

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

Injury No.: 01-112723

Employee: Steve Crump
Employer: PrintPack Georgia, Inc. (Settled)
Insurer: Travelers (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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, heard oral argument and considered the entire record. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 4, 2009, by issuing a separate opinion denying compensation in the above-captioned case.

The administrative law judge concluded that employee's 1995 and 2001 injuries did not combine to create Second Injury Fund liability. Thus, the administrative law judge denied employee's claim that he be awarded future medical treatment and costs and fees. We agree with the administrative law judge's conclusion that there is no Second Injury Fund liability, however, we disagree with the administrative law judge's reasoning in arriving at said conclusion.

I. Issue

Is there Second Injury Fund liability?

II. Findings of Fact

Employee began working for employer in 1990 as a helper and was promoted to pressman by 2000. Employee's job was to operate the flexographic printing press. The press had a part known as a "doctor blade," whose function was to wipe ink off of the press that put the ink on the paper. The blade weighs 40-45 pounds when clean and up to 100 pounds when compressed with ink.

Employee had no medical restrictions or limitations prior to his 1995 injury. In 1995, employee was injured while working for employer as a helper on a printing press. On the date of his injury, employee put a roll of paper onto the press. The press malfunctioned and the roll came off the press. Employee tried to grab the roll and stiffened up. Employee reported his injury, and saw Dr. Elcock and Dr. Schaefer for treatment. He was then referred to Dr. Robson, a spine surgeon. Dr. Robson performed a microdiscectomy laminotomy at the L5-S1 level on January 6, 1998.

Employee returned to work full duty without medical restrictions. He testified that he "felt fine" for about four years. Employee had no complaints in his back and he

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continued to play softball, golf, and basketball. He ran and frequently walked for exercise.

Employee testified that on September 2, 2001, he injured his back again at work while lifting the doctor blade. He stated that everything was fine up until the 2001 event. Employee saw Dr. Robson on September 13, 2001, and stated that he had been doing well up “**until about a month ago**” and could not recall a specific injury. There was no mention during this visit that employee injured himself lifting a doctor blade.

Dr. Robson recommended another microdiscectomy and noted there was a possibility that employee might need a lumbar fusion. Dr. Robson performed a L5-S1 microdiscectomy on October 1, 2001.

On October 9, 2001, employee filed a workers’ compensation claim for this alleged September 2, 2001, accident. The filed claim listed that the injury occurred due to “constant repetitive pushing, pulling and lifting using repetitive motion causing disability and progressive pain and injury.” Employee amended this claim twice alleging the same mechanism of injury.

Following the October 1, 2001, surgery, employee continued in Dr. Robson’s care. Dr. Robson returned employee to work light-duty, with restrictions of lifting 30 pounds occasionally and 25 pounds repetitively.

Dr. Robson saw employee on December 18, 2001, and wrote a letter to employee following their meeting. This letter reaffirmed what employee had told Dr. Robson on September 13, 2001, that employee had been doing well up until about a month prior to September 2001 and that **he could recall no specific event** leading up to his increase in symptoms.

In February 2002, employee had a repeat MRI which did not show recurrence of the herniation. Dr. Robson talked to employee about living with his continued symptoms or undergoing a fusion. Employee chose not to have surgery and was released from treatment.

Employee saw Dr. Morrow on June 5, 2002, for an independent medical evaluation. Employee related to Dr. Morrow that he was injured on September 2, 2001, while working on the press and removing the doctor blade. Dr. Morrow rated employee as having a 30% permanent partial disability of the body as a whole due to the 2001 injury, and 20% permanent partial disability of the body as a whole due to the 1995 injury.

Dr. Morrow recommended employee avoid repetitive work, prolonged standing and walking, or lifting weights in excess of 25 pounds occasionally, and 20 pounds repetitively.

On September 3, 2002, employee saw Dr. Robson concerning his ongoing low back and right leg radiating pain and occasional leg cramping. Dr. Robson changed his medications and scheduled an epidural steroid injection. Dr. Robson counseled

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employee on work tasks, including how to change the doctor blade without exacerbating his symptoms. Dr. Robson also offered to write a restriction requiring that employer accommodate employee as to that task.

Employee testified that on September 16, 2002, he was injured at work lifting a doctor blade. Employee saw Dr. Robson on October 3, 2002. Employee reported to Dr. Robson that he had made no improvement since taking Neurontin the month before and having had the epidural. Dr. Robson concluded that employee suffered from post-laminectomy instability and disc space collapse at L5-S1 level. During this visit, **employee made no mention of being injured at work 17 days earlier** while again lifting a doctor blade despite Dr. Robson's counseling on this subject on September 3, 2002.

Employee filed a workers' compensation claim for this alleged September 16, 2002, injury on October 24, 2002. The claim for compensation alleged an injury due to "doing constant pushing, pulling, and lifting using repetitive motion causing disability and progressive pain and injury to his back, legs, and body as a whole." The claim made no mention of lifting a doctor blade, causing a specific injury. The claim was later amended to allege the same mechanism of injury.

On November 18, 2002, employee saw Dr. Lange for an independent medical evaluation on behalf of employer's insurer. Dr. Lange noted that employee had given conflicting information as to whether or not he had been injured while lifting a doctor blade, or whether repetitive activities caused his increase in symptoms in September 2002. As a result, Dr. Lange noted that there were causation issues. Dr. Lange stated that if repetitive activities caused employee's herniation, his work would not be the substantial cause.

Employee had ongoing complaints and Dr. Robson performed surgery on him again on November 20, 2002. Dr. Robson performed a laminectomy and fusion with a bone graft and a Ray cage at L5-S1. Employee continued to have significant pain and numbness after the surgery. Dr. Robson released employee back to work in March, 2003 with restrictions, but his employer would not take him back.

Employee saw Dr. Cohen for an independent medical evaluation on August 26, 2003. Employee told Dr. Cohen that his back had never healed from the 2001 injury leading up to the 2002 injury. Dr. Cohen rated employee's three injuries at 75% permanent partial disability of the body as a whole. Dr. Cohen conceded during his deposition that part of his rating was not based on medical reasons, but on the fact that he had seen a settlement stipulation for the 1995 injury and used the percentage of disability in the stipulation as part of his rating.

Employee continued to have pain complaints and treated with Dr. Marquis, a pain specialist. Dr. Marquis attempted various treatments on employee to relieve his pain, but with little success.

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Employee saw Tim Lalk, for a vocational evaluation on January 6, 2005. Mr. Lalk had his deposition taken on February 22, 2005. Mr. Lalk's opinion was that based upon Dr. Robson's restrictions employee was employable in the light or sedentary level. Mr. Lalk opined that employee was unemployable if Dr. Cohen's restrictions were followed. Employee related to Mr. Lalk that he had a decrease in overall functioning following the 2001 injury.

Employee saw Dr. Lange for another independent medical evaluation on October 11, 2005. Dr. Lange stated that from reading the medical records it was obvious that there were significant questions related to causation for both the alleged 2001 and 2002 injuries. Dr. Lange observed that Dr. Robson counseled employee on how to perform work activities, including changing a doctor blade, so as to avoid injury. Dr. Lange noted that employee was alleging that he was injured by this very activity. Dr. Lange characterized this as a "self-fulfilling prophecy." Dr. Lange further noted that employee's medical records show that he had a significant amount of complaints following his 2001 injury up until the time of his alleged 2002 injury.

Dr. Marquis saw employee for an independent medical evaluation on October 24, 2005. Dr. Marquis was deposed on June 12, 2008. He opined that employee was permanently and totally disabled due to a combination of all three work accidents.

Employee settled his 1995 workers' compensation claim with employer in February 2000 for 22.5% permanent partial disability of his body as a whole rated at the lower back.

Employee settled both his 2001 and 2002 claims with employer in September 2007 for 22.5% permanent partial disability of the body as a whole rated at the lower back and 22% permanent partial disability of the body as a whole rated at the back, respectively. The Second Injury Fund was not a party to either settlement.

III. Conclusions of Law

The administrative law judge found no Second Injury Fund liability because the 1995 and 2001 injuries did not combine to create Second Injury Fund liability. However, in arriving at said conclusion, the administrative law judge did not analyze the issue of causation. The award appears to assume that a work-related accident occurred in September of 2001, but the analysis for that conclusion is not fully enunciated. Considering the facts of this case, causation is an issue that must be addressed before Second Injury Fund liability can be analyzed.

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." The employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

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Under Missouri Workers' Compensation Law, in order for an injury to be compensable, it must "arise out of" and "in the course of" the employment. Section 287.120.1 RSMo (2000)¹ states, in pertinent part:

"Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment...."

Section 287.020 RSMo provides further guidance as to what constitutes "arising out of" and "in the course of" employment. Section 287.020.2 RSMo states, in pertinent part:

"An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability...."

With regard to this 2001 claim, employee alleges that he was injured at work while lifting the doctor blade, on September 2, 2001. Employee testified to this in great detail during the final hearing. However, we find that there is too much contradictory evidence to find employee credible.

First of all, employee was seen by Dr. Robson on September 13, 2001, just 11 days after the alleged accident, and related that he had been doing "extremely well **until about a month ago.**" This would place any injury in August 2001. Further, employee told Dr. Robson that he recalled "no specific injury." Employee made no mention to Dr. Robson of injuring himself with a doctor blade. If employee's injury occurred as he claims, it is illogical that employee would not tell Dr. Robson, his treating physician for the 1995 injury, that he injured his back just 11 days ago lifting the doctor blade. Employee had no incentive to withhold that information from Dr. Robson.

Secondly, employee's original workers' compensation claim, filed on October 9, 2001, just 29 days after the alleged accident, does not allege a specific injury. The original claim alleges "constant pushing, pulling and lifting using repetitive motion causing disability and progressive pain and injury." It is not credible that employee would forget how he was hurt in such a short period of time leading up to the filing of his original workers' compensation claim, especially considering how certain he was at the final hearing as to how he was allegedly injured. Employee even repeated this language from the original claim in his amended claims.

Lastly, employee saw Dr. Robson on December 18, 2001. Following said visit, Dr. Robson wrote a follow-up letter to employee, which reaffirmed what employee had told Dr. Robson in September: 1) employee injured himself in

¹ Unless otherwise indicated, all statutory references are to RSMo (2000).

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August 2001, not September 2001, and, (2) employee's injury was due to some unspecified event, not an accident at work.

Based upon the objective contemporaneous medical records and the record as a whole, we find that employee's 2001 injury did not arise out of and in the course of his employment. We agree with the administrative law judge's conclusion that there is no Second Injury Fund liability, but instead of finding that the 1995 and 2001 injuries merely do not combine to create Second Injury Fund liability, we find that the 2001 injury was not even compensable because it did not arise out of and in the course of the employment. Therefore, there is no Second Injury Fund liability.

Thus, employee's claim is denied.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued June 4, 2009, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 9th day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Steve Crump

CONCURRING OPINION

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

Having reviewed the evidence and considered the whole record, I join in and adopt the separate opinion of the award of the administrative law judge denying future medical treatment and costs and fees relative to employee's 2001 injury.

William F. Ringer, Chairman

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CONCURRING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed. Therefore, I adopt the decision of the administrative law judge, in its entirety, as my decision in this matter.

Because the Commission majority has adopted different reasoning, I respectfully dissent from the majority reasoning.

John J. Hickey, Member

AWARD

Employee: Steve Crump

Injury No.: 01-112723

Dependents: See award

Before the
**Division of Workers'
Compensation**

Employer: PrintPack Georgia, Inc. (previously settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (only)

Insurer: Travelers (previously settled)

Hearing Date: March 4, 2009

Checked by: KMH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? n/a
3. Was there an accident or incident of occupational disease under the Law? n/a
4. Date of accident or onset of occupational disease: alleged September 2, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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? n/a
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:
Claimant alleges he injured his back and body as a whole while changing a doctor blade on the printing press.
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: alleged back and body as a whole
14. Nature and extent of any permanent disability: 22.5 % of the body as a whole related to the low back
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? unknown

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- 17. Value necessary medical aid not furnished by employer/insurer? Unknown
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$493.33/\$329.42
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

90 weeks of permanent partial disability from Employer (previously paid)

22. Second Injury Fund liability: NO

TOTAL: (PREVIOUSLY PAID)

23. Future requirements awarded: None

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 n/a of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Steve Crump

Injury No.: 01-112723

Dependents: See award

Before the
**Division of Workers'
Compensation**

Employer: PrintPack, Inc. (previously settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (only)

Insurer: Travelers (previously paid)

Checked by: KMH

A hearing was held on the above captioned matter March 4, 2009. Steve Crump (Claimant) was represented by attorney Dean Plocher. The Second Injury Fund was represented by Assistant Attorney General Kevin Nelson. Claimant's cases against PrintPack Georgia, Inc. (Employer) were settled before this hearing.

The record was left open until March 18, 2009 for Claimant to submit the Reports of Injury on Claimant's 2001 and 2002 cases. Claimant sent these to the Court with a copy to the AAG on March 12, 2009. No objections to these exhibits were filed, and the two reports of injury are admitted as Exhibits HH and II. The Second Injury Fund objected to the admission of exhibits C and BB, which are the Stipulations for Compromise settlement on Claimant's 1995, 2001, and 2002 cases. I find these exhibits are admissible simply as evidence of the settlement agreement between Employer and Claimant, but do not bind the Second Injury Fund to the terms of the settlement agreements. In addition, these settlement stipulations are relevant on the issue of future medical to show all issues against Employer have been settled. All remaining exhibits were admitted into evidence and the court took Judicial notice of the Stipulations for Compromise Settlement between Claimant and Employer for his three work injuries.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award. Any markings on the exhibits were there when received into evidence and were not made by this court.

STIPULATIONS

The parties stipulated to the following:

1. Claimant alleges he was injured by accident arising out of and in the course of his employment September 2, 2001 and September 16, 2002.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law on the alleged injury dates.
3. Employer's liability was fully insured by Travelers at the time of the alleged 2001 injury and Federal Insurance Company c/o Chubb Services at the time of the 2002 injury.

4. Employer had notice of the alleged injuries and claims for compensation were timely filed.
5. Claimant's average weekly wage was sufficient to entitle him to TTD/PPD rates of \$493.33/\$329.42 for the 2001 injury and \$488.80/\$340.12 for the 2002 injury.
6. Claimant received an unknown amount of TTD and medical benefits from Employer for his 2001 injury. Claimant received no TTD for his 2002 injury and an unknown amount of medical benefits for his 2002 injury.
7. On September 13, 2007, Claimant settled both of his primary injuries with Employer. He settled his 2001 case for 22.5% PPD to the back and his 2002 case for 22% of the back.

ISSUES

The parties stipulated the issues to be resolved in each case are as follows:

1. Whether Claimant sustained an injury by accident at work.
2. Whether Claimant's injuries arose out of and in the course of his employment.
3. Whether Claimant's injuries and treatment were medically and causally related to his work.
4. Whether Claimant is entitled to future medical care.
5. The nature and extent, if any, of Second Injury Fund liability.
6. Whether Claimant is entitled to costs and fees pursuant to 287.560.

FINDINGS OF FACT

Based upon the competent and substantial evidence and my observations of Claimant at trial, I find:

1. Claimant is a 50 year-old male who has a high-school diploma and a few college credits from a Junior College. He has no other vocational or technical training. He spent his career working in the printing industry. He began working for Employer in 1990 as a helper and worked his way up to Journeyman Pressman in 2000. As a helper, Claimant used a hoist to put 1500 pound rolls of paper onto and off the press. Claimant also frequently changed the doctor blades on the press. Doctor blades are six feet wide and have a flat blade that attaches to the roller to stop ink from getting onto all the paper. The blades wear out and have to be changed periodically. Each blade weighs approximately 40 pounds when empty. The blades can weigh up to 100 pounds when replaced due to a

build-up of ink. In order to remove the blades, one has to climb a ladder and bend over into an awkward position to pull the blades out of the machine. These ink encrusted blades are the heaviest item Claimant lifted at work.

2. Claimant had no medical limitations or injuries prior to his 1995 injury.
3. In 1995, Claimant was injured while working at James River Printing Company (Employer's former name) as a helper on a printing press. His job was to assist the pressmen. On the date of his injury, Claimant put a roll of paper onto the press. The press malfunctioned and the roll came off the press. Claimant tried to grab the roll and stiffened up. Claimant reported this injury to his boss and was sent to Dr. Robson.
4. Dr. Robson opined Claimant had a large central herniated disc. He initially provided conservative treatment with numerous epidural steroid injections and physical therapy. Eventually he recommended surgery and operated on Claimant in January 1998 to remove a large extruded disc fragment at L5-S1.
5. Claimant returned to work full duty without medical restrictions. Claimant testified he "felt fine" after this for about four years. He had no complaints in his back. He continued to play softball, golf and basketball. He ran and frequently walked for exercise. He was a fisher and testified he could do everything he needed to do. He was able to work his very physical job. Claimant was promoted to Pressman and had an assistant. His job still involved physical labor, and Claimant testified he was stronger at that point than he is now.
6. Claimant settled this case in February 2000 for 22.5% PPD to his low back.
7. In September 2001, Claimant was working 12 hour shifts for 3 days on and 2 days off. He worked weekends and holidays. Claimant testified on September 1 or 2, 2001, he was working on a press. He climbed a ladder to remove the doctor blade. As Claimant pulled the blade out, he turned to put it down and felt a pop and pull in his back. He had pain across his back and down his right leg to his toes. This pain was worse than in 1995 when he had no leg pain. He reported this injury to his supervisor. Claimant testified he did not injure himself at home.
8. Claimant saw Dr. Robson September 13, 2001. He stated he last saw Claimant 3 years ago following his microdiscectomy and Claimant had done extremely well until about a month ago. He stated Claimant "recalled no specific injury but started having increased symptoms involving his low back and posterior aspect of his right leg." He prescribed pain relievers and ordered an MRI which showed a "fairly large recurrent disc herniation". Dr. Robson recommended another microdiscectomy and notes there is a chance in the future he may require a fusion.
9. On October 1, 2001, Claimant was admitted to Missouri Baptist Hospital. The admission notes indicate he had done well following his prior surgery and was reinjured about a month ago and developed low back and right leg pain. Claimant underwent surgery to remove the recurrent herniation, and had several weeks of physical therapy. Dr.

Robson's follow-up records indicate this surgery significantly decreased Claimant's leg pain, but he continued to have some leg and low back pain.

10. On October 1, 2001, Claimant filed a Claim for Compensation indicating he was injured September 2, 2001 as a result of constant pushing, pulling, and lifting using repetitive motion.
11. On October 23, 2001, Employer filed a Report of Injury with the Division of Workers' Compensation indicating Claimant was injured at 12:00 am on September 2, 2001 while working as a pressman. Employer notes Claimant was doing constant pushing, pulling, and lifting using repetitive motion causing disability and progressive pain and injury. Employer also noted they were notified of the injury September 26, 2001.
12. By December 18, 2001, Dr. Robson noted Claimant had made no significant progress and still had low back pain and radiating pain into his right leg with increased activity. Dr. Robson opined Claimant might need a repeat MRI to determine if he is a candidate for a spinal fusion.
13. Dr. Robson wrote Claimant a letter dated December 18, 2001, and stated that even though Claimant described no specific incident during his office visit in September, it was clear to Dr. Robson something happened because he would have been symptomatic with the size disc herniation that was found on his subsequent scan.
14. In February 2002, Claimant had a repeat MRI which did not show recurrence of the herniation. Dr. Robson talked to Claimant about living with his continued symptoms or undergoing a fusion. Claimant chose not to have surgery and was released from treatment.
15. Claimant saw his rating doctor, Dr. Morrow, June 5, 2002. The report indicates Claimant was injured September 2, 2001 while working on the press and removing the doctor blade. He thought he had a back sprain, but over the next few weeks the pain worsened into his back and down his right lower extremity. Dr. Morrow examined Claimant, reviewed the treating records, and rated his disability at 20% to the body for his 1995 injury and 30% of the body related to his 2001 injury. He recommended Claimant avoid repetitive work, prolonged standing and walking, or lifting weights in excess of 25 pounds occasionally and 20 pounds repetitively.
16. In September 2007, Claimant settled his 2001 injury for 22.5% of the back.
17. Following completion of treatment for his 2001 injury, Claimant's activities were limited. He did return to work, but could no longer play softball, run, swim, and was only able to walk short distances. This injury left him unable to do a lot of the things he routinely did. He was able to mow the lawn and maintain his home. When he returned to work he did not have permanent restrictions, but his co-workers helped him lift. He had continuing, but not constant, pain in his low back and leg.

18. Claimant next saw Dr. Robson September 3, 2002. He continued to have low back pain and right leg radiating pain. Dr. Robson changed his medications and scheduled an epidural steroid injection. He notes he talked to Claimant about changing the doctor blade at work and recommended he limit that activity.
19. On September 16, 2002, Claimant was running a printing press and climbed up to remove the ink encrusted doctor blade. As Claimant handed the blade to his helper, he felt a pop in his back. He felt tremendous pressure in his low back and the pressure and pain radiated down both legs into his feet. The pain was so strong, he almost dropped the blade on his assistant. Claimant was unable to get off the ladder without assistance. He sat on the ground for a while. Claimant reported the injury to his supervisor who told him to sit for a while and he would write up the report later.
20. Claimant saw Dr. Robson October 3, 2002. He opined Claimant had a complete collapse at the L5-S1 disc space. He recommended conservative treatment.
21. On October 22, 2002, Claimant filed a Claim for Compensation indicating he injured his back at work September 16, 2002 as a result of repetitive pushing, pulling and lifting.
22. On November 4, 2002, Employer filed a Report of Injury with the Division indicating Claimant alleged he aggravated his prior back strain when changing the doctor blade on September 16, 2002. Employer notes they were notified of this injury on September 16, 2002.
23. On November 18, 2002, Claimant saw Dr. Lange on behalf of Employer's 2001 Insurer. Claimant gave a history of injuries consistent with his trial testimony. Dr. Lange noted Claimant had no significant signs of symptom magnification. He had minimal range of motion in his back due to pain. He opined Claimant had suboptimal relief following his 2001 surgery and may need a fusion. He noted Claimant related a specific traumatic event in 2002 causing his current symptoms. He also noted other medical records were unclear in regard to causation and indicate Claimant suggested repetitive activities caused his herniation. Dr. Lange stated if that was correct, his work would not be the substantial cause for the herniation. He stated without additional information, there was no way to state whether the single traumatic event occurred. He indicated MMI after fusion does not occur until approximately one year after the operative procedure.
24. Conservative treatment failed and Claimant underwent a laminectomy and fusion with a bone graft and a Ray cage at L5-S1 on November 20, 2002. Claimant continued to have significant pain and numbness after the surgery. Dr. Robson ordered an updated MRI in February 2003 which showed no recurrent herniation. Dr. Robson opined Claimant has S1 nerve root damage and recommended physical therapy and continued medications. He released Claimant to work in March 2003, but Employer would not take him back with restrictions. By May 1, 2003, Dr. Robson opined Claimant was unable to return to work as a printer and needs restrictions in the moderate work range with a 30 pound lifting limit. He also recommended no repetitive bending, stooping, twisting or awkward positions. He opined Claimant had chronic radiculopathy and needs chronic pain medications.

25. In August 2003, Claimant saw Dr. Cohen for an evaluation and rating. He notes a history of injuries in 2001 and 2002 consistent with Claimant's testimony at trial. Based on Claimant's complaints and Dr. Cohen's examination, he diagnosed failed lumbar laminectomy syndrome and lumbar radiculopathy. He found Claimant's symptoms are a direct result of his 2001 and 2002 work injuries. Claimant's work was a substantial factor in his disability, and his treatment was medically necessary and reasonable. Dr. Cohen opined Claimant would need pain medications and sleep aids for the remainder of his life. He estimated the cost of the physician's care and medications to be up to \$2,000 per year. He recommended Claimant be restricted from any repetitive work and should not lift more than 5-10 pounds. He rated Claimant's disability at 75% of the body apportioned between his three back injuries and opined Claimant is permanently and totally disabled as a result of the combination of his three injuries.
26. Claimant settled his 2002 case for 22% of the back in September 2007.
27. In 2003, Claimant moved to the Springfield area and began treating at CoxHealth Center for ongoing insomnia, depression and back pain and sciatica into his right leg. He had a repeat MRI which showed significant scar tissue at the S1 nerve root and significant degenerative changes at L5-S1. Dr. Marquis provided extensive courses of medications including muscle relaxants, antidepressants, antiepileptics and narcotics. Claimant had significant difficulties with the side-effects of the medications and had difficulty with recall, attention, processing and executive function. Dr. Marquis sent Claimant to a psychologist for his depression and to Dr. Brooks, a pain management specialist. Dr. Brooks recommended additional physical therapy and implanted a trial dorsal column stimulator or TENS unit in June 2004. This did not provide good relief, and it was removed within a week.
28. Claimant testified Dr. Marquis told him since the TENS unit failed, there is no way to relieve his pain besides medications. Claimant testified Dr. Marquis told him he has so much scar tissue in his back, it looks like he has had six surgeries, and Claimant would need medications the rest of his life.
29. Dr. Marquis opined Claimant's response to the treatment was less than optimal. In October 2005, Dr. Marquis opined the treatment failed to significantly reduce Claimant's pain and no further surgery would help. He found Claimant had a significantly diminished quality of life due to his constant back and lower extremity pain. Dr. Marquis believes it is impossible for Claimant to engage in any sort of meaningful occupational activity and he is completely and permanently disabled due to his chronic back and lower extremity pain. Claimant continues to see Dr. Marquis to monitor and refill his numerous medications.
30. In June 2007, Dr. Marquis again noted Claimant is permanently and totally disabled due to his chronic pain stemming from his low back. He is unable to engage in any gainful employment or vocational rehabilitation. He opined Claimant's treatment was reasonable and necessary and his injuries were the substantial factor and prevailing factor in causing his permanent total disability. He opined Claimant will need future medical care in the form of narcotic medications. Since he failed the dorsal column stimulator, there is no option for him other than medications. Dr. Marquis opined the first two injuries resulted

in disc fragments and the MRI after the third injury showed a complete collapse in the disc space. This necessitated fusion. He opined the three injuries combined create his disability.

31. Claimant saw his vocational rehabilitation specialist, Mr. Tim Lalk, January 6, 2005. Mr. Lalk noted Claimant was able to supervise a warehouse crew in the early 1980s. He had some courses in business but did not pursue bookkeeping or any other office skills. He has little computer knowledge and no other experience that will allow him to work at a skilled level. Mr. Lalk opined while Claimant may be able to work in unskilled entry level positions at the sedentary to light level of exertion given Dr. Robson's restrictions, Claimant is unable to compete in the open labor market given the limitations imposed by Dr. Cohen, given Claimant's symptoms and how they limit his activities, and given the treatment he continues to receive. Claimant is not able to be active for a full day and ease his symptoms simply by changing positions from sitting to standing or walking. Mr. Lalk noted that even when Claimant controls his level of activity at home, he is still unable to rest at night and needs to lie down during the day. He does not believe any employer would accommodate this need and has no vocational rehabilitation services to recommend unless Claimant is able to control his symptoms and increase his level of activity so he can work at a sedentary level.
32. In October 2005, Claimant again saw Dr. Lange at the request of Employer's 2001 Insurer. Dr. Lange notes Claimant had both back and leg complaints between the 2001 and 2002 surgeries, but he continued to work full duty. He notes Claimant told Dr. Robson September 3, 2002, that changing the doctor blade causes an increase in his symptoms. Dr. Lange calls Claimant's September 16, 2002, injury a "self-fulfilling prophecy". He opined if Claimant was injured that date changing a doctor blade, that event is the substantial factor causing the need for the November 2002 fusion. Given Claimant's ongoing symptoms, Dr. Lange opined Claimant probably reached his MMI in May 2003 and will require ongoing medications and permanent restrictions.
33. Claimant testified after his 2001 injury, the pain was relieved somewhat with anti-inflammatories. Since his 2002 injury, he takes numerous pain medications on a daily basis. He takes morphine twice a day, neurontin to block the pain, bupropion twice a day for energy, amitriptylene for sleep and depression, gabapentin for nerves. The doctor has told him he will always need narcotics for pain relief. The narcotics relieve his pain to some degree, but he still has constant low back and leg pain. He took oxycontin until the insurance company cut this, and his doctor switched him to morphine sulfate.
34. Claimant continues to have pain across his low back and into both legs more on the right than the left. He has numbness in his right foot and often stumbles. His right leg has constant pain all the way down to his foot. His pain increases with activity and only decreases with medications. He cannot walk as much as he did after the 2001 injury and cannot do any of the activities he used to enjoy. He limits standing to 15 minutes due to weakness in his leg. Driving more than 10 minutes increases numbness in his foot. He is unable to get comfortable and cannot sleep more than a few hours at a time. He sleeps a few hours during the day to relieve his pain and because he doesn't sleep well at night. He believes he cannot work because he is unable to sit or stand for any length of time, he takes narcotics daily for his pain, and he is physically unable to work. The doctor told

him he could not return to work while taking narcotics. He has memory problems related to his medications. He has severe headaches a few times a week that last three hours or all day. He has had no improvement in his symptoms since 2002.

35. His daily activities are limited. He takes medications and goes to bed around 11:30 p.m. He is only able to sleep around 3-4 hours and is usually restless. He wakes up with low back pain and muscle cramps in his right leg. He has no daily routine and does not do much during the day. He lies in a recliner and watches TV most of the time. He tries to walk around the block. He is not able to do many chores around the house. He cannot do laundry or cut the grass. He doesn't socialize much and thinks he is depressed.
36. Claimant's wife Gina is a dependent. Claimant has six children, two of whom are still dependents. Caleb is 17 years old and Peyton is 7 years old. Both boys are dependents and receive social security benefits from Claimant.
37. Claimant has not returned to work since his 2002 injury. He is asking for weekly PTD benefits, future medical benefits for what he takes now and what he may need later, and an attorney fee award.
38. Claimant is credible. During the hearing, he sat with his right leg extended. He frequently shifted positions and stood during trial to relieve his pain.

RULINGS OF LAW

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

1. Claimant's 1995 and 2001 injuries do not combine to create Second Injury Fund liability.

The Fund asserts they have no liability as they question whether an accident occurred at work September 2, 2001. I find that point moot, and it is not necessary to address the compensability of the 2001 injury.

This is a case of a back injury superimposed on a preceding back injury. In *Searcy v. McDonnell Douglas Aircraft Co., et al.*, 894 S.W.2d 173, (Mo.App. E.D. 1995), the court noted "the presence of a pre-existing industrial disability, in and of itself, is not enough to induce Second Injury Fund liability. To create Second Injury Fund liability, the pre-existing disability must combine with the disability from the subsequent injury in one of two ways: (1) the two disabilities combined result in a greater degree of disability than the sum of the degree of disability from the pre-existing condition and the degree of disability from the subsequent injury; or (2) the pre-existing disability combines with the disability from the second injury to create permanent total disability. 287.220 RSMo 1986; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App.1990)."

The court further noted “as a general rule where the first and second injuries are to the same part of the body, as in this case, the second supplements the first rather than combining to create a greater disability than the sum of the two.” *Id. at 178*

There is no medical evidence to support the proposition that Claimant’s 1995 injury and his 2001 injury created a greater overall disability than their simple sum. I find Claimant’s pre-existing disability did not combine with his subsequent injury in this manner.

I find there is no greater disability which would impose liability on the Fund.

2. Claimant is not entitled to future medical care.

Claimant requests future medical benefits, however he has not guided me to any precedent which would allow for the imposition of future medical benefits against the Second Injury Fund. Section 287.140 provides for medical expenses from Employer. The case against Employer was settled in 2007, and they are no longer a party to this case. I find no statutory authority or case law for the imposition of medical expenses against the Second Injury Fund.

3. Claimant is not entitled to costs and fees.

Claimant argues he is entitled to costs and attorney fees because the Second Injury Fund offered no lay or expert medical or vocational testimony to contradict Claimant’s allegations of permanent total disability. The Fund did not address this point in their proposed award, but stated on the record their position that costs are not appropriate as the Fund has contested Claimant was injured at work.

While I disagree with the Fund’s position, I find an award of costs is not merited in this case. Given the evidence, the Fund did not defend the case “without reasonable ground” as is required in order to assess costs.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

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

Injury No.: 02-110987

Employee: Steve Crump
Employer: PrintPack Georgia, Inc. (Settled)
Insurer: Federal Insurance Co., c/o Chubb Services (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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, heard oral argument and considered the entire record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated June 4, 2009.

Preliminaries

This case involves three separate workers' compensation claims for compensation with injury dates in 1995, 2001, and 2002, respectively. Employee settled his 1995 claim with employer in February 2000 for 22.5% permanent partial disability of his body as a whole rated at the lower back. Employee also settled both his 2001 and 2002 claims with employer in September 2007 for 22.5% permanent partial disability of the body as a whole rated at the lower back and 22% permanent partial disability of the body as a whole rated at the back, respectively.

Although employee settled all of his claims against employer, he proceeded to final hearing against the Second Injury Fund for both his 2001 and 2002 claims. The administrative law judge heard both cases to consider what, if any, is the nature of Second Injury Fund liability.

With regard to the 2002 claim, the administrative law judge found that employee was injured by an accident arising out of and in the course of his employment on September 16, 2002. The administrative law judge further found that employee's injuries were medically and causally related to his work and that he is permanently and totally disabled as a result of the combination of his disabilities incurred from the 1995, 2001, and 2002 accidents. The Second Injury Fund was, therefore, ordered to pay permanent total disability benefits beginning September 17, 2002. However, the administrative law judge did not find the Second Injury Fund liable for future medical treatment or costs and fees, as requested by employee.

Both the Second Injury Fund and employee filed timely Applications for Review to the Commission. Therefore, the primary issue currently before the Commission is the nature and extent of any Second Injury Fund liability.

Employee: Steve Crump

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Findings of Fact

Employee began working for employer in 1990 as a helper and was promoted to pressman by 2000. Employee's job was to operate the flexographic printing press. The press had a part known as a "doctor blade," whose function was to wipe ink off of the press that put the ink on the paper. The blade weighs 40-45 pounds when clean and up to 100 pounds when compressed with ink.

Employee had no medical restrictions or limitations prior to his 1995 injury. In 1995, employee was injured while working for employer as a helper on a printing press. On the date of his injury, employee put a roll of paper onto the press. The press malfunctioned and the roll came off the press. Employee tried to grab the roll and stiffened up. Employee reported his injury, and saw Dr. Elcock and Dr. Schaefer for treatment. He was then referred to Dr. Robson, a spine surgeon. Dr. Robson performed a microdiscectomy laminotomy at the L5-S1 level on January 6, 1998.

Employee returned to work full duty without medical restrictions. He testified that he "felt fine" for about four years. Employee had no complaints in his back and he continued to play softball, golf, and basketball. He ran and frequently walked for exercise.

Employee testified that on September 2, 2001, he injured his back again at work while lifting the doctor blade. He stated that everything was fine up until the 2001 event. Employee saw Dr. Robson on September 13, 2001, and stated that he had been doing well up "**until about a month ago**" and could not recall a specific injury. There was no mention during this visit that employee injured himself lifting a doctor blade.

Dr. Robson recommended another microdiscectomy and noted there was a possibility that employee might need a lumbar fusion. Dr. Robson performed a L5-S1 microdiscectomy on October 1, 2001.

On October 9, 2001, employee filed a workers' compensation claim for this alleged September 2, 2001, accident. The filed claim listed that the injury occurred due to "constant repetitive pushing, pulling and lifting using repetitive motion causing disability and progressive pain and injury." Employee amended this claim twice alleging the same mechanism of injury.

Following the October 1, 2001, surgery, employee continued in Dr. Robson's care. Dr. Robson returned employee to work light-duty, with restrictions of lifting 30 pounds occasionally and 25 pounds repetitively.

Dr. Robson saw employee on December 18, 2001, and wrote a letter to employee following their meeting. This letter reaffirmed what employee had told Dr. Robson on September 13, 2001, that employee had been doing well up until about a month prior to September 2001 and that **he could recall no specific event** leading up to his increase in symptoms.

Employee: Steve Crump

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In February 2002, employee had a repeat MRI which did not show recurrence of the herniation. Dr. Robson talked to employee about living with his continued symptoms or undergoing a fusion. Employee chose not to have surgery and was released from treatment.

Employee saw Dr. Morrow on June 5, 2002, for an independent medical evaluation. Employee related to Dr. Morrow that he was injured on September 2, 2001, while working on the press and removing the doctor blade. Dr. Morrow rated employee as having a 30% permanent partial disability of the body as a whole due to the 2001 injury, and 20% permanent partial disability of the body as a whole due to the 1995 injury.

Dr. Morrow recommended employee avoid repetitive work, prolonged standing and walking, or lifting weights in excess of 25 pounds occasionally, and 20 pounds repetitively.

On September 3, 2002, employee saw Dr. Robson concerning his ongoing low back and right leg radiating pain and occasional leg cramping. Dr. Robson changed his medications and scheduled an epidural steroid injection. Dr. Robson counseled employee on work tasks, including how to change the doctor blade without exacerbating his symptoms. Dr. Robson also offered to write a restriction requiring that employer accommodate employee as to that task.

Employee testified that on September 16, 2002, he was injured at work lifting a doctor blade. Employee saw Dr. Robson on October 3, 2002, just 17 days after the alleged accident. Employee reported to Dr. Robson that he had made no improvement since taking Neurontin the month before and having had the epidural. Dr. Robson concluded that employee suffered from post-laminectomy instability and disc space collapse at L5-S1 level. During this visit, **employee made no mention of being injured at work 17 days earlier** while again lifting a doctor blade despite Dr. Robson's counseling on this subject on September 3, 2002.

On October 24, 2002, employee filed a workers' compensation claim for this alleged September 16, 2002, injury. The claim for compensation alleged an injury due to "doing constant pushing, pulling, and lifting using repetitive motion causing disability and progressive pain and injury to his back, legs, and body as a whole." The claim made no mention of lifting a doctor blade, causing a specific injury. The claim was later amended to allege the same mechanism of injury.

On November 18, 2002, employee saw Dr. Lange for an independent medical evaluation on behalf of employer's insurer. Dr. Lange noted that employee had given conflicting information as to whether or not he had been injured while lifting a doctor blade, or whether repetitive activities caused his increase in symptoms in September 2002. As a result, Dr. Lange noted that there were causation issues. Dr. Lange stated that if repetitive activities caused employee's herniation, his work would not be the substantial cause.

Employee: Steve Crump

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Employee had ongoing complaints and Dr. Robson performed surgery on him again on November 20, 2002. Dr. Robson performed a laminectomy and fusion with a bone graft and a Ray cage at L5-S1. Employee continued to have significant pain and numbness after the surgery. Dr. Robson released employee back to work in March 2003 with restrictions, but his employer would not take him back.

Employee saw Dr. Cohen for an independent medical evaluation on August 26, 2003. Employee told Dr. Cohen that his back had never healed from the 2001 injury leading up to the 2002 injury. Dr. Cohen rated employee's three injuries at 75% permanent partial disability of the body as a whole. Dr. Cohen conceded during his deposition that part of his rating was not based on medical reasons, but on the fact that he had seen a settlement stipulation for the 1995 injury and used the percentage of disability in the stipulation as part of his rating.

Employee continued to have pain complaints and treated with Dr. Marquis, a pain specialist. Dr. Marquis attempted various treatments on employee to relieve his pain, but with little success.

Employee saw Tim Lalk, for a vocational evaluation on January 6, 2005. Mr. Lalk had his deposition taken on February 22, 2005. Mr. Lalk's opinion was that based upon Dr. Robson's restrictions employee was employable in the light or sedentary level. Mr. Lalk opined that employee was unemployable if Dr. Cohen's restrictions were followed. Employee related to Mr. Lalk that he had a decrease in overall functioning following the 2001 injury.

Employee saw Dr. Lange for another independent medical evaluation on October 11, 2005. Dr. Lange stated that from reading the medical records it was obvious that there were significant questions related to causation for both the alleged 2001 and 2002 injuries. Dr. Lange observed that Dr. Robson counseled employee on how to perform work activities, including changing a doctor blade, so as to avoid injury. Dr. Lange noted that employee was alleging that he was injured by this very activity. Dr. Lange characterized this as a "self-fulfilling prophecy." Dr. Lange further noted that employee's medical records show that he had a significant amount of complaints following his 2001 injury up until the time of his alleged 2002 injury.

Dr. Marquis saw employee for an independent medical evaluation on October 24, 2005. Dr. Marquis was deposed on June 12, 2008. He opined that employee was permanently and totally disabled due to a combination of all three work accidents.

III. Conclusions of Law

The administrative law judge found employee to be permanently and totally disabled as a result of the combination of the 1995, 2001, and 2002 injuries. In arriving at said conclusion, the administrative law judge first determined that employee sustained a work-related accident on September 16, 2002. The administrative law judge found that employee credibly testified that he injured his back at work on that date while lifting a doctor blade. We disagree with the administrative law judge's conclusion that employee's 2002 injury arose out of and in the course of his employment.

Employee: Steve Crump

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Under Missouri Workers' Compensation Law, in order for an injury to be compensable, it must "arise out of" and "in the course of" the employment. Section 287.120.1 RSMo (2000)¹ states, in pertinent part:

"Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment...."

Section 287.020 RSMo provides further guidance as to what constitutes "arising out of" and "in the course of" employment. Section 287.020.2 RSMo states, in pertinent part:

"An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability...."

With regard to this 2002 claim, employee alleges that he was injured at work while lifting the doctor blade, on September 16, 2002. Employee testified to this in great detail during the final hearing. However, we find that there is too much contradictory evidence to find employee credible.

The most telling evidence concerns the contemporaneous medical records of Dr. Robson. On September 3, 2002, just 13 days prior to employee's alleged accident, Dr. Robson counseled employee on work tasks, including how to change the doctor blade without exacerbating his symptoms. Then, on October 3, 2002, just 17 days after the alleged accident, employee returned to Dr. Robson concerning his ongoing pain complaints, but he did not mention at all to Dr. Robson that he was allegedly injured at work on September 16, 2002, while lifting a doctor blade. It only seems logical that if employee was actually injured as he claims, that he would have mentioned something to his treating physician, especially in light of his ongoing complaints and Dr. Robson's advice on September 3, 2002. Further, employee's failure to say anything to Dr. Robson is beyond dispute in light of both employee and his attorney repeatedly stipulating to the accuracy and veracity of Dr. Robson's records.

In addition, employee's claim, which was filed on October 24, 2002, alleges an injury due to "constant pushing, pulling, and lifting using repetitive motion causing disability and progressive pain and injury to his back, legs, and body as a whole." The claim made no mention of lifting a doctor blade, causing a specific injury. This contradicts employee's detailed recollection of the alleged specific injury at final hearing. We find that this evidence, coupled with the aforementioned contemporaneous medical records, trumps employee's self-serving testimony at the final hearing.

Based upon the aforementioned, we find that employee's 2002 injury did not arise out of and in the course of his employment. Therefore, having found that employee did not

¹ Unless otherwise indicated, all statutory references are to RSMo (2000).

Employee: Steve Crump

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sustain a work-related accident on September 16, 2002, we further find that there is no Second Injury Fund liability because there was not a last injury to combine with employee's preexisting disabilities. We hereby reverse the award and decision of the administrative law judge and find that employee's claims for permanent total disability benefits, future medical treatment, and costs and fees, are denied.

The award and decision of Administrative Law Judge Kathleen Hart, issued June 4, 2009, is attached hereto solely for reference.

Given at Jefferson City, State of Missouri, this 9th day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Steve Crump

CONCURRING OPINION

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

Having reviewed the evidence and considered the whole record, I join in and adopt the final award denying permanent total disability benefits, future medical treatment and costs and fees relative to employee's 2002 injury.

William F. Ringer, Chairman

Employee: Steve Crump

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed. Therefore, I adopt the decision of the administrative law judge, in its entirety, as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

John J. Hickey, Member

AWARD

Employee: Steve Crump

Injury No.: 02-110987

Dependents: See award

Before the
**Division of Workers'
Compensation**

Employer: PrintPack Georgia, Inc. (previously settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (only)

Insurer: Federal Insurance Co, c/o Chubb Services
(previously settled)

Hearing Date: March 4, 2009

Checked by: KMH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 16, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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: Claimant injured his back and body as a whole while changing a doctor blade on the printing press.
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: back and body as a whole
14. Nature and extent of any permanent disability: 22% of the body as a whole previously paid by Employer and permanent and total disability against the Second Injury Fund beginning September 17, 2002, due to a combination of the primary injury and preexisting injuries.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? unknown

Employee: Steve Crump

Injury No.: 02-110987

- 17. Value necessary medical aid not furnished by employer/insurer? Unknown
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$488.80/\$340.12
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

88 weeks of permanent partial disability from Employer (previously paid)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
\$148.68 weekly differential payable by SIF for 88 weeks beginning
September 17, 2002, and, thereafter, \$488.80 per week as
provided by law.

TOTAL: TO BE DETERMINED

23. Future requirements awarded:

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:

Dean Plocher

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Steve Crump

Injury No.: 02-110987

Dependents: See award

Before the
**Division of Workers'
Compensation**

Employer: PrintPack Georgia, Inc. (previously settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (only)

Insurer: Federal Insurance Co, c/o Chubb Services, (previously settled)

Checked by: KMH

A hearing was held on the above captioned matter March 4, 2009. Steve Crump (Claimant) was represented by attorney Dean Plocher. The Second Injury Fund was represented by Assistant Attorney General Kevin Nelson. Claimant's cases against PrintPack Georgia, Inc. (Employer) were settled before this hearing.

The record was left open until March 18, 2009 for Claimant to submit the Reports of Injury on Claimant's 2001 and 2002 cases. Claimant sent these to the Court with a copy to the AAG on March 12, 2009. No objections to these exhibits were filed, and the two reports of injury are admitted as Exhibits HH and II. The Second Injury Fund objected to the admission of exhibits C and BB, which are the Stipulations for Compromise settlement on Claimant's 1995, 2001, and 2002 cases. I find these exhibits are admissible simply as evidence of the settlement agreement between Employer and Claimant, but do not bind the Second Injury Fund to the terms of the settlement agreements. In addition, these settlement stipulations are relevant on the issue of future medical to show all issues against Employer have been settled. All remaining exhibits were admitted into evidence and the court took Judicial notice of the Stipulations for Compromise Settlement between Claimant and Employer for his three work injuries.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award. Any markings on the exhibits were there when received into evidence and were not made by this court.

STIPULATIONS

The parties stipulated to the following:

1. Claimant alleges he was injured by accident arising out of and in the course of his employment September 2, 2001 and September 16, 2002.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law on the alleged injury dates.
3. Employer's liability was fully insured by Travelers at the time of the alleged 2001 injury and Federal Insurance Company c/o Chubb Services at the time of the 2002 injury.

4. Employer had notice of the alleged injuries and claims for compensation were timely filed.
5. Claimant's average weekly wage was sufficient to entitle him to TTD/PPD rates of \$493.33/\$329.42 for the 2001 injury and \$488.80/\$340.12 for the 2002 injury.
6. Claimant received an unknown amount of TTD and medical benefits from Employer for his 2001 injury. Claimant received no TTD for his 2002 injury and an unknown amount of medical benefits for his 2002 injury.
7. On September 13, 2007, Claimant settled both of his primary injuries with Employer. He settled his 2001 case for 22.5% PPD to the back and his 2002 case for 22% of the back.

ISSUES

The parties stipulated the issues to be resolved in each case are as follows:

1. Whether Claimant sustained an injury by accident at work.
2. Whether Claimant's injuries arose out of and in the course of his employment.
3. Whether Claimant's injuries and treatment were medically and causally related to his work.
4. Whether Claimant is entitled to future medical care.
5. The nature and extent, if any, of Second Injury Fund liability.
6. Whether Claimant is entitled to costs and fees pursuant to 287.560.

FINDINGS OF FACT

Based upon the competent and substantial evidence and my observations of Claimant at trial, I find:

1. Claimant is a 50 year-old male who has a high-school diploma and a few college credits from a Junior College. He has no other vocational or technical training. He spent his career working in the printing industry. He began working for Employer in 1990 as a helper and worked his way up to Journeyman Pressman in 2000. As a helper, Claimant used a hoist to put 1500 pound rolls of paper onto and off the press. Claimant also frequently changed the doctor blades on the press. Doctor blades are six feet wide and have a flat blade that attaches to the roller to stop ink from getting onto all the paper. The blades wear out and have to be changed periodically. Each blade weighs approximately 40 pounds when empty. The blades can weigh up to 100 pounds when replaced due to a build-up of ink. In order to remove the blades, one has to climb a ladder and bend over

into an awkward position to pull the blades out of the machine. These ink encrusted blades are the heaviest item Claimant lifted at work.

2. Claimant had no medical limitations or injuries prior to his 1995 injury.
3. In 1995, Claimant was injured while working at James River Printing Company (Employer's former name) as a helper on a printing press. His job was to assist the pressmen. On the date of his injury, Claimant put a roll of paper onto the press. The press malfunctioned and the roll came off the press. Claimant tried to grab the roll and stiffened up. Claimant reported this injury to his boss and was sent to Dr. Robson.
4. Dr. Robson opined Claimant had a large central herniated disc. He initially provided conservative treatment with numerous epidural steroid injections and physical therapy. Eventually he recommended surgery and operated on Claimant in January 1998 to remove a large extruded disc fragment at L5-S1.
5. Claimant returned to work full duty without medical restrictions. Claimant testified he "felt fine" after this for about four years. He had no complaints in his back. He continued to play softball, golf and basketball. He ran and frequently walked for exercise. He was a fisher and testified he could do everything he needed to do. He was able to work his very physical job. Claimant was promoted to Pressman and had an assistant. His job still involved physical labor, and Claimant testified he was stronger at that point than he is now.
6. Claimant settled this case in February 2000 for 22.5% PPD to his low back.
7. In September 2001, Claimant was working 12 hour shifts for 3 days on and 2 days off. He worked weekends and holidays. Claimant testified on September 1 or 2, 2001, he was working on a press. He climbed a ladder to remove the doctor blade. As Claimant pulled the blade out, he turned to put it down and felt a pop and pull in his back. He had pain across his back and down his right leg to his toes. This pain was worse than in 1995 when he had no leg pain. He reported this injury to his supervisor. Claimant testified he did not injure himself at home.
8. Claimant saw Dr. Robson September 13, 2001. He stated he last saw Claimant 3 years ago following his microdiscectomy and Claimant had done extremely well until about a month ago. He stated Claimant "recalled no specific injury but started having increased symptoms involving his low back and posterior aspect of his right leg." He prescribed pain relievers and ordered an MRI which showed a "fairly large recurrent disc herniation". Dr. Robson recommended another microdiscectomy and notes there is a chance in the future he may require a fusion.
9. On October 1, 2001, Claimant was admitted to Missouri Baptist Hospital. The admission notes indicate he had done well following his prior surgery and was reinjured about a month ago and developed low back and right leg pain. Claimant underwent surgery to remove the recurrent herniation, and had several weeks of physical therapy. Dr. Robson's follow-up records indicate this surgery significantly decreased Claimant's leg pain, but he continued to have some leg and low back pain.

10. On October 1, 2001, Claimant filed a Claim for Compensation indicating he was injured September 2, 2001 as a result of constant pushing, pulling, and lifting using repetitive motion.
11. On October 23, 2001, Employer filed a Report of Injury with the Division of Workers' Compensation indicating Claimant was injured at 12:00 am on September 2, 2001 while working as a pressman. Employer notes Claimant was doing constant pushing, pulling, and lifting using repetitive motion causing disability and progressive pain and injury. Employer also noted they were notified of the injury September 26, 2001.
12. By December 18, 2001, Dr. Robson noted Claimant had made no significant progress and still had low back pain and radiating pain into his right leg with increased activity. Dr. Robson opined Claimant might need a repeat MRI to determine if he is a candidate for a spinal fusion.
13. Dr. Robson wrote Claimant a letter dated December 18, 2001, and stated that even though Claimant described no specific incident during his office visit in September, it was clear to Dr. Robson something happened because he would have been symptomatic with the size disc herniation that was found on his subsequent scan.
14. In February 2002, Claimant had a repeat MRI which did not show recurrence of the herniation. Dr. Robson talked to Claimant about living with his continued symptoms or undergoing a fusion. Claimant chose not to have surgery and was released from treatment.
15. Claimant saw his rating doctor, Dr. Morrow, June 5, 2002. The report indicates Claimant was injured September 2, 2001 while working on the press and removing the doctor blade. He thought he had a back sprain, but over the next few weeks the pain worsened into his back and down his right lower extremity. Dr. Morrow examined Claimant, reviewed the treating records, and rated his disability at 20% to the body for his 1995 injury and 30% of the body related to his 2001 injury. He recommended Claimant avoid repetitive work, prolonged standing and walking, or lifting weights in excess of 25 pounds occasionally and 20 pounds repetitively.
16. In September 2007, Claimant settled his 2001 injury for 22.5% of the back.
17. Following completion of treatment for his 2001 injury, Claimant's activities were limited. He did return to work, but could no longer play softball, run, swim, and was only able to walk short distances. This injury left him unable to do a lot of the things he routinely did. He was able to mow the lawn and maintain his home. When he returned to work he did not have permanent restrictions, but his co-workers helped him lift. He had continuing, but not constant, pain in his low back and leg.
18. Claimant next saw Dr. Robson September 3, 2002. He continued to have low back pain and right leg radiating pain. Dr. Robson changed his medications and scheduled an epidural steroid injection. He notes he talked to Claimant about changing the doctor blade at work and recommended he limit that activity.

19. On September 16, 2002, Claimant was running a printing press and climbed up to remove the ink encrusted doctor blade. As Claimant handed the blade to his helper, he felt a pop in his back. He felt tremendous pressure in his low back and the pressure and pain radiated down both legs into his feet. The pain was so strong, he almost dropped the blade on his assistant. Claimant was unable to get off the ladder without assistance. He sat on the ground for a while. Claimant reported the injury to his supervisor who told him to sit for a while and he would write up the report later.
20. Claimant saw Dr. Robson October 3, 2002. He opined Claimant had a complete collapse at the L5-S1 disc space. He recommended conservative treatment.
21. On October 22, 2002, Claimant filed a Claim for Compensation indicating he injured his back at work September 16, 2002 as a result of repetitive pushing, pulling and lifting.
22. On November 4, 2002, Employer filed a Report of Injury with the Division indicating Claimant alleged he aggravated his prior back strain when changing the doctor blade on September 16, 2002. Employer notes they were notified of this injury on September 16, 2002.
23. On November 18, 2002, Claimant saw Dr. Lange on behalf of Employer's 2001 Insurer. Claimant gave a history of injuries consistent with his trial testimony. Dr. Lange noted Claimant had no significant signs of symptom magnification. He had minimal range of motion in his back due to pain. He opined Claimant had suboptimal relief following his 2001 surgery and may need a fusion. He noted Claimant related a specific traumatic event in 2002 causing his current symptoms. He also noted other medical records were unclear in regard to causation and indicate Claimant suggested repetitive activities caused his herniation. Dr. Lange stated if that was correct, his work would not be the substantial cause for the herniation. He stated without additional information, there was no way to state whether the single traumatic event occurred. He indicated MMI after fusion does not occur until approximately one year after the operative procedure.
24. Conservative treatment failed and Claimant underwent a laminectomy and fusion with a bone graft and a Ray cage at L5-S1 on November 20, 2002. Claimant continued to have significant pain and numbness after the surgery. Dr. Robson ordered an updated MRI in February 2003 which showed no recurrent herniation. Dr. Robson opined Claimant has S1 nerve root damage and recommended physical therapy and continued medications. He released Claimant to work in March 2003, but Employer would not take him back with restrictions. By May 1, 2003, Dr. Robson opined Claimant was unable to return to work as a printer and needs restrictions in the moderate work range with a 30 pound lifting limit. He also recommended no repetitive bending, stooping, twisting or awkward positions. He opined Claimant had chronic radiculopathy and needs chronic pain medications.
25. In August 2003, Claimant saw Dr. Cohen for an evaluation and rating. He notes a history of injuries in 2001 and 2002 consistent with Claimant's testimony at trial. Based on Claimant's complaints and Dr. Cohen's examination, he diagnosed failed lumbar laminectomy syndrome and lumbar radiculopathy. He found Claimant's symptoms are a

direct result of his 2001 and 2002 work injuries. Claimant's work was a substantial factor in his disability, and his treatment was medically necessary and reasonable. Dr. Cohen opined Claimant would need pain medications and sleep aids for the remainder of his life. He estimated the cost of the physician's care and medications to be up to \$2,000 per year. He recommended Claimant be restricted from any repetitive work and should not lift more than 5-10 pounds. He rated Claimant's disability at 75% of the body apportioned between his three back injuries and opined Claimant is permanently and totally disabled as a result of the combination of his three injuries.

26. Claimant settled his 2002 case for 22% of the back in September 2007.
27. In 2003, Claimant moved to the Springfield area and began treating at CoxHealth Center for ongoing insomnia, depression and back pain and sciatica into his right leg. He had a repeat MRI which showed significant scar tissue at the S1 nerve root and significant degenerative changes at L5-S1. Dr. Marquis provided extensive courses of medications including muscle relaxants, antidepressants, antiepileptics and narcotics. Claimant had significant difficulties with the side-effects of the medications and had difficulty with recall, attention, processing and executive function. Dr. Marquis sent Claimant to a psychologist for his depression and to Dr. Brooks, a pain management specialist. Dr. Brooks recommended additional physical therapy and implanted a trial dorsal column stimulator or TENS unit in June 2004. This did not provide good relief, and it was removed within a week.
28. Claimant testified Dr. Marquis told him since the TENS unit failed, there is no way to relieve his pain besides medications. Claimant testified Dr. Marquis told him he has so much scar tissue in his back, it looks like he has had six surgeries, and Claimant would need medications the rest of his life.
29. Dr. Marquis opined Claimant's response to the treatment was less than optimal. In October 2005, Dr. Marquis opined the treatment failed to significantly reduce Claimant's pain and no further surgery would help. He found Claimant had a significantly diminished quality of life due to his constant back and lower extremity pain. Dr. Marquis believes it is impossible for Claimant to engage in any sort of meaningful occupational activity and he is completely and permanently disabled due to his chronic back and lower extremity pain. Claimant continues to see Dr. Marquis to monitor and refill his numerous medications.
30. In June 2007, Dr. Marquis again noted Claimant is permanently and totally disabled due to his chronic pain stemming from his low back. He is unable to engage in any gainful employment or vocational rehabilitation. He opined Claimant's treatment was reasonable and necessary and his injuries were the substantial factor and prevailing factor in causing his permanent total disability. He opined Claimant will need future medical care in the form of narcotic medications. Since he failed the dorsal column stimulator, there is no option for him other than medications. Dr. Marquis opined the first two injuries resulted in disc fragments and the MRI after the third injury showed a complete collapse in the disc space. This necessitated fusion. He opined the three injuries combined create his disability.

31. Claimant saw his vocational rehabilitation specialist, Mr. Tim Lalk, January 6, 2005. Mr. Lalk noted Claimant was able to supervise a warehouse crew in the early 1980s. He had some courses in business but did not pursue bookkeeping or any other office skills. He has little computer knowledge and no other experience that will allow him to work at a skilled level. Mr. Lalk opined while Claimant may be able to work in unskilled entry level positions at the sedentary to light level of exertion given Dr. Robson's restrictions, Claimant is unable to compete in the open labor market given the limitations imposed by Dr. Cohen, given Claimant's symptoms and how they limit his activities, and given the treatment he continues to receive. Claimant is not able to be active for a full day and ease his symptoms simply by changing positions from sitting to standing or walking. Mr. Lalk noted that even when Claimant controls his level of activity at home, he is still unable to rest at night and needs to lie down during the day. He does not believe any employer would accommodate this need and has no vocational rehabilitation services to recommend unless Claimant is able to control his symptoms and increase his level of activity so he can work at a sedentary level.
32. In October 2005, Claimant again saw Dr. Lange at the request of Employer's 2001 Insurer. Dr. Lange notes Claimant had both back and leg complaints between the 2001 and 2002 surgeries, but he continued to work full duty. He notes Claimant told Dr. Robson September 3, 2002, that changing the doctor blade causes an increase in his symptoms. Dr. Lange calls Claimant's September 16, 2002, injury a "self-fulfilling prophecy". He opined if Claimant was injured that date changing a doctor blade, that event is the substantial factor causing the need for the November 2002 fusion. Given Claimant's ongoing symptoms, Dr. Lange opined Claimant probably reached his MMI in May 2003 and will require ongoing medications and permanent restrictions.
33. Claimant testified after his 2001 injury, the pain was relieved somewhat with anti-inflammatories. Since his 2002 injury, he takes numerous pain medications on a daily basis. He takes morphine twice a day, neurontin to block the pain, bupropein twice a day for energy, amitriptylene for sleep and depression, gabitril for nerves. The doctor has told him he will always need narcotics for pain relief. The narcotics relieve his pain to some degree, but he still has constant low back and leg pain. He took oxycontin until the insurance company cut this, and his doctor switched him to morphine sulfate.
34. Claimant continues to have pain across his low back and into both legs more on the right than the left. He has numbness in his right foot and often stumbles. His right leg has constant pain all the way down to his foot. His pain increases with activity and only decreases with medications. He cannot walk as much as he did after the 2001 injury and cannot do any of the activities he used to enjoy. He limits standing to 15 minutes due to weakness in his leg. Driving more than 10 minutes increases numbness in his foot. He is unable to get comfortable and cannot sleep more than a few hours at a time. He sleeps a few hours during the day to relieve his pain and because he doesn't sleep well at night. He believes he cannot work because he is unable to sit or stand for any length of time, he takes narcotics daily for his pain, and he is physically unable to work. The doctor told him he could not return to work while taking narcotics. He has memory problems related to his medications. He has severe headaches a few times a week that last three hours or all day. He has had no improvement in his symptoms since 2002.

35. His daily activities are limited. He takes medications and goes to bed around 11:30 p.m. He is only able to sleep around 3-4 hours and is usually restless. He wakes up with low back pain and muscle cramps in his right leg. He has no daily routine and does not do much during the day. He lies in a recliner and watches TV most of the time. He tries to walk around the block. He is not able to do many chores around the house. He cannot do laundry or cut the grass. He doesn't socialize much and thinks he is depressed.
36. Claimant's wife Gina is a dependent. Claimant has six children, two of whom are still dependents. Caleb is 17 years old and Peyton is 7 years old. Both boys are dependents and receive social security benefits from Claimant.
37. Claimant has not returned to work since his 2002 injury. He is asking for weekly PTD benefits, future medical benefits for what he takes now and what he may need later, and an attorney fee award.
38. Claimant is credible. During the hearing, he sat with his right leg extended. He frequently shifted positions and stood during trial to relieve his pain.

RULINGS OF LAW

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

1. Claimant was injured by accident during the course and scope of his employment September 16, 2002.

Claimant credibly testified he injured his back at work when changing a doctor blade September 16, 2002. Claimant's testimony is corroborated by the history contained in the medical records and by the Report of Injury. Employer filed a Report of Injury with the Division stating they were notified of the injury on September 16, 2002. After consideration of all the evidence, I find Claimant was injured by accident during the course and scope of his employment September 16, 2002.

2. Claimant's injuries and treatment were medically and causally related to his work.

Claimant has the burden of proving all essential elements of a claim, including causation. *Grime v. Altech Industries*, 83 S.W.3d 581, 583 (Mo.App. 2002)(overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. Banc 2003)). There must be expert medical testimony that these conditions were directly connected to the employment, without which a finding for Claimant would be mere conjecture. *Id.*

Claimant's expert, Dr. Cohen, credibly testified Claimant's work was a substantial factor in causing his disability, and his treatment was medically necessary and reasonable.

Claimant's current treating doctor, Dr. Marquis, also opined Claimant's treatment was reasonable and necessary and his injuries were the substantial and prevailing factor in causing his permanent total disability.

Employer's expert, Dr. Lange, also opined if Claimant was in fact injured September 16, 2002, while changing a doctor blade, that event is the substantial factor causing the need for the November 2002 fusion.

While Claimant had ongoing complaints from his 2001 injury, the evidence is clear he had an injury September 16, 2002, and the medical experts opine this event caused a change in his condition and necessitated further treatment. Based on the entire record, I find Claimant's 2002 injury and subsequent treatment was medically and causally related to his September 16, 2002, work accident.

3. Claimant is not entitled to future medical care.

Claimant requests future medical benefits, however he has not guided me to any precedent which would allow for the imposition of future medical benefits against the Second Injury Fund. Section 287.140 provides for medical expenses from Employer. The case against Employer was settled in 2007, and they are no longer a party to this case. I find no statutory authority or case law for the imposition of medical expenses against the Second Injury Fund.

4. Claimant is permanently and totally disabled as a result of the combination of his disabilities.

Section 287.220 RSMO provides that in cases of permanent total disability against the Second Injury Fund, there must be a determination of the following:

1. the percentage of disability resulting from the last injury alone;
2. that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or to obtaining re-employment;
3. that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

Claimant settled his last injury with Employer prior to this hearing. Based on my review of the evidence including the treating records, the medical opinions and Claimant's complaints, I find Claimant sustained a 22% permanent partial disability to his low back as a result of his September 16, 2002, work injury.

Claimant had two serious back injuries prior to his 2002 work injury. The medical records and stipulations for compromise settlement regarding those injuries were admitted into evidence. Prior to his 2002 injury, Claimant had been compensated 45% PPD to his low back as a result of his two prior back injuries and surgeries.

While he had few complaints following his 1998 back surgery, the medical records establish he had disability as a result of this injury. Mr. Lalk testified the fact Claimant had few complaints does not mean he did not have disability. It simply means he was quite functional, but needed to take precautions in order to protect his back from further injury. Mr. Lalk opined

this injury was a hindrance or obstacle to employment because while Claimant may be able to function at work, there are other job activities that might require more strenuous activity and would be prohibitive. Dr. Cohen also testified that while Claimant was pain free after this first surgery, there is definite disability from this injury because the disc space was altered by surgery and was subject to a rerupture.

After his second back surgery in 2001, he had intermittent low back pain and pain radiating into his right leg with increased activity. He began having difficulty at work. Claimant was no longer able to participate in any sports, and was unable to do many of the routine things he did around the house. He now required medications to relieve his pain. While he returned to work without medical restrictions, he sought the help of co-workers with much of the heavy lifting.

I find Claimant's 1995 and 2001 injuries caused a hindrance or obstacle to his employment or to obtaining re-employment. The final question is whether the combination of Claimant's injuries rendered him permanently and totally disabled.

The test for permanent total disability is whether Claimant is able to adequately compete in the open labor market given his condition. *Messex v. Sachs Elec. Co.*, 989 S.W. 2d 206, 210 (Mo. App. E.D. 1999). The pertinent consideration in this test is the determination of whether any employer in the usual course of business would reasonably be expected to employ Claimant given his condition. *Carlson v. Plant Farm*, 952 S.W. 2d 369, 373 (Mo. App. W.D. 1997).

The SIF did not submit any medical opinion or vocational evidence establishing Claimant's ability to work.

Claimant's current treating physician, Dr. Marquis, continues to treat Claimant with medications, including narcotics, to ease his pain and depression. He opined Claimant has a significantly diminished quality of life due to his constant back and lower extremity pain. He opined it is impossible for Claimant to engage in any sort of meaningful occupational activity and is completely and permanently disabled due to his chronic back and lower extremity pain. He further opined Claimant's three injuries combined to create his permanent total disability.

Claimant's expert, Dr. Cohen, restricted Claimant from any repetitive work and imposed a lifting restriction of no more than 5-10 pounds. After reviewing the treatment records and examining Claimant, he rated Claimant's injuries and opined Claimant is permanently and totally disabled as a result of the combination of his three injuries.

Claimant's vocational expert, Tim Lalk, opined Claimant is unable to compete in the open labor market given Dr. Cohen's restrictions, Claimant's symptoms and limitations, and his continuing treatment. He found Claimant is not able to be active for a full day and opined no employer would accommodate his need to lie down during the day to ease his symptoms. He found Claimant has a multitude of ongoing complaints, sleeps only three to five hours at a time, needs to lay down during the day as needed to relieve his pain, and continues to rely on narcotic pain medications. He opined Claimant is not able to sustain any kind of work on a consistent, daily basis due to his complaints and limitations.

While Claimant is young, and I believe he has the intellectual capability to learn a new trade, I find his physical limitations make it unlikely any Employer would reasonably be expected to employ him in his current condition. This is supported by the credible testimony of Dr. Cohen, Dr. Marquis, and Mr. Lalk.

Claimant is permanently and totally disabled as a result of the combined effects from his September 16, 2002, work injury and his preexisting disabilities. Claimant never returned to work following this injury. Claimant received compensation from Employer of 22% PPD to his back, or 88 weeks. No evidence was presented by the Fund to show whether there was a healing period which would necessarily delay Fund liability. Accordingly, I find permanent total disability as of September 17, 2002. The Fund is liable for total disability to have begun on September 17, 2002. The Second Injury Fund is hereby ordered to pay permanent total disability benefits at the differential rate of \$148.68 per week beginning September 17, 2002, during those 88 weeks, and thereafter, \$488.80 per week for as long as provided by law. The amount accrued to date shall be paid forthwith with interest as provided by law.

5. Claimant is not entitled to costs and fees.

Claimant argues he is entitled to costs and attorney fees because the Second Injury Fund offered no lay or expert medical or vocational testimony to contradict Claimant's allegations of permanent total disability. The Fund did not address this point in their proposed award, but stated on the record their position that costs are not appropriate as the Fund has contested Claimant was injured at work.

While I disagree with the Fund's position, I find an award of costs is not merited in this case. Given the evidence, the Fund did not defend the case "without reasonable ground" as is required in order to assess costs.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation