.*, 147 S.W.3d 865, 867 -868 (Mo.App. W.D. 2004). Repetitive trauma is a legally sufficient cause of an occupational disease of the spine. *See, i.e., Smith v. Climate Engineering*, 939 S.W.2d 429 (Mo.App. E.D. 1997)(overruled on other grounds).

There is conflicting evidence as to whether the work he performed for Employer was a substantial factor in causing the back condition that ultimately required surgery. Claimant testified credibly that he first became aware of the connection between his work and his back was when Dr. Bailey, the treating surgeon, told him his condition was work related. Dr. Bailey acknowledged that there are many factors that contribute to disc disease, but testified that the type of work Claimant did over a long period of time will accelerate underlying disc degeneration and back problems. Dr. Cohen testified

Claimant's work caused an overuse disorder and was a substantial factor in need for surgery and resulting back disability. For Employer, Dr. Lange testified that Claimant's work specifically, and heavy work in general, is not scientifically proven to influence disc degeneration. He suggested an inactive "couch potato" was more susceptible to disc disease than a career heavy laborer such as Claimant.

Despite Employer's assertion that Claimant hurt his back at home when he stretched, the evidence is clear that the herniated disc did not occur acutely – all three doctors agree that the nerve damage found by the operating doctor was too extensive to indicate a recent event had caused the herniation, but that his condition was chronic in nature. Therefore, I find that Claimant's back condition was not caused when he stretched in bed shortly before he went to the hospital, nor by any specific event close in time to the need for treatment.

I find the evidence establishes that Claimant's work as a machinist for Employer, which involved heavy, fast paced, physical work, was a substantial factor in the development and acceleration of his disc disease. I find Dr. Bailey's testimony to be more credible than Dr. Lange's. Not only was Dr. Bailey's opinion more consistent with the other credible evidence, but also as the treating physician with first-hand knowledge, he has a unique perspective. Furthermore, Dr. Cohen supports Dr. Bailey's conclusion, and refutes Dr. Lange's opinion with citation to credible published resources. Claimant has met his burden of establishing his back disease and disability arise out of and in the course of employment.

II. Claimant is entitled to past medical expenses, and future medical treatment at the expense and direction of Employer.

Section 287.140.1 "entitles the worker to medical treatment as may reasonably be required *to cure and relieve from the effects of the injury.*" *Ford v. Wal-Mart Associates, Inc.*, 155 S.W.3d 824, 828 (Mo.App. E.D. 2005)(citations omitted). It is sufficient to award future medical benefits if the claimant shows by reasonable probability that he is in need of additional medical treatment by reason of his work-related accident. *Bock v. Broadway Ford Truck Sales, Inc.*, 55 S.W.3d 427, 437 (Mo.App. E.D. 2001). . 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 treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989).

The overwhelming weight of the evidence establishes that the treatment Claimant received for his back beginning December 10, 2000 to the present was reasonable, necessary, and directly related to his lumbar spine disease. Doctors Bailey, Cohen and Lange all agree on this point. The reasonable treatment includes the treatment provided or directed by Dr. Bailey, Dr. Gahn, and the other facilities reflected in Exhibits Q through W. The documented expenses total \$91,120.76.

Once an employee produces documentation detailing past medical expenses, and provides testimony regarding the relationship of the expenses to the medical condition, the burden then shifts to an employer to demonstrate by a preponderance of the evidence that an employee has ceased to be liable to healthcare providers for amounts that have been written-off or for fees that were adjusted. *Framer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 118 (Mo.banc 2003). It is an employer's defense "to establish that [the employee] was not required to pay the billed amounts, that [his] liability for the disputed amounts was extinguished, and that the reason that [his] liability was extinguished does not otherwise fall within the provisions of [S]ection 287.270." *Id at 823; see also Ellis v. Western Elec. Co.*, 664 S.W.2d 639, 643 (Mo.App. S.D. 1984) (placing the burden of showing facts entitling it to a credit on the employer). There is insufficient evidence to determine whether Claimant has or will be held responsible for less than the billed amounts. I award the total billed amount of \$91,120.76 to Claimant for his fair and reasonable past medical expenses.

Furthermore, by virtue of his implanted nerve stimulator, Claimant needs ongoing treatment to cure and relieve him of the effects of his lumbar injury. Employer is ordered to provide Claimant with all medical treatment necessary to maintain his spinal cord stimulator and to allow him to obtain ongoing pain relief medication, though his primary physician or a qualified physician authorized by Employer to provide ongoing medical maintenance.

III. Claimant is permanently and totally disabled as a result of his work-related lumbar spine condition.

There is no dispute that Claimant has permanent disability as a result of his back condition. Having determined that the condition is work-related, the issue becomes the nature and extent of the disability. In a case such as this, where the claimant seeks permanent total disability from either the employer or the Second Injury Fund, "the first determination is the degree of disability from the last injury considered alone." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003). If the employee's last injury in and of itself rendered him permanently and totally disabled, the Fund has no liability; the employer is responsible for the entire amount of compensation. *Id.; Birdsong v. Waste Management*, 147 S.W.3d 132, 138 (Mo.App. S.D. 2004).

Claimant is physically unable to return to work as a machinist. However, "(t)otal disability is defined as the inability to return to any employment and not merely the employment in which the [Claimant] was engaged at the time of the

accident.... The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment.... The critical question then becomes whether any employer in the usual course of employment would reasonably be expected to hire this [Claimant] in his or her present physical condition." *Lorentz v. Missouri State Treasurer*, 72 S.W.3d 315, 319 (Mo.App. S.D. 2002)(overruled on other grounds) citing *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. 1999).

Based on the substantial and competent evidence, including the testimony of Claimant, who I had the opportunity to personally observe on two separate occasions and find credible, the medical records, the experts I find most convincing, and the Law of the State of Missouri, I find Claimant has established he is permanently and totally disabled. I find that it would be unreasonable to expect any employer in the usual course of employment to hire Claimant in his present physical condition.

Claimant's testimony regarding his limitations and symptoms is compelling, and is supported by the medical records. Permanent nerve damage has caused radiculopathy. He takes multiple medications to control his pain. He has a spinal cord stimulator implanted in his body. The combination of his physical symptoms and the effects of his pain-control medications make it impossible for him to function in any work setting. Dr. Cohen established that Claimant was totally disabled, and when asked to isolate the last injury alone, Dr. Cohen testified that Claimant's total disability is due to the limitations and symptoms of his work-related overuse or cumulative trauma disorder alone. Claimant's ex-wife confirmed his poor physical state. I find the testimony of Claimant, Mrs. Cain, and Dr. Cohen, along with the overwhelming weight of the medical records, establishes that Claimant is permanently and totally disabled by virtue of his work-related back condition in and of itself.

The evidence that contradicts the conclusion that Claimant has permanent total disability from the last injury alone is not credible, compelling, or consistent with the record as a whole. While Mr. England also concluded Claimant was permanently and totally disabled, he felt it was due to a combination of his "obvious and easily observable physical difficulties," which come from his last injury to the back, and his "problems with panic attacks and anxiety." I find that there is insufficient evidence to establish that Claimant has a panic disorder or any significant preexisting disability associated with anxiety.^[3] Therefore, I find Mr. England's conclusion Claimant is totally disabled due to a combination of disabilities to be lacking in foundation. Dr. Lange assigned restrictions of lifting no more than 15 pounds frequently, avoiding bending at the waist and torso rotation, and intermittent sitting, walking and standing, which renders Claimant disabled as a machinist, but felt Claimant was not totally disabled for other occupations. However, Dr. Lange opinion does not consider Claimant's credible subjective complaints, the limitations caused by his medications, and his overall ability to function in a work setting. Because Ms. Abram's opinion is based on the opinion of Dr. Lange, it is also lacking in foundation. Thus, the only credible, well-founded opinion on total disability is that of Dr. Cohen.

Claimant has been totally disabled since the onset of his disease on December 9, 2000. He was in the under active care through January 29, 2002, at which time his temporary total disability became permanent. He is entitled to temporary total disability benefits from Employer beginning December 9, 2000 to January 28, 2002, and thereafter shall receive permanent total disability benefits from Employer from January 29, 2002 for his lifetime.

IV. The Second Injury Fund is Not Liable for Claimant's Permanent Total Disability.

The Employer is responsible for Claimant's permanent total disability. If a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. E.D. 2000). The claim against the Second Injury Fund is denied.

V. The appropriate rate of compensation for total disability benefits \$599.96.

The parties agree as to the wages earned by Claimant in the approximate 13 weeks prior to injury and that he qualifies for the maximum rate for permanent partial disability benefits, but they disagree as to the proper calculation of the rate for temporary total disability ("TTD") and permanent total disability ("PTD"). The calculation should be done in accordance with §287.250(4) & (7), which state:

(4) 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 or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week...* (emphasis added).

(7) In computing the average weekly wage pursuant to subdivisions (1) to (6) of this subsection, an employee shall be considered to have been actually employed for only those weeks in which labor is actually performed by the

employee for the employer and wages are actually paid by the employer as compensation for such labor.

Claimant had gross earnings of \$11,010.05 in the applicable period, but missed a total of seven days as follows: one day in week three; three days in week four; two days in week six; and one day in week thirteen. I find Claimant earned \$11,010.05 in the 13-week period prior to his work injury. However, by application of subsections (4) and (7) of §287.250, the gross earnings shall be divided by twelve, not thirteen, weeks to determine the applicable average weekly wage, resulting in maximum rate TTD/PTD of \$599.96.

CONCLUSION

Claimant's spinal disease is an occupational disease arising out of and in the course of employment. He received a great deal of reasonable and necessary medical treatment to attempt to cure and relieve the effects of the injury. Its severe, debilitating effects have rendered him totally disabled, despite the fact he has some preexisting disabilities. Claimant has presented sufficient evidence to establish he is permanently and totally disabled as a result of his work-related disability. Employer shall compensate Claimant for his medical expenses, provide ongoing medical maintenance, and pay total disability benefits. The Second Injury Fund has no liability.

This award is subject to a lien of up to 25% in favor of Attorney Ronald D. Edelman for legal services.

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

[\[1\]](#) The objections by Employer's attorney and the Second Injury Fund on pages 23 to 26 of Exhibit E are well founded and sustained. Mr. England's answers on pages 24 to 27 are struck.

[\[2\]](#) Dr. Repaso's handwritten file notes are illegible (Exhibit I).

[\[3\]](#) The sole record cited by Claimant in support of a preexisting panic disability is an off work slip from his family physician forbidding overtime in the summer of 1990 due to "mental and physical fatigue associated with stress." However, the specialist to whom the family doctor referred Claimant diagnosed vertigo possibly due to a viral condition (Exhibit P).