

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

Injury No. 05-084548

Employee: Donald Elliott

Employer: Don and Freeman Elliott  
d/b/a AAA Stone (Dismissed)

Insurer: St. Paul Travelers (Dismissed)

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

This 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 parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

**Introduction**

The parties asked the administrative law judge to resolve the following issues: (1) accident; and (2) Second Injury Fund liability.

The administrative law judge rendered the following findings and conclusions: (1) employee failed to meet his burden of proving an injury occurred as defined in § 287.020 RSMo; (2) employee failed to prove that his fall from the truck tailgate was an activity deemed to be in the normal course and scope of employment and thus resulted in an "injury" as defined by the statutes, and therefore no Second Injury Fund liability exists; (3) employee failed to meet his burden of proof to establish an accident arising out of and in the course and scope of his employment and therefore is not entitled to Second Injury Fund benefits in this matter; and (4) if one were to assume for sake of argument that employee had met his burden of proof that there was an accident within the course and scope of his employment, the last event in 2005 alone rendered employee permanently and totally disabled, and the conclusion remains the same, that there would be no Second Injury Fund liability.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in determining employee's injury did not arise out of his employment; and (2) in finding employee is permanently and totally disabled because of the last accident alone.

**Findings of Fact**

Apart from brief stints as a meat deliveryman, and as a laborer for various companies, employee spent his entire work history as a stonemason. Eventually, employee formed his own stonemasonry company. He was working in that capacity on July 13, 2005, the date of the primary injury. As owner and operator of his own stonemasonry company, employee performed all of the administrative and clerical duties involved in running the company, supervised between two and six workers, and also worked 40 or more hours per week as a stonemason. The latter role involved heavy manual labor, such as lifting

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as much as 100 pounds, the use of tools, working on one's feet most of the day, and occasional bending and stooping.

*Preexisting conditions of ill-being*

In the 1990s, employee suffered a low back injury while working for a cheese company. Treating physicians diagnosed a herniated L5-S1 disc and employee underwent a decompressive laminectomy and discectomy by Dr. Arnold Schoolman on October 17, 1996. Employee initially had a good result from the surgery and was able to return to work running his stonemasonry company.

The record does not contain postoperative records from Dr. Schoolman assigning any work restrictions; employee testified he did not believe he had any restrictions from Dr. Schoolman following the October 1996 surgery. However, a few years after the surgery, employee began to suffer renewed pain in his low back. Employee reported chronic low back pain to his personal physician, Dr. Brad Townsend, on September 18, 2000. On March 31, 2003, Dr. Townsend prescribed Lorcet, an opioid analgesic, for a diagnosis of chronic low back pain.

On August 26, 2003, employee suffered another low back injury. Employee was working with one foot in the bed of his pickup truck and the other on the tailgate. The tailgate cables broke, causing employee to drop suddenly. Employee returned to Dr. Townsend with worsened low back symptoms following this incident.

As of March 15, 2004, Dr. Townsend continued to prescribe Lorcet for chronic low back pain; he noted the medicine provided "moderate relief, if [the] pain isn't too severe." *Transcript*, page 290. By January 4, 2005, employee complained to Dr. Townsend of progressively worsening low back pain. Dr. Townsend switched employee's pain medications from Lorcet to Vicodin, and ordered an MRI which revealed an annular tear at L4-5, significant disc space narrowing at L5-S1, and bilateral neural foraminal stenosis at L5-S1. Dr. Townsend referred employee to a pain specialist after employee reported the Vicodin was not effective in managing his low back pain.

On February 24, 2005, employee saw Dr. David Breyer, a pain management specialist who diagnosed low back pain with left lower extremity radiculopathy, prescribed a Medrol Dosepak, Elavil, and a TENS unit, and later administered a series of three epidural steroid injections. On May 25, 2005, employee reported to Dr. Townsend that the treatment with Dr. Breyer wasn't helping, so Dr. Townsend discussed with employee the possibility of obtaining a surgical consultation.

Throughout his treatment with Drs. Breyer and Townsend, employee continued to operate his stonemasonry company on a full-time basis, and it does not appear that the treating physicians medically restricted his ability to do so. However, employee credibly testified (and we so find) that after the 2003 back injury, it was very painful to perform his work, and that he changed the way he worked. For example, employee stopped going up on scaffolds, and sought help moving any stones over 50 or 60 pounds. The narcotic pain medication employee took to manage his pain also made him sluggish and tired, and affected his ability to drive for his business.

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Employee's medical expert, Dr. P. Brent Koprivica, believes that employee suffered a permanent aggravating injury to the lumbar spine on August 26, 2003, and rated employee's overall preexisting low back condition as constituting a 25% permanent partial disability of the body as a whole at the time employee sustained the primary injury on July 13, 2005. Dr. Koprivica issued this rating and testified that employee's preexisting disability constituted a hindrance or obstacle to employment, despite acknowledging that employee was working full-time running his stonemasonry business without any medical restriction on his activities. Dr. Koprivica explained that employee was working for himself, so he was able to regulate his own activity level, and also was able to take narcotic pain medications regularly while on the job. Dr. Koprivica noted that any other employer would likely have serious reservations about employee's use of such medications in the workplace.

After careful consideration, we are persuaded by Dr. Koprivica's opinion with regard to preexisting disability. The record reveals employee's preexisting low back pain was not adequately controlled even with narcotic medications, and there was an outstanding suggestion from Dr. Townsend that employee would obtain a surgical consultation. We are not persuaded that employee's ability to stoically continue working despite his well-documented severe low back pain compels a finding that employee suffered no preexisting disability referable to his low back condition. We find that employee suffered a preexisting permanent partial disability referable to the low back as of July 13, 2005.

#### The primary injury

On July 13, 2005, employee was at a scrap yard unloading a box of copper wire that his workers had salvaged while on the job. It was employee's practice to take salvaged copper to the scrap yard and use the proceeds to buy beer and barbeque to reward his workers upon completion of a job. Employee did this about once a month.

On this date, employee was standing on the tailgate of his truck when the tailgate cables broke, causing employee to fall into a dumpster, striking his head and back. Employee suffered a brief period of unconsciousness, then someone came and helped employee out of the dumpster. Following this incident, employee suffered a worsening of his low back pain. On July 18, 2005, he returned to Dr. Townsend, who prescribed additional Lorcet, and later, duragesic patches.

These treatments were unsuccessful in managing employee's low back pain, so employee saw an orthopedic surgeon, Dr. Glenn Amundson, who ordered an MRI and diagnosed discogenic pain. Dr. Amundson recommended and ultimately performed a bi-level lumbar fusion surgery on January 31, 2008. This surgery was also ineffective at relieving employee's low back pain, and employee was unable to return to work. Employee continued to take daily narcotic pain medications prescribed by Dr. Townsend. On November 13, 2008, Dr. Martin Thai, a pain management specialist, diagnosed failed back syndrome, and agreed that opioid medications were necessary for pain control.

Dr. Koprivica opined that the injury of July 13, 2005, was a substantial factor in causing employee to suffer further lumbar disc injury in the form of new discogenic pain resulting in a need for the bi-level fusion surgery. Dr. Koprivica rated the July 13, 2005, injury as resulting in a 35% permanent partial disability of the body as a whole. We find Dr. Koprivica's opinions with regard to the primary injury to be persuasive, and find that

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the July 2005 injury resulted in new discogenic pain and associated 35% permanent partial disability of the body as a whole referable to the lumbar spine.

*Nature and extent of permanent disability*

Employee completed the 11<sup>th</sup> grade, but did not graduate from high school or obtain his GED. Employee was 55 years of age on the stipulated date of maximum medical improvement, August 9, 2008. As noted above, all of employee's work history involved manual labor, stonemasonry, or running his own stonemasonry business.

Presently, employee suffers from sharp pain in his low back that runs down the back of his left leg. He takes four to six doses of oxycodone per day to manage these symptoms, and also uses a duragesic pain patch. Employee is unable to endure prolonged sitting, standing, or walking. Employee spends an hour or two per day lying down.

Employee tries to stay busy performing an occasional "junking" activity with his father loading up old, unwanted cars and removing any parts of value. This activity doesn't require any heavy lifting, but occasionally involves some awkward postures while removing a difficult-to-reach part. When he has a junk car, employee will typically spend a couple hours working on it per day. Employee also uses a riding mower to mow about a quarter or half acre of his property, and continues his hobby of fishing once or twice per week, and hunting deer, squirrels, and rabbits.

Dr. Koprivica assigned numerous restrictions for what he described as "the synergism of combining" the disabilities referable to employee's preexisting lumbar disability and the disability employee suffered as a result of the 2005 primary injury. *Transcript*, page 149. Dr. Koprivica's restrictions include the following: no prolonged sitting over 1 hour; no standing/walking intervals over 30 minutes; employee should have the ad lib ability to change positions when needed; no lifting from the floor, and only occasional lifting/carrying of less than 20 pounds; no frequent or constant bending at the waist, pushing or pulling, twisting, lifting, or carrying; avoid full body vibration and jarring; avoid frequent or constant squatting, crawling, or kneeling; and avoid climbing. Dr. Koprivica testified that the combination of employee's preexisting lumbar industrial disability with the further lumbar disability attributable to the July 13, 2005, injury results in permanent total disability. Employee also presented expert vocational testimony from Mary Titterington, a certified vocational rehabilitation counselor. Ms. Titterington believes it is not very realistic to assume any employer will hire employee in light of his physical condition and restrictions, his use of narcotic pain medications, his age, and his employment history.

The Second Injury Fund, on the other hand, does not present any expert testimony or evidence. Instead, the Second Injury Fund argues that Dr. Koprivica believes that the primary injury, considered in isolation, renders employee permanently and totally disabled. We have carefully reviewed Dr. Koprivica's testimony and reports, and we found no such opinion from Dr. Koprivica. Instead, we discovered that every time he was invited by the Second Injury Fund to agree that the 2005 back injury alone rendered employee permanently and totally disabled, Dr. Koprivica answered that it was instead employee's overall low back disability (including that referable to his preexisting injuries and surgery) that renders employee permanently and totally disabled. In fact, we note that Dr. Koprivica specifically denied, multiple times, that the primary injury would have been sufficient to render employee permanently and totally disabled in isolation. *Transcript*, pages 85-6, 110.

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Although Dr. Koprivica agreed, during a 2009 deposition taken for purposes of a workers' compensation proceeding in Kansas, that employee's permanent total disability "is a result" of the 2005 injury, he did not opine in that deposition that employee would be permanently and totally disabled by the effects of the 2005 injury considered *alone*. And, in his 2014 deposition in this matter, Dr. Koprivica credibly explained that he was never asked in the Kansas proceeding whether the 2005 injury rendered employee permanently and totally disabled in isolation, and that he meant to indicate in his 2009 deposition merely that employee was permanently and totally disabled *following* the 2005 injury.

Ultimately, it appears to us that the Second Injury Fund mischaracterizes the evidence when it argues, in its brief, that Dr. Koprivica assigned permanent total disability to the primary injury considered in isolation in both his 2009 and 2014 depositions. The Second Injury Fund's only other argument is that employee was able to work before the last injury, so the last injury in isolation must have been sufficient to permanently and totally disable him. But an employee will *always* be working at the time of the last injury, owing to the statutory requirement that there be a "subsequent compensable injury" to trigger Second Injury Fund liability. See § 287.220.1 RSMo.

After careful consideration, we are persuaded by Dr. Koprivica's opinion that employee is incapable of competing for work in the open labor market based on a combination of the effects of the primary injury with his preexisting disabling conditions referable to the low back. We so find.

## **Conclusions of Law**

### Scope of disputed issues

As noted at the outset of this award, the record reflects that the parties asked the administrative law judge to resolve only two issues: (1) accident; and (2) Second Injury Fund liability. See *Transcript*, page 4-5. Yet, in his award, the administrative law judge did not render any findings or conclusions pertinent to the issue whether employee suffered an "accident" as defined under § 287.020.2 RSMo. Instead, the administrative law judge appears to have considered an altogether different issue which he variously described as (1) whether employee suffered an "injury" as defined under § 287.020 RSMo; (2) whether employee suffered an "accident arising out of and in the course and scope of his employment"; and (3) whether employee suffered "an accident in the course and scope of his employment." See *Award*, pages 7-9. Owing to the absence of specific statutory references or clear conclusions of law from the administrative law judge giving effect to the language of those statutes, we can only speculate as to the nature of the test (or tests) that he applied, although it appears to have involved the question whether employee suffered an injury that was related to the typical duties performed by a stone mason. The administrative law judge also made the curious choice to rely upon *Porter v. RPCS, Inc.*, 402 S.W.3d 161 (Mo. App. 2013), a factually inapposite decision that also construed and applied the substantive 2005 amendments to Chapter 287, which, of course, are inapplicable to this claim.

We note these matters not to find undue fault with the administrative law judge, but rather because we are concerned he may have exceeded the scope of his authority by addressing an issue (or issues) that the parties did not clearly identify on the record as in dispute. See *Lawson v. Emerson Electric Co.*, 809 S.W.2d 121 (Mo. App. 1991). Fortunately for our purposes, however, the parties appear now to agree, in their briefs

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and at oral argument, that the issue whether employee suffered an injury arising out of and in the course of employment is properly considered by this Commission. For this reason, in addition to resolving the issue whether employee sustained an accident, we will consider whether employee's injury arose out of and in the course of his employment for purposes of § 287.020.3 RSMo.

Accident

The version of § 287.020.2 RSMo applicable to this claim defines "accident", as follows:

The word "accident" as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.

We have found that employee, while moving scrap copper in the bed of his truck, fell when his tailgate collapsed, and suffered low back pain as a result. These facts unquestionably satisfy the statutory test set forth above. We conclude, therefore, that employee suffered an "accident."

Injury arising out of and in the course of employment

The version of § 287.020.3(2) RSMo applicable to this claim provides, as follows:

An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and
- (b) It can be seen to have followed as a natural incident of the work; and
- (c) It can be fairly traced to the employment as a proximate cause; and
- (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life[.]

The Second Injury Fund argues that employee failed to satisfy the foregoing test because he agreed, on cross-examination, that his injury occurred while he was not doing anything directly associated with the masonry aspect of his job, like putting up stone. We are not persuaded, for a number of reasons. First, we note that the Second Injury Fund asks us to read the foregoing as if the legislature had used the words "occupational title" in place of the more general words "work" and "employment." The relevant test is not whether employee's injury arose out of and in the course of the narrow and specific set of duties we would typically associate with the occupational title of stonemason, but rather whether the injury arose out of and in the course of employee's overall employment for employer, whatever duties and activities that employment may have entailed. As counsel for the Second Injury Fund conceded at oral argument, a carpenter would not be precluded from workers' compensation benefits solely because an injury occurred while the carpenter did not have a hammer in hand. We conclude that the language of the statute simply does not support the restrictive reading urged by the Second Injury Fund.

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More importantly, the Second Injury Fund misstates the very nature of the employment at issue in this case. Employee wasn't working merely as a stonemason when he was injured, but rather as a *business owner*. Employee credibly testified, and we have found, that employee regularly redeemed scrap copper gathered on the job for cash that he in turn spent to reward his workers. This activity was, without question, naturally incidental to employee's work as a business owner. Employee sustained his injuries while engaged in this activity, and because of a risk or hazard inherent in this activity. Indeed, employee's work injury of 2003 involved a very similar mechanism of injury; this strongly suggests that the risk of this type of injury was directly related to the employment.

We conclude, therefore, that employee's injury arose out of and in the course of his employment for purposes of § 287.020.3(2).

Second Injury Fund liability

Section 287.220 RSMo creates the Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

*Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have found that, as of the date of the primary low back injury, employee suffered from a preexisting permanent partially disabling condition referable to his low back. When we apply the foregoing test, we are convinced this condition had the potential to combine with subsequent work injuries to cause greater disability than in the absence of the condition. Accordingly, we conclude this condition was serious enough to constitute a hindrance or obstacle to employment for purposes of § 287.220.1 RSMo.

Fund liability for PTD under Section 287.220.1 occurs when the claimant establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. For [an employee] to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.

*Lewis v. Treasurer of Mo.*, 435 S.W.3d 144, 157 (Mo. App. 2014).

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Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Id.*

We have determined that, as a result of the primary injury, employee sustained a 35% permanent partial disability of the body as a whole referable to the lumbar spine. We have also found, based on the persuasive testimony from Dr. Koprivica, that employee is unable to compete in the open labor market owing to the combination of his preexisting disabling conditions with his disability referable to the primary injury. It follows that the primary injury, considered in isolation, does not render employee permanently and totally disabled.

We are convinced that employee met his burden under § 287.220.1. We conclude the Second Injury Fund is liable for permanent total disability benefits.

### **Conclusion**

We reverse the award of the administrative law judge.

The Second Injury Fund is liable to employee for permanent total disability benefits and is hereby ordered to pay those benefits beginning August 9, 2008, in the amount of \$51.61 per week for 140 weeks, and thereafter at the stipulated permanent total disability rate of \$416.69. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued December 19, 2014, is attached solely for reference.

For necessary legal services rendered to employee, Mark Kolich, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 1<sup>st</sup> day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## **FINAL AWARD AS TO SECOND INJURY FUND ONLY**

Employee: Donald Elliott Injury No: 05-084548

Employer: Don and Freeman Elliott d/b/a AAA Stone

Insurer: St. Paul Travelers (Settled)

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

Hearing Date: October 14, 2014

Reviewed by: MSS/lh

### **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? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: July 13, 2005.
5. State location where accident occurred or occupational disease contracted: Jackson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
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 happened or occupational disease contracted: Employee was unloading scrap metal out of a truck at a salvage yard and fell.
12. Did accident or occupational disease cause death? No. Date of death? N/A

13. Parts of body injured by accident or occupational disease: Body as a whole.
14. Nature and extent of any permanent disability: Not determined at this time.
15. Compensation paid to-date for temporary disability: \$10,475.59
16. Value necessary medical aid paid to date by employer/insurer? \$99,088.40
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$625.00
19. Weekly compensation rate: \$416.69/\$365.08.
20. Method wages computation: By agreement.

#### **COMPENSATION PAYABLE**

21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: N/A

## **FINDINGS OF FACT AND RULINGS OF LAW**

Employee: Donald Elliott Injury No: 05-084548  
Employer: Don and Freeman Elliott d/b/a AAA Stone  
Insurer: St. Paul Travelers (Settled)  
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund  
Hearing Date: October 14, 2014 Reviewed by: MSS/lh

### **FINDINGS OF FACT and RULINGS OF LAW**

This case comes on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri on October 14, 2014. The Claimant Donald Elliott was present with his counsel, Mr. Mark Kolich. The Second Injury Fund was represented by their counsel, Ms. Kim Fournier. The case of the Employer and Insurer has previously been settled for a compromised lump sum.

This case involves injuries on or about July 13, 2005, while the Claimant was in the employ of Don and Freeman Elliott, d/b/a AAA Stone, and allegedly sustained injuries by accident arising out of and in the course and scope of employment in Jackson County, Missouri. At the time of the injuries, the parties were subject to the Missouri workers' compensation law and the Employer's liability fully insured by St. Paul Travelers. The Employer had notice of the injury and claims were timely filed. I show the average weekly wage agreed to be \$625 and the compensation rate agreed to be \$416.69/\$365.08. Weekly benefits have been paid totaling \$10,475.59 representing 25 and 1/4<sup>th</sup> weeks. Medical expenses of \$99,088.40 have been paid.

The issues to be resolved at this hearing include: one, whether there was an accident; and, two, the liability of the Second Injury Fund.

The evidence of trial consisted of the testimony of Claimant, together with Claimant's offered Exhibit A through H. The Second Injury Fund offered Exhibits 1 through 3, and called no live testimony to trial.

Donald Elliot is a 61-year-old man who lives in Clinton Missouri. Mr. Elliott has an 11<sup>th</sup> grade education with no high school equivalency or additional training. Other than brief stints as a laborer for a meat company, a cheese company and a company that builds awnings for homes, Mr. Elliott has been a lifelong stone mason. He began his career in this industry for his uncle as a laborer and then began a company of his own he called AAA Stone which he owned and operated for 20 plus years. He has done all aspects of this business (including heavy lifting, bending and stooping -SIF Exhibit 3, page 28-30) and believes that he has the skill to perform office jobs.

### **Before the 2005 injury**

Mr. Elliott had a work related injury in the mid 1990's while he was laboring for the Clearfield Cheese Company. At that time he injured his back and underwent surgery by Dr. Schoolman. Following that injury, Mr. Elliott went back to work as a stone mason. He started his own business, AAA Stone, where he performed all aspects of his job. He performed all business aspects of the job including the accounting and supervision as well as the physical aspects of the job which included lifting up to 100 pounds with regularity. His job also required him to bend, lift, stoop and use tools to assist him with the stone work. Mr. Elliott had no restrictions imposed as a result of this surgery. (SIF Exhibit 3, pages 26-28) There were a couple of times over the years that Mr. Elliott went to see a chiropractor or his primary care physician, Dr. Townsend, for treatment for back pain. (SIF Exhibit 3, page 35) Those visits occurred in 2000 and once in 2003 just before the he suffered a work related injury in 2003.

In August of 2003, Mr. Elliott was loading his truck when his tailgate broke causing him to fall in re-injure his back. After that incident, Mr. Elliott sought treatment from his primary care provider, Dr. Townsend. He received narcotic pain medications as well as injections. He continued to have pain in his back, however continued performing his job as a stone mason. He did indicate that he would ask for help with lifting and discontinued climbing scaffolding after this incident, but he would work through the pain. (SIF Exhibit 3, page 37) Mr. Elliott did not have limitations to his ability to sit stand or walk nor did he have to lie down during the day after this injury. (SIF Exhibit 3, page 59-60)

Despite these injuries, Mr. Elliott continued to work full time (40-60 hours per week), doing all aspects of his job. (SIF Exhibit 3, page 39) He continued to participate in the hobbies he enjoyed such as bowling, hunting, and fishing, did not miss time from work and cared for his own yard-work. (SIF Exhibit 3, page 70, He had no leg instability, nor any sleep interruption following this incident. (SIF Exhibit 3, page 53, 61)

### **2005 Injury:**

In July of 2005, Mr. Elliott took some copper he had taken from job sites to a scrapyard to sell for cash. He indicated that with the cash, he would buy his workers food or drinks. He admitted at hearing that this was not the type of thing that is considered part of what a stone mason does in the ordinary course and scope of their business. While at the scrapyard, Mr. Elliott was standing on the back of his truck when the tailgate broke and he fell into a dumpster.

After the incident, Mr. Elliott had to increase his narcotic pain medication, but tried to continue working. Ultimately, Mr. Elliott underwent a fusion on his lumbar spine. Mr. Elliott pursued his underlying workers' compensation claim in Kansas. The Kansas Appeals Board for the Kansas Division of Worker' Compensation concluded that Mr. Elliot was "permanently and totally disabled as a result of the accident on July 13, 2005." (Exhibit H) Mr. Elliott received more than \$100,000 for his permanent total disability from the Kansas Division of Workers' Compensation. (Exhibit H)

**Since the 2005 Injury:**

Mr. Elliott currently takes 4-6 oxydone per day for his pain and continues to require a duragesic pain patch. He now has sharp pains in his back that run down the back of his left leg. His leg has given out multiple times, one time causing him to injure his hand. (SIF Exhibit 3, page 52-53) He is unable to sit, stand or walk for any period of time or duration without pain. (SIF Exhibit 3, page 58) Since his 2005 injury, he lies down unpredictably throughout the day for 1-2 hours per day. (SIF Exhibit 3, page 60) His sleep is disturbed each night and he becomes drowsy during the day. (SIF Exhibit 3, page 60)

When Mr. Elliott is not lying down, he tries to stay busy with mowing the lawn, helping a little around the house, maybe moving some brush, and “junking”. (SIF Exhibit 3, page 63, 66-68) He and his father take old cars and try to remove the parts that are valuable for money. He has not done much of this in the past year, though. He also lived away from home to avoid stress with his family for approximately 3 months. (SIF Exhibit 3, page 64-65) During that time he was working to maintain his keep by doing yard maintenance and fence mending for the person whose house in which he was staying. (SIF Exhibit 3, page 65-66, 68) He continues to fish 1-2 times per week and does continue to hunt. (SIF Exhibit 3; Page 16) He sometimes takes his boat to the lake, loads and unloads it himself, and fishes from the boat. (SIF Exhibit 3; page 16-17)

Mary Titterington, claimant’s vocational expert, testified two times with reference to this injury. She testified in December of 2008 that the 2005 injury had substantially impacted Mr. Elliott’s daily living, that he had interrupted sleep, and was taking significant narcotic medications. (SIF Exhibit 1, page 8-9, 15). She was not provided with any information as to whether Mr. Elliott had limitations between 2003 and 2005. (SIF Exhibit 1, page 41) Despite this, she was able to find Mr. Elliott unemployable in the open labor market given his restrictions and narcotic usage. (SIF Exhibit 1, pages 17-18)

Ms. Titterington testified a second time on 4/8/14. At that time she stated that between 1996 and 2003 Mr. Elliott was working very heavy demand category work on a full time basis, and without restriction. (Exhibit B, page 19) Ms. Titterington agreed that the 2003 back injury did not result in surgery or restrictions, and that M. Elliott returned to heavy demand category work. (Exhibit B, page 21) She did not have any information that Mr. Elliott required to rotate his postures (including the need to lie down) between 2003 and 2005, or any information that he was having sleep disturbance during that time. (Exhibit B, page 22, 28, 29) Ms. Titterington agreed that if a person needs to lie down they are unemployable. (Exhibit B, page 28) Ms. Titterington agreed that if Dr. Koprivica’s restrictions were a result of the 2005 work accident, then Mr. Elliott’s unemployability would be caused by the 2005 accident. (Exhibit B, page 24-25, 26-28, 31-32)

Dr. Brent Koprivica, M.D., claimant’s rating physician also testified two times. In 2009 he testified that the 2005 accident is responsible for Mr. Elliott’s restrictions. (SIF Exhibit 2, page 24) He also found that accident to be the substantial factor contributing to the need for Mr. Elliott to have a fusion after the 2005 accident. (SIF Exhibit 2, page 70) Dr. Koprivica testified that in addition to the restrictions being imposed, and surgery necessitated as a result of the 2005 accident, that Mr. Elliott’s failed back syndrome and Mr. Elliott’s inability to return to

employment were also both a result of the 2005 accident. (SIF Exhibit 2, page 71-72) Dr. Koprivica agreed that despite the 2003 low back injury there was no indication that Mr. Elliott was restricted from working before 2005, but rather was working heavy and strenuous activities as a stone mason. (SIF Exhibit 2, page 74)

Dr. Koprivica again testified on 4/11/14. At that time he agreed that between 1996 and 2003 Mr. Elliott worked without restriction or formal accommodation. (Exhibit A, page 31) He also agreed that the 2003 back injury did not result in surgery, accommodations, or restrictions and that Mr. Elliott continued to work full time in a heavy demand category. (Exhibit A, page 33, 35) He agreed that Mr. Elliott underwent a fusion following the 2005 injury and increased his narcotic usage substantially. (Exhibit A, page 37) Dr. Koprivica continued to agree that Mr. Elliott's failed back syndrome occurred after his 2005 work injury as a result of the pain associated with his fusion. (Exhibit A, page 38, 49-50) He also stated that the severe restrictions he believed were necessary for Mr. Elliott were a result of his 2005 injury. (Exhibit A, page 48)

### MEDICAL EVIDENCE

The Claimant after his alleged accident of July 13, 2005, came under the care of Dr. Glenn Amundson, an orthopaedic surgeon. Dr. Amundson ordered an MRI which showed mild disc bulging at L5-S1. Dr. Amundson was of the opinion that the Claimant needed and had performed a two-level lumbar fusion which was done on January 31, 2008. The Claimant has remained largely symptomatic because of what has been deemed a fusion which failed to provide symptomatic relief, and in the terms of at least one doctor has been deemed to have "failed back syndrome".

Claimant was last seen by Dr. Amundson on July 25, 2008. Dr. Amundson acknowledged Claimant's continuing need for pain medication and referred the Claimant to Dr. Townsend for pain management and monitoring the Claimant's medication. Dr. Townsend in turn referred the Claimant to Dr. Martin Thai, a pain management specialist who diagnosed failed back surgery syndrome and prescribed opiates as the necessary pain control for the Claimant. Dr. Thai suggested a range of long acting medicine ranging from morphine sulfate, Oxycontin, Duragesic Fentanyl or Methadone. Dr. Thai was also of the opinion that a spinal cord stimulator may be beneficial.

Dr. P. Brent Koprivica also examined the Claimant after the 2005 accident and that exam took place on August 27, 2008. Dr. Koprivica also diagnosed failed back syndrome and imposed significant restrictions. At the time of the Claimant's visit with Dr. Koprivica, the Claimant was taking six to eight Hydrocodone pills per day in addition to a duragesic patch to cope with his pain. Dr. Koprivica concluded that because of the disabling pain and the side effects of the pain medication, most notably drowsiness and reduced ability to concentrate, the Claimant was permanently and totally disabled.

The Claimant was examined for workers' compensation purposes by vocational expert Mary Titterington on October 13, 2008. Ms. Titterington opined after interviews, testing and examination of the Claimant and taking into account all medical records reviewed and doctors'

restrictions provided that given the Claimant's age, limited education, work history, lack of transferable skills, medical restrictions and physical limitations, including the daily use of narcotic pain medicine, that the Claimant was not realistic employable.

### FINDINGS

In a workers' compensation matter, the Claimant carries the burden of proof to all material elements necessary to establish entitlement to compensation. I find that in reviewing the evidence submitted that the Claimant has failed to meet his burden of proof proving an injury occurred as defined in §287.020 RSMo 2000. The question is whether he had an injury, which is a defined term in §287.020 RSMo 2000 “.2(1) in this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course and scope of employment ...

An injury shall be deemed to arising out of and in the course of employment only if: (b) it can be seen to have followed *as a natural incident of the work*. Emphasis added.

A claimant must establish a causal connection between the accident and the compensable injury. Kerns v. Midwest Conveyor, 126 S.W.3d 445 (Mo.App. W.D. 2004). An injury will not be deemed to arise out of employment if it merely happens to occur while working. Miller v. Mo.Highway and Transportation Commission, 287 S.W.3d 671 (Mo Banc 2009). In order for Mr. Elliott to succeed on his claim as he carries the burden of proof proving each element of the claim. Lawrence v. Joplin R-8 School District, 834 S.W. 2d 789 (Mo.App. E.D. 1992).

Mr. Elliott failed to meet his burden of proof in this matter because the mechanism of injury in 2005 involved an episode where Mr. Elliott had taken some copper he had taken from a jobsite to scrap yards to sell for cash. The Claimant indicated in his testimony this was something he had frequently done and that with the cash he would occasionally buy his workers food or drinks. The Claimant freely admitted at the hearing this was not the type of thing that is considered part of what a stone mason does in the ordinary course and scope of their business. The Claimant, nevertheless, while at that scrap yard standing on the back of his truck when the tailgate broke and he fell into the dumpster suffering the injuries which are the underlying basis of this claim.

As a result of the Claimant's 2005 injury, Claimant currently takes four to six Oxycodone pills per day for pain and requires a duragesic pain patch. The Claimant now complains of sharp pains in his back that run down the back of his leg and that his leg has given out on multiple occasions causing him to fall, and at one point the fall caused injury to his hand. The Claimant testified he is unable to sit, stand or walk for any period of time or duration without pain. Since the 2005 injury the Claimant indicated he lies down unpredictably throughout the day for periods of one to two hours per day and that his sleep is disturbed each night because of his pain. The Claimant has not been able to work for pay since his 2005 injury but testifies he continues to fish one to two times per week and does hunt. The Claimant is able to take his boat to the lake where he loads and unloads it himself and fishes from his boat.

All of the above-mentioned conditions of ill which the Claimant has testified to is his current state of affairs were not present prior to the 2005 incident involving the surgery and fusion to his low back.

The Claimant in this matter has failed to meet his burden of proof because by his own account the salvaging of metal is not an activity that “follows as a natural incident of the work” of being a stone mason. The Claimant’s case very closely resembles the case of Porter v. RPCS, Inc., 402 S.W.3d 161 (Mo.App. S.D. 2013) where the employee fell at work but was unable to show a causal connection between the accident and the work activity. It was deemed by the Court that Claimant failed to establish the necessary element that the injury arose out of and in the course and scope of employment and received no benefits. As in that case, the Claimant has failed to prove that his fall from the truck tailgate was from an activity deemed to be in the normal course and scope of employment and thus resulted in an “injury” as defined by the statutes, and therefore no Second Injury Fund liability exists.

Another issue to be considered is whether or not the Claimant would be deemed permanently and totally disabled against the Second Injury Fund even if a compensable accident were deemed to have occurred. In determining the extent of disability attributable to the Second Injury Fund, the extent of the compensable injury and compensation due from the employer must be determined first. Roller v. Treasurer, 935 S.W.2d 739 (Mo.App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made.

The extent of liability that the Employer has for the Claimant’s 2005 injury must be assessed first prior to evaluating any potential liability of the Second Injury Fund. If that injury alone, without consideration of any pre-existing or subsequent injuries renders the Claimant permanently and totally disabled, the Employer is responsible for permanent total disability benefits to the Employee and inquiry into the liability of the Second Injury Fund is never undertaken. Roller v. Treasurer of the State of Missouri, 935 S.W. 2d 739 (Mo.App. 1996). Lammert v. Vess Beverages, Incorporated, 968 S.W.2d 720 (Mo.App. 1998).

The best reading of the evidence presented indicates that following the 2005 work-related injury, the Claimant suffered from such overwhelming pain and physical restrictions and limitations that he has never returned to work in the open labor market. Before his injury Claimant worked successfully full time, without restriction, without limitation to his ability to sit, stand or walk in a very heavy demand category profession. The conclusion that the Claimant is permanently and totally disabled following his 2005 work injury considered alone and in isolation is supported by the weight of the evidence in the form of the testimony of Dr. Koprivica, the vocational testimony of Ms. Titterington, and in the records of Dr. Thai. Those restrictions briefly by Ms. Titterington, Dr. Koprivica and Dr. Thai severely limit the Claimant’s ability to sit, stand or walk for any period of time or duration without pain, documented sleep disturbances and significant usage of narcotic pain medication. The Claimant also testified his leg gives out due to his low back and he has to unpredictably lie down for periods of one to two hours per day each and every day. Those physical restrictions coupled with Ms. Titterington’s opinion on vocational abilities permanently and totally remove the Claimant from the open labor

market based on those conditions alone. It is noted that the medical records support and the Claimant's testimony confirms that these conditions mentioned above were not present before this 2005 accident.

It is of some note, although not conclusive, to the determination of this case that the Claimant as a result of the 2005 alleged accident did pursue and receive permanent total benefits in the state of Kansas for his 2005 injury.

Wherefore, I find on the basis of the above-mentioned evidence and testimony presented that the Claimant has failed to meet his burden of proof to establish an accident arising out of and in the course and scope of his employment and therefore is not entitled to Second Injury Fund benefits in this matter. If one were to assume for sake of argument that the Claimant had met his burden of proof that there was an accident within the course and scope of his employment, I find that the last event in 2005 alone rendered the Claimant permanently and totally disabled and that the conclusion remains the same, that there would be no Second Injury Fund liability.

Made by: \_\_\_\_\_

Mark S. Siedlik  
*Administrative Law Judge*  
*Division of Workers' Compensation*