

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

Injury No.: 03-145218

Employee: Jimmie Davidson
Employer: Mihalevich Concrete Construction
Insurer: Ace Fire Underwriters Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: June 24, 2003
Place and County of Accident: Adair County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 27, 2006. The award and decision of Administrative Law Judge Robert J. Dierkes, issued February 27, 2006, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 12th day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jimmie Davidson

Injury No. 03-145218

Dependents: N/A
Employer: Mihalevich Concrete Construction
Additional Party: Second Injury Fund
Insurer: Ace Fire Underwriters Insurance Company
Hearing Date: December 12, 2005

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: RJD/tmh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: June 24, 2003.
5. State location where accident occurred or occupational disease was contracted: Adair County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee injured his back while using a board to direct the flow of concrete from a chute.
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: Low back.
14. Nature and extent of any permanent disability: Total disability.
15. Compensation paid to-date for temporary disability: \$20,856.63.
16. Value necessary medical aid paid to date by employer/insurer? \$63,707.82.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$611.10.
19. Weekly compensation rate: \$407.40/\$340.12.
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:
Weekly benefits of \$407.40 for permanent total disability from and after June 3, 2004, for Claimant's life.
 22. Second Injury Fund liability: None.
 23. Future requirements awarded: Medical benefits as set forth herein.
- 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 Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jimmie Davidson

Injury No: 03-145218

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

Dependents: N/A

Employer: Mihalevich Concrete Construction

Additional Party: Second Injury Fund

Insurer: Ace Fire Underwriters Insurance Company

Checked by: RJD/tmh

ISSUES DECIDED

These cases, Injury Nos. 01-165367 and 03-145218, were consolidated for evidentiary hearing by order of the Division of Workers' Compensation. The evidentiary hearing was held in these cases on December 12, 2005, in Kirksville. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on January 18, 2006. The hearing was to determine the following issues:

1. (In both cases) the nature and extent of Claimant's permanent disability, if any;
2. (In both cases) the liability of Employer-Insurer, if any, for permanent partial disability benefits or permanent

total disability benefits;

3. (In both cases) the liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits; and
4. (In Injury No. 03-145218 only) whether Employer and Insurer shall be ordered to provide additional future medical benefits for Claimant, pursuant to Section 287.140.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over these cases;
2. That venue for both cases is proper in Adair County;
3. That the claim for compensation in each case was filed within the time allowed by the statute of limitations, Section 287.430;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. (In Injury No. 01-165367) that the rates of compensation are \$407.40/\$329.42, based on an average weekly wage of \$611.10;
6. (In Injury No. 03-145218) that the rates of compensation are \$407.40/\$340.12, based on an average weekly wage of \$611.10;
7. (In Injury No. 01-165367) that Claimant sustained an accident arising out of and in the course of his employment with Mihalevich Concrete Construction on October 12, 2001;
8. (In Injury No. 03-145218) that Claimant sustained an accident arising out of and in the course of his employment with Mihalevich Concrete Construction on June 24, 2003;
9. That the notice requirement of Section 287.420 is not a bar to the claim for compensation in either case;
10. That Ace Fire Underwriters Insurance Co. fully insured the Missouri workers' compensation liability of Mihalevich Concrete Construction at all relevant times;
11. (In both cases combined) that Employer-Insurer paid \$63,707.82 in medical benefits;
12. (In Injury No. 01-165367) that Employer-Insurer paid 2 3/7 weeks of temporary total disability benefits, totaling \$989.40; and
13. (In Injury No. 03-145218) that Employer-Insurer paid 51 4/7 weeks of temporary total disability benefits, through June 2, 2004, totaling \$20,856.63.

EVIDENCE

The evidence consisted of the testimony of Claimant, Jimmie ("Pat") Davidson; the deposition testimony of Dr. Mark Lichtenfeld; the deposition testimony of Timothy G. Lalk, a vocational rehabilitation counselor; and medical records.

FINDINGS OF FACT AND RULINGS OF LAW

I find that Claimant, Jimmie ("Pat") Davidson was born March 11, 1955, and has an 11th grade education. He does not have a GED, nor any other vocational training or further education. Claimant has not served in the military; Claimant testified that he tried to enlist in the Navy, but he was rejected. Claimant has been married for 31 years, and Claimant and his wife have three children.

Claimant's work history includes hauling hay, trimming trees, building pole barns, working as a handyman, working an assembly line, fork lift operator, and loading and delivering lumber. From 1982 to 1990, Claimant drove a concrete mixer.

Beginning in 1990, Claimant worked for Mihalevich Concrete Construction, Employer herein. Claimant's job title was "lead man". As lead man, Claimant was responsible for the crew's tools and equipment, and was responsible for setting up the concrete jobs. Claimant worked right along side the other crewmembers, shoveling concrete, using a jackhammer, bull float and finishing tools, and tearing out old driveways and floors.

As stipulated, I find that Claimant sustained work-related accidents with Employer on October 12, 2001, and on June 24, 2003, both accidents causing injury to Claimant's back. Prior to October 12, 2001, Claimant had experienced hearing problems, including problems interpreting speech when background noise is present. Claimant also testified that he experiences constant ringing in his ears. Claimant has never sought any diagnostic testing, care or treatment for the hearing problems. Claimant also testified regarding a loss of central vision in his left eye. There are no medical records regarding this problem prior to October 12, 2001. In the Fall of 2002, Claimant was referred by his family doctor to eye specialists in Columbia. Two laser treatments were performed which were unsuccessful. Claimant was then referred to Dr. Dean Hainsworth at University of Missouri, who performed surgery on Claimant's left eye on December 12, 2002. On a follow-up visit on February 24, 2003, Claimant was noted to have 20/30 vision in his left eye. This decreased to 20/50 on the August 4, 2003; visit, and to 20/60 on the February 4, 2004, visit. On the latter visit, Dr. Hainsworth noted that Claimant felt his left-eye vision had decreased, and has times where "he can't see anything at all".

In addition to the alleged hearing and vision problems, Claimant had back problems prior to October 12, 2001. In 1974, Claimant slipped while climbing on a machine and had one doctor visit. In 1991, Claimant had back pain while pouring a floor, and missed one or two days of work. In April 1995, Claimant twisted his back and had one or two doctors' visits. In August 1998, Claimant was seen at the Emergency Room for pain in the left lumbar area after hammering in a bent-over position; Claimant's pain got so bad he could not get up off the ground and had to be picked up into a vehicle and brought to the E.R. Claimant gave a history of a similar episode happening once before. In December 2000, Claimant was seen by his family doctor for back pain from a fall a week earlier, with some radiation of pain down his right leg. By December 26, 2000, Claimant was doing well and was released to full duty by Dr. Sparks. There is no record of back complaints between December 26, 2000, and October 12, 2001.

October 12, 2001 accident. On October 12, 2001, Claimant was working for Employer getting ready to pour curbs and gutters. He was bending over, nailing the forms with a hammer. While swinging the hammer, Claimant felt immediate pain in his back and both legs. Claimant "couldn't straighten out". The parties stipulated that Claimant sustained an accident arising out of and in the course of his employment with Mihalevich Concrete Construction on October 12, 2001. The following day, Claimant went to see a chiropractor, and on October 15, 2001, Claimant saw Dr. Sparks. An MRI done on 10/18/01 showed central disc herniations at L3-4, L405 and L5-S1, none of which were causing foraminal stenosis or canal stenosis. On 10/25/01, a lumbar epidural steroid injection was done for back and left leg pain. On 10/30/01, Dr. Sparks noted that "This gentleman had as much back pain as I have ever seen any one person have." Nevertheless, by 11/6/01, Dr. Sparks noted that Claimant was "doing well" and Dr. Sparks returned Claimant to full duty. On January 11, 2002, Claimant had CT-guided right sacroiliac joint injection. On 1/21/02, Dr. Sparks noted that Claimant "feels fine". On 2/4/02, Claimant returned to Dr. Sparks reporting no troubles and no pain. Claimant was to continue working at full duty. Claimant did not see a physician for his back between 2/4/02 and 6/24/03.

June 24, 2003 accident. On June 23, 2003, Employee slipped while getting out of Employer's truck. He fell, and his lower back started hurting. Claimant testified that he was "scared" that he had severely injured his back, and requested Employer to send him to the doctor. Claimant saw Dr. Sparks on June 24, 2003, was diagnosed with acute strain and acute myospasm, was given prednisone, and was returned to full duty. Claimant did return to work on June 24, 2003, and on June 25, 2003, Claimant injured his back again when he was using a board to help direct the flow of concrete from the chute. (Although the evidence is clear that these two incidents occurred on June 23 and 25, the parties stipulated that Claimant sustained an accident arising out of and in the course of his employment with Mihalevich Concrete Construction on June 24, 2003.) Claimant saw Dr. Sparks again on June 25, 2003, an MRI was done on that date showing no interval change, and Claimant was given a duragesic patch to wear. Claimant had a severe reaction to the patch and was hospitalized on June 30, 2003. While in the hospital, Claimant came under the care of pain specialists. He received a lumbar epidural steroid injection on July 1, 2003, and was on pain medications and prednisone. On July 9, 2003, Dr. Sparks recommended that Claimant see a spine surgeon.

On July 11, 2003, Claimant saw Dr. Trecha at Columbia Orthopaedic Group. On the intake forms, Claimant cited the date of October 12, 2001, as the onset of his problems. Claimant underwent additional conservative treatment with two additional epidural steroid injections, exercise, smoking cessation, weight loss, etc. On October 15, 2003, Dr. Trecha performed a discogram, and recommended an anterior discectomy and fusion with instrumentation at L5-S1. In the intervening month, Claimant's pain was described in the medical records as agonizing and getting progressively worse. On November 18, 2003, the surgery was performed. On December 1, 2003, Claimant reported to Dr. Trecha that he was doing better, and the back pain was almost gone.

Claimant saw Dr. Trecha again on February 23, 2004. Claimant noted that he was feeling a little worse in his right leg, with a little numbness and twitching, but no real back pain. Claimant stated to Dr. Trecha that his right leg symptoms started about three weeks prior when he slipped and fell on some ice.

Claimant saw Dr. Trecha on April 5, 2004. He was walking two miles a day. Claimant reported some minor symptoms in his right lower extremity and some aching across his back. X-rays showed a solid fusion of L5 on S1 with intact and in-place implants. Claimant told Dr. Trecha that he believed he could not return to concrete work and requested some information about vocational rehabilitation.

Claimant saw Dr. Trecha on May 17, 2004. X-rays showed a solid fusion of the anterior space between L5 and S1 with

intact and in-place implants. Claimant was “doing better,” but complained of right posterior iliac discomfort, and Dr. Trecha recommended a trigger point injection and a functional capacity evaluation.

When Claimant saw Dr. Trecha on June 2, 2004, Dr. Trecha noted that Claimant was doing better, and was exercising and walking two miles a day. The functional capacity evaluation showed Claimant at a physical demand level of “medium”. Dr. Trecha pronounced Claimant at maximum medical improvement and rated Claimant’s disability at 25% of the body as a whole.

Claimant has not worked since June 25, 2003, nor has Claimant sought work. Claimant testified that he tried his best during the functional capacity evaluation, but that he couldn’t get out of bed for a day-and-a-half after the functional capacity evaluation.

Claimant testified that his back is not doing well at all. He says he has pain everyday and that his pain is constant. Claimant testifies that activity will make his back pain worse. When he “pushes it,” such as walking too much at the grocery store or at Wal-Mart, he gets tingling in his buttocks and legs, and this progresses to shooting pains down his legs. Claimant testified that he is comfortable standing for 20-30 minutes and that he is comfortable sitting for no more than 20-30 minutes. Claimant testified that he has to lie down often. Claimant testified that he can sleep for about three hours at night before he has to get up and walk around. Claimant testified that he gets moody, cranky, and aggravated.

Dr. Mark Lichtenfeld testified by deposition on June 30, 2005. Dr. Lichtenfeld evaluated Claimant on October 19, 2004, at the request of Claimant’s attorney. Dr. Lichtenfeld testified that as a result of the 10/12/01 accident, Claimant has the following diagnoses: (1) acute thoracic spine strain, resolved; (2) chronic lumbosacral spine strain; (3) multiple herniated discs at L3-4, L4-5 and L5-S1; (4) right sacroiliitis; (5) lumbar radicular pain. Dr. Lichtenfeld testified to his belief that Claimant sustained a 25% permanent partial disability of the body as a whole due to the 10/12/01 accident. Dr. Lichtenfeld also stated: “This disability rating does not take into consideration any of the patient’s prior lumbar spine strains as they all resolved.” Dr. Lichtenfeld also testified that the only preexisting disabilities at the time of the 10/12/01 accident were Claimant’s tinnitus and hearing loss. Dr. Lichtenfeld opined that the tinnitus represented a 15% permanent partial disability of the body as a whole, and that the hearing loss also represented a significant disability, which he could not quantify without additional testing.

Dr. Lichtenfeld testified that, as a result of the 6/24/03 accident, Claimant has the following diagnoses: (1) exacerbation of chronic lumbosacral spine strain; (2) right lateralized herniated discs at L3-4 and L5-S1; (3) Bilateralization of the herniated disc at L4-5; (4) status post anterior discectomy and fusion at L5-S1 with allograft and hardware; (5) right L4 and S1 radiculopathy. Dr. Lichtenfeld testified to his belief that Claimant sustained a 45% permanent partial disability of the body as a whole due to the 6/24/03 accident alone. With regard to disabilities preexisting the 6/24/03 accident, Dr. Lichtenfeld reiterated the tinnitus and hearing problems, the aforementioned back disability from the 10/12/01 accident, and the eye problems; Dr. Lichtenfeld stated that the degree of the visual disability was best assessed by an ophthalmologist after additional testing.

Dr. Lichtenfeld further testified: “Taking into consideration the patient’s educational background and vocational history as well as his preexisting conditions and the injury to his back that occurred at his workplace in June 2003, Mr. Davidson is totally and permanently disabled as he’s unable to compete in the open labor market.” Dr. Lichtenfeld agreed that he is not a vocational expert and would defer to a vocational expert regarding Claimant’s employability.

Mr. Timothy Lalk testified by deposition taken April 8, 2005. Lalk is a vocational rehabilitation counselor who evaluated Claimant on January 11, 2005, at the request of Claimant’s attorney. Lalk testified to his opinion that Claimant is unable to secure and maintain employment in the open labor market. Lalk explained his reasoning thus:

His problem with returning to employment is due to the symptoms related to his back. I’ve noted in the medical records that he’s had two back injuries, that he’s had symptoms and limitations from the first injury and then additional symptoms and limitations following the second one, that his condition has obviously become worse with both of those injuries. I would defer to a doctor to determine if either one of those alone could have made him disabled. But simply looking at the chronology, it appears to me that he’s gotten worse over time. ... If he has to compete with a pool of individuals, then I don’t think he’s going to be successful because he would need special accommodations from an employer which would allow him to rest repeatedly during the day and he would not be able to persist in his job through a full day because he needs to control his symptoms. Other employees who would be able to do the same type of work would be given consideration over him. ...

Based upon the restrictions recommended by Dr. Lichtenfeld and based upon the symptoms and limitations which Mr. Davidson reported to me, it’s my opinion that Mr. Davidson is not able to secure and maintain employment in the open labor market and is not able to compete for any position. I do not believe any employer would be willing to accommodate Mr. Davidson in any position which he could perform based upon his skills or experience by allowing Mr. Davidson to lie down several times during the day. I also do not believe that any employer would consider offering Mr. Davidson a position once that employer observed Mr. Davidson’s difficulty in simply sitting through an interview. Mr. Davidson displays obvious discomfort and inability to remain in any one position for more than a short period of time. He appears to be having real discomfort and appears to be under a lot of strain simply from performing activities of walking and sitting. ... What’s important to me is whether a person can get through a day by simply changing positions and still function. If a person is telling me that they can’t do that, that they still have to lie down during the day, then I see opportunities for employment at that level of education and experience is vanishing. A person is not going to be able to enter an unskilled, entry level job where they’re asking the employer to allow them to lie down several times during the day.

Mr. Lalk agreed that if one considered only the restrictions placed upon Claimant by Dr. Trecha and the results of the functional

capacity evaluation, Claimant would be employable.

Permanent disability issues – Injury No. 01-165367. It is apparent from the evidence, including Claimant’s own testimony, that Claimant’s acute symptoms from the October 12, 2001, accident had subsided by February 4, 2002, and that Claimant had been working at his physically demanding job for at least a full year without incident. It is clear that Claimant’s condition had stabilized prior to February 4, 2002, and that Claimant’s permanent disability from the 10/12/01 accident was minimal. I find, therefore, that Claimant sustained a permanent partial disability of 5% of the body as a whole as a result of the October 12, 2001, accident. This results in 20 weeks of permanent partial disability benefits at the stipulated rate of \$329.42, totaling \$6,588.40. **Employer and Insurer are ordered to pay Claimant the sum of \$6,588.40 for permanent partial disability benefits in Injury No. 01-165367.**

In Injury No. 01-165367, the claim against the Second Injury Fund is denied.

Injury No. 03-145218. Claimant has alleged that he is permanently and totally disabled. Under section 287.020.7, “total disability” is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is whether a claimant is able to competently compete in the open labor market given his or her condition and situation. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 210 (Mo.App. E.D.1999). When the claimant is disabled by a combination of the work-related event and pre-existing disabilities the responsibility for benefits lies with the Second Injury Fund. Section 287.220.1 RSMo. If the last injury in and of itself renders a claimant permanently and totally disabled the Second Injury Fund has no liability and the employer is responsible for the entire compensation. *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

In applying the aforementioned principles to the instant case, the first question that must be answered is whether Claimant is indeed unable to compete in the open labor market in his current condition. This is not a simple question to answer. Claimant was released by Dr. Trecha on June 2, 2004, with work restrictions consistent with the functional capacity evaluation of the same date concluding that Claimant evidenced the ability to perform work at a “medium” physical demand level. Claimant’s own vocational expert, Timothy Lalk, concedes that Dr. Trecha’s findings, considered alone, would dictate a finding that Claimant is employable. Nevertheless, Claimant presented himself to Dr. Lichtenfeld, to Mr. Lalk, and to the undersigned administrative law judge as having symptoms significantly more severe than those suggested by Dr. Trecha and the FCE results. In particular, Claimant has presented himself as having such constant and severe pain as to render it impossible for him to sit for more than 20 minutes and to lie down often during the day. Lalk commented several times in his deposition regarding Claimant’s obvious pain and discomfort during the evaluation process, based upon his facial expressions, and changes in his voice and mannerisms. Lalk indicated very strongly that he believed Claimant’s actions in this regard to be real and not feigned.

I have presided over dozens of evidentiary hearings in which the employee claimed to be permanently and totally disabled due to back pain. During each of these hearings, I carefully observe the employee, both while he/she is testifying and at all other times as well. I try not to make my observation obvious, particularly while other witnesses are testifying, in an attempt to ascertain the employee’s actions when he/she is not “on stage”. I observe the employee’s posture, movements, sitting, standing, facial and vocal expressions, etc. I try to determine whether the employee’s behavior appears to be consistent or inconsistent with the claimed pain and disability, and if the behavior is otherwise appropriate and internally consistent. I try to determine whether the employee’s behaviors are different when on the witness stand than during the other portions of the hearing. I attempt to determine if any or all of the employee’s “pain behaviors” are feigned and/or exaggerated.

In many such cases, the employee will alternate sitting and standing during his/her testimony, and Claimant did so in this case as well. This is the first case, however, where the employee spent the last 45 minutes of his (almost three-hour) testimony *lying on the floor*. It is certainly possible that this was all an act on Claimant’s part; if so, then Claimant should be nominated for an Academy Award. Claimant’s behaviors throughout the hearing were consistent with one who is experiencing unremitting severe pain. I found no hint of feigning or exaggeration. I believe that Claimant truly was, and is, in pain. The character and intensity of Claimant’s pain, as manifested by his behaviors, would be such as to erase any doubt as to whether Claimant would be able to compete in the open market for employment. Therefore, despite evidence to the contrary (i.e., Dr. Trecha’s notes of 6/2/04 and the FCE findings), I find that Claimant is permanently and totally disabled.

Having found that Claimant is permanently and totally disabled, it must next be determined as to whether the permanent total disability is the result of a combination of the 6/24/03 accident and Claimant’s preexisting disabilities, or whether the 6/24/03 accident, in and of itself, rendered Claimant permanently and totally disabled. This, at first blush, also appears to be a difficult question to answer. Claimant has alleged numerous preexisting disabilities, including hearing problems, vision problems, and prior back injuries. Dr. Lichtenfeld testified that, considering Claimant’s education (or lack thereof) and vocational history, *all of* Claimant’s disabilities combined to render Claimant permanently and totally disabled. Dr. Lichtenfeld was never asked to opine, however, as to whether the 6/2/04 injury, considered alone, was sufficient to render Claimant permanently and totally disabled.

In looking at each one of Claimant’s (potential) prior disabilities, the evidence would strongly suggest that the back injuries of 1974, 1991, 1995, 1998, and 2000 left Claimant with NO permanent disability. That was apparently Dr. Lichtenfeld’s opinion when he said (in regard to his disability rating for the 10/12/01 injury): “This disability rating does not take into consideration

any of the patient's prior lumbar spine strains *as they all resolved.*" Further, after each of these injuries, Claimant returned to work; after the 1991, 1995, 1998 and 2000 injuries, Claimant returned to work *as a concrete crew lead man*, with no changes in his routine whatsoever. Likewise, Claimant's (largely undocumented) hearing difficulties did not cause Claimant to miss one minute of work or to change the way he worked in any manner. Claimant's visual difficulties likewise caused no change in Claimant's work. It can be strongly argued that the hearing and visual problems were not *disabilities*, at all, in a vocational sense.

Moreover, let's look at the basis for the vocational determination of permanent total disability by Timothy Lalk. The major recurring theme in Lalk's testimony is Claimant's inability to get through the day without lying down: "He would need special accommodations from an employer which would allow him to rest repeatedly during the day"; "he would not be able to persist in his job through a full day because he needs to control his symptoms"; "Mr. Davidson's difficulty in simply sitting through an interview"; "still have to lie down during the day"; "a person is not going to be able to enter an unskilled, entry level job where they're asking the employer to allow them to lie down several times during the day". The evidence clearly shows that Claimant's inability to get through the day without lying down has nothing to do with the visual or hearing problems. So, considering the real reason why Claimant is permanently and totally disabled, there are only two potential causes: (1) the 6/24/03 accident considered alone, or (2) the 6/24/03 accident combined with the 10/12/01 accident.

Claimant's injuries from the 10/12/01 accident were different from those in the 1974, 1991, 1995, 1998, and 2000 accidents in several respects. Claimant had an MRI and an epidural steroid injection after the 10/12/01 accident; he had neither after any of the previous accidents. This strongly suggests that Claimant's acute symptoms from the 10/12/01 accident were more severe than he had before experienced. After Claimant obtained relief from the epidural steroid injection, Dr. Sparks noted: "This gentleman had as much back pain as I have ever seen any one person have." Considering the extreme nature of this statement, and considering that Dr. Sparks was Claimant's physician during some of his previous bouts of back pain, this is an extremely strong suggestion that Claimant's acute symptoms from the 10/12/01 accident were more severe than he had before experienced. Claimant also had a right SI joint injection after the 10/12/01 accident. Nevertheless, Claimant was returned to full duty after the 10/12/01 accident, and worked as a concrete crew lead man for a year before the 6/24/03 accident without seeing a health care provider for his back. Claimant had no surgery after the 10/12/01 accident. Claimant could still sit, stand, walk, and work without restriction after the 10/12/01 accident. Claimant continued to do home repairs after the 10/12/01 accident. Most importantly, Claimant had absolutely no need to lie down after the 10/12/01 accident.

While there are several factors which distinguish the 10/12/01 accident from the 1974, 1991, 1995, 1998, and 2000 accidents, the factors which distinguish the 6/24/03 accident from the 10/12/01 accident are more numerous and more significant. Claimant never returned to work after the 6/24/03 accident. Claimant was required to undergo surgery after the 6/24/03 accident. Claimant was placed on permanent work restrictions after the 6/24/03 accident. Claimant continues to have radicular pain since the 6/24/03 accident. Claimant cannot sit or stand for more than 15-20 minutes at a time since the 6/24/03 accident. Claimant has sleep difficulties since the 6/24/03 accident. Claimant has to lie down multiple times during the day since his 6/24/03 accident.

The injury of 10/12/01, while obviously more serious than the 1974, 1991, 1995, 1998 and 2000 injuries, was, nevertheless, an injury from which Claimant successfully recovered, and which had no significant permanent effect upon his work or upon his life outside of work. The 6/24/03 accident, in contrast, was the progenitor of the restrictions and disabilities (including Claimant's inability to get through the day without lying down), which have rendered Claimant unable to compete in the open market for employment. **Therefore, I find that the 6/24/03 accident in and of itself rendered Claimant permanently and totally disabled. The Second Injury Fund thus has no liability and Employer and Insurer are responsible for payment of Claimant's permanent total disability benefits in Injury No. 03-145218.**

The stipulated weekly compensation rate for permanent total disability benefits is \$407.40. **Employer and Insurer are ordered to pay Claimant the weekly sum of \$407.40, from and after June 3, 2004, for Claimant's life.** As of February 22, 2006, 90 weeks of compensation have accrued, totaling \$36,666.00.

Future medical benefits. The last issue to be decided is whether Employer and Insurer shall be ordered to provide Claimant with ongoing and future medical treatment pursuant to Section 287.140. In *Dean v. St. Luke's Hospital*, 936 S.W.2d 601 (Mo.App. W.D. 1997), the Western District Court of Appeals stated (at 603):

The standard for proof of entitlement to an allowance for future medical treatment cannot be met simply by offering testimony that it is "possible" that the claimant will need future medical treatment. (Citation omitted.) Neither is it necessary, however, that the claimant present conclusive evidence of the need for future medical treatment. (Citation omitted.) To the contrary, numerous workers' compensation cases have made clear that in order to meet their burden claimants such as Ms. Dean are required to show by a "reasonable probability" that they will need future medical treatment.

Dr. Lichtenfeld testified that Claimant would benefit from regular prescription medication, additional diagnostic testing, and (depending upon the results of the diagnostic testing) possible surgery. Clearly, Claimant is in need of continuing prescription medication for his pain and inflammation; the need for prescription medication certainly meets the standard for "reasonable probability". **In Injury No. 03-145218, Employer and Insurer are ordered, therefore, to provide Claimant with future medical benefits pursuant to Section 287.140, RSMo.**

Claimant's attorney, Dean Christianson, is allowed 25% of all sums awarded (including future sums) as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon.

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

Date: _____

Made by: _____

ROBERT J. DIERKES
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation