

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

Injury No.: 04-149102

Employee: Terry Fairfield
Employer: Ford Motor Company
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge (ALJ) dated November 8, 2010.

Preliminaries

The ALJ found that employee filed a timely claim for compensation in accordance with § 287.430 RSMo. The ALJ further found that employee sustained an injury by accident arising out of and in the course of his employment on April 13, 2004, and that employer had actual notice of the injury within 30 days of its occurrence.

With regard to the nature and extent of permanent disability, the ALJ found that employee suffered 15% permanent partial disability of the body as a whole as a result of the April 13, 2004, work injury. The ALJ found that this 15% permanent partial disability combined with employee's preexisting disabilities to render him permanently and totally disabled.

The ALJ awarded employee future medical care, but denied employee's claim for past medical expenses.

Employer and the Second Injury Fund appealed to the Commission and allege, among other things, that the ALJ erred in finding that employee filed a timely claim for compensation.

Findings of Fact

Employee had two claims pending in 2010 when the parties conducted the Final Hearing for Injury No. 04-149102. The first injury occurred in 2002 and the second injury occurred in 2004. Both of the injuries were to employee's low back.

On March 21, 2002, employee sustained an injury to his low back while putting away stock at the end of his shift. He felt a "pop" in his low back when he was coming up from bending to get stock off a skid. Shortly after receiving notice of the March 2002 injury, employer authorized Dr. Stephen Reintjes, a neurosurgeon, to treat employee.

¹ Statutory references are to the Revised Statutes of Missouri 2000 unless otherwise indicated.

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Dr. Reintjes diagnosed a right L5-S1 disc herniation and performed two surgeries, the first in April 2002 and the second in July 2002.

After the two surgeries employee continued to complain of pain in his low back. Dr. Reintjes recommended that employee obtain a second opinion. On December 23, 2002, employee saw Dr. Geoffrey Blatt for another opinion. Dr. Blatt diagnosed employee with disc collapse at L5-S1 and recommended a fusion of the L5-S1 level. Dr. Blatt performed an L5-S1 fusion with a right hip bone harvest on April 10, 2003.

On January 5, 2004, employee was seen by Dr. Blatt in follow-up. Dr. Blatt noted that employee still had discomfort in his back with lifting but that he was much better than he was pre-operatively. Dr. Blatt noted that employee wanted to return to his regular duties. Dr. Blatt agreed that he should return to work, but suggested that he limit his repetitive bending to prevent additional problems in the future. Dr. Blatt released employee from his care, noting that employee could return to treat for the March 2002 injury on an as needed basis. Dr. Blatt imposed permanent work restrictions to avoid lifting, pushing, or pulling more than 20 pounds, and to avoid repetitive bending.

On January 29, 2004, employee saw Dr. Brent Koprivica for an independent medical evaluation. Dr. Koprivica believed employee was at maximum medical improvement and assessed employee as having sustained 50% permanent partial disability as a result of the March 21, 2002, accident.

Employer authorized and paid for all of employee's treatment referable to the March 21, 2002, injury.

Employee alleges that on April 13, 2004,² he sustained a new injury to his low back. Employee went to employer's on-site medical facility on that date and stated that he felt a pull in his back while lifting a skid. A nurse at the plant assessed employee as having an "acute exacerbation" of chronic lumbar pain and sent him to one of the physicians at the plant medical facility.

Employee never reported the April 13, 2004, event to the claims personnel in employer's workers' compensation office located inside the plant. Employee claims that he did not know he was supposed to report the injury to the workers' compensation office despite the fact that he reported his March 2002 injury to the personnel in that office. Employee testified that he thought the plant medical personnel would report the April 13, 2004, injury to the workers' compensation office for him.

Employer admitted during the hearing that employee sustained an accident involving his low back on April 13, 2004, while in the course and scope of his employment.

² We note that the records contain an inconsistency with regard to the date of this alleged injury. Some of the records list April 6, 2004, as the date of injury and some of the records list April 13, 2004, as the date of injury. We find that the majority of the records indicate that the injury occurred on April 13, 2004, and, therefore, we have used that date throughout this final award.

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Dr. Blatt examined employee on April 15, 2004. Employee testified that prior to the April 13, 2004, incident he had already scheduled an appointment with Dr. Blatt for April 15th to discuss ongoing concerns with respect to the March 21, 2002, injury.

Dr. Blatt stated in his April 15, 2004, note that employee had scheduled the appointment about a month prior to the visit because he was having some intermittent right leg discomfort and low back pain. In his April 15, 2004, note, Dr. Blatt recorded that on the prior Tuesday employee was "pulling a skid and had increase in his low back pain...." Dr. Blatt was concerned employee might have re-injured the fusion site or sustained a new injury. He ordered an MRI to determine the precise status of employee's low back.

Dr. Blatt saw employee again on June 10, 2005. He wrote that employee was in for updated work restrictions. There is no evidence that employer authorized the June 10, 2005, visit or paid for it. The \$67.00 charge for the visit was filed with both employee's group carrier (Blue Cross Blue Shield) and with the workers' compensation carrier. However, employee paid the \$67.00 bill himself.

Employer's workers' compensation plant representative, JoAnn Rickner, testified at the hearing that the printout from employer's workers' compensation system shows payments made for employee's March 21, 2002, injury. Ms. Rickner stated that the last workers' compensation benefit employer paid with respect to employee was an office visit with Dr. Blatt on September 20, 2004. However, said printout does show that employer paid a \$75.00 charge to Dr. Blatt on July 7, 2005, for a disability rating Dr. Blatt provided on that day for the 2002 injury. The rating stated that employee sustained 10% permanent impairment solely as a result of the March 21, 2002, accident. Dr. Blatt mentioned the April 13, 2004, injury, but did not provide an opinion as to permanent disability related to said injury.

Dr. Blatt testified that he never tried to treat another injury of employee's other than the March 21, 2002, injury. He reiterated that his 10% rating was strictly referable to the March 21, 2002, injury.

For several years employee denied that he sustained a new injury on April 13, 2004. Employee testified during a deposition on October 29, 2007, that he did not suffer any other injuries to his back after the March 2002 injury. Employee testified during that deposition that the April 13, 2004, incident was not a new injury because he had pains every day no matter what he did.

Employee did not file a claim for compensation for the April 13, 2004, accident until January 29, 2008. Ms. Rickner testified that employee did not report the April 13, 2004, injury to employer's workers' compensation office until February 2008. Employer filed its first report of injury to the Division of Workers' Compensation (Division) on February 14, 2008.

Conclusions of Law

With regard to the issue of notice, § 287.420 RSMo provides, in pertinent part:

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No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, have been given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission finds that there was good cause for failure to give the notice, or that the employer was not prejudiced by failure to receive the notice. No defect or inaccuracy in the notice shall invalidate it unless the commission finds that the employer was in fact misled and prejudiced thereby.

Once an employer receives notice of an injury from an employee, it then has an obligation to file a report of injury with the Division. That obligation is derived from § 287.380 RSMo, which provides, in pertinent part:

1. Every employer or his insurer in this state, whether he has accepted or rejected the provisions of this chapter, shall within ten days after knowledge of an accident resulting in personal injury to any employee notify the division thereof, and shall, within one month from the date of filing of the original notification of injury, file with the division under such rules and regulations and in such form and detail as the division may require, a full and complete report of every injury or death to any employee for which the employer would be liable to furnish medical aid, other than immediate first aid which does not result in further medical treatment or lost time from work, or compensation hereunder....

In addition to the employee's obligation to provide written notice to the employer, the employee must also file a claim for compensation in accordance with the provisions of § 287.430 RSMo, which provides, in pertinent part:

[N]o proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death.

In this case, the parties agree that employee failed to provide employer with written notice of the injury within 30 days of its occurrence. However, employee maintains that employer received actual notice of the injury on April 13, 2004. The courts have held that actual notice is sufficient proof that the employer was not prejudiced by the employee's failure to provide written notice. See *Doerr v. Teton Transp., Inc.*, 258 S.W.3d 514, 527-28 (Mo. App. 2008).

Immediately after the injury on April 13, 2004, employee reported to employer's on-site medical facility. He was initially treated by a nurse and then referred to the company

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doctor. The notes from that on-site visit indicate that employee reported injuring his back when he lifted a skid.

Employer indicated in its February 14, 2008, report of injury that it was notified of employee's injury on April 13, 2004.

Based upon the aforementioned facts, we find, as did the ALJ, that employer received actual notice of the injury on April 13, 2004. We find that this actual notice is sufficient proof that employer was not prejudiced by employee's failure to provide written notice of the accident within one month of April 13, 2004.

Having found that employer received actual notice of the accident on April 13, 2004, and that employer failed to file a report of injury within one month of that date, we find that the three year statute of limitations under § 287.430 RSMo is applicable. Therefore, because the April 13, 2004, injury occurred more than three years prior to employee's January 29, 2008, claim for compensation, employee's claim can only be deemed timely filed if employer provided a last payment on account of the April 13, 2004, injury after January 29, 2005. We find that employer did not provide any payment on account of the April 13, 2004, injury.

The ALJ concluded that employee's claim for compensation was timely filed within the three year statute of limitations on a finding that Dr. Blatt's treatment of employee on June 10, 2005, was authorized by employer and was related to the April 13, 2004, accident, not the March 21, 2002, accident. We find that the competent and substantial evidence refutes this finding by the ALJ.

Employer's workers' compensation plant representative, Ms. Rickner, credibly testified that the last workers' compensation benefit employer paid with respect to employee – for any injury – was an office visit with Dr. Blatt on September 20, 2004. Ms. Rickner referred to Employer's Exhibit 6, which shows employer's payments made with respect to employee's claim. Said exhibit confirms Ms. Rickner's testimony. Ms. Rickner went on to testify that the exhibit shows that the sole payment of any kind made by employer within three years of January 29, 2008, was a \$75.00 payment to Dr. Blatt's office for a July 7, 2005, rating report. Employer's payment for a rating report does not constitute a payment made under Chapter 287 on account of the injury and, therefore, does not toll the statute of limitations under § 287.430. See *Lloyd v. County Electric Co.*, 599 S.W.2d 57, 60-61 (Mo. App. 1980). In addition, Dr. Blatt testified that his opinions contained in the July 7, 2005, rating report were limited solely to the March 21, 2002, injury. Dr. Blatt further testified that he never even tried to treat employee for any injury other than the March 21, 2002, injury. Therefore, even if employer did pay Dr. Blatt for treatment within three years of January 29, 2008, it would not extend the statute of limitations for the April 13, 2004, injury, because any payments made would have been made on account of the March 21, 2002, injury.

Based upon the foregoing, we find that employee failed to satisfy his burden that employer made any payment under Chapter 287 on account of the April 13, 2004 injury. Accordingly, we find that employee failed to prove that the three year statute of

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limitations should extend beyond April 13, 2007, and therefore, employee's claim is barred by the statute of limitations contained in § 287.430. Employee's claim for benefits is denied. We find that all other issues are moot.

Decision

We hereby reverse the award and decision of the administrative law judge and find that employee's claim for benefits is denied.

The award and decision of Administrative Law Judge Kenneth J. Cain, issued November 8, 2010, is attached hereto for reference.

Given at Jefferson City, State of Missouri, this 18th day of January 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

NOT SITTING
James Avery, Member

CONCURRING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Injury No.: 04-149102

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CONCURRING OPINION

I write separately to disclose the fact that I did not participate in the September 14, 2011, oral argument in this matter. I have reviewed the evidence, read the briefs of the parties, and considered the whole record. I join Chairman Ringer in the Commission's decision.

Curtis E. Chick, Jr., Member

AWARD

Employee: Terry Fairfield

Injury No. 04-149102

Dependents: N/A

Employer: Ford Motor Company

Insurer: Self-Insured

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

Hearing Date: August 19 and August 26, 2010

Briefs filed: October 4, 2010

Checked by: KJC/lh

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: April 13, 2004.
5. State location where accident occurred or occupational disease was contracted: Claycomo, Clay 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, while in the course and scope of his employment for Ford was lifting and pulling on a skid when he felt a pull in his back and sustained a disk protrusion at L4-5 and an aggravation of his prior back impairment.
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: 15 percent to body as a whole.

15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? See Award for additional finding of fact and rulings of law.
17. Value necessary medical aid not furnished by employer/insurer? Undetermined.
18. Employee's average weekly wages: Maximum by agreement.
19. Weekly compensation rate: \$662.55/\$347.05.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: Undetermined.

60 weeks for permanent partial disability @ \$347.05 per week = \$20,823.00

N/A weeks for temporary total (temporary partial) disability.

N/A weeks for disfigurement

22. Second Injury Fund liability:

Second Injury Fund differential: \$315.50 per week for 9 week period June 30, 2006 to September 1, 2006 = \$2,839.50 (See additional findings of fact and rulings of law)

Permanent total disability benefits from Second Injury Fund @\$662.55 per week effective with September 2, 2006.

Total: Undetermined.

23. Future requirements awarded: Undetermined.

Said payments to begin as of the date of the award and to be payable and be subject to modification and review as provided by law.

The compensation awarded herein shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. William Spooner.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Terry Fairfield Injury No. 04-149102
Dependents: N/A
Employer: Ford Motor Company
Insurer: Self-Insured
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: August 19 and August 26, 2010
Briefs filed: October 4, 2010 Checked by: KJC/lh

FINDINGS OF FACT AND RULINGS OF LAW

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

- 1) Whether the limitation period had expired prior to the filing of the claim against the Employer;
- 2) Whether the limitation period had expired prior to the filing of the claim as to the Second Injury Fund;
- 3) Whether the Employee provided his Employer with timely and proper notice of the alleged accident;
- 4) The nature and extent of the disability sustained by the Employee;
- 5) Liability of the Employer for past medical aid in the amount of \$13,022.65;
- 6) Liability of the Employer for future medical benefits;
- 7) Whether as to the claim filed against the Second Injury the Employee sustained an accident as defined by Missouri law; and
- 8) The nature and extent of any liability as to the Second Injury Fund.

At the hearing, Mr. Terry Fairfield (hereinafter referred to as Claimant) testified that he was born on December 12, 1957 and that he had a high school education. He stated that his first job was at Ace Tool and Die where he worked for one year. He stated that afterwards he worked at Ford Motor Company for nearly 30 years.

Claimant testified that he worked on a variety of jobs at Ford including the assembly line and in the market area where he did stock work. He stated that his job in the market area required a lot of bending, twisting and lifting. He described the job as very repetitive and related that on an average day he moved about 30,000 pounds of products.

Claimant testified that he initially injured his back at work on March 21, 2002 while lifting heavy boxes. He stated that the injury occurred as he bent over and lifted a box and felt a

pop in his back and immediate pain. He stated that he initially thought he would be "okay". He stated that by the next morning he was screaming in pain and that he called his fiancée who drove him to the hospital.

Claimant testified that the injury occurred on a Friday and that he reported it to his employer on the following Monday. He stated that his employer referred him to Dr. Steven Reintjes, a neurosurgeon, who ordered a myelogram. He stated that on April 30, 2002 Dr. Reintjes performed a hemilaminectomy and discectomy at L5-S1 on Claimant's low back. He stated that on July 30, 2002 Dr. Reintjes performed a second surgery on his back.

Claimant testified that after the second surgery he received epidural injections, which helped for a day or two. He stated that in November 2002 he had another MRI and that Dr. Reintjes informed him that there was nothing else he could do.

Claimant testified that a friend's daughter who was a nurse recommended that he contact Dr. Geoff Blatt. He stated that on April 30, 2003 Dr. Blatt performed a fusion with screws and cages in his low back by using a bone from his hip. He stated that prior to the surgery he consulted with Dr. Reintjes and that he told Ford about the surgical recommendation.

Claimant testified that Dr. Blatt released him to return to work in August 2003 with a lifting restriction of 20 pounds and further restrictions on bending and pushing. He stated that initially Ford provided light duty. He stated that Ford eventually placed him back in the market area where he worked as a "picker" rather than as a stocker. He stated that the lifting and bending and twisting requirements for the two jobs were essentially the same.

Claimant testified that he did fairly well on the "picker" job although he continued to experience back pain and pain and numbness in his leg. He stated that Dr. Blatt released him from treatment in January 2004 and instructed him to continue to treat with his family doctor. He stated that he had had two or three disk bulges in his back at that time.

Claimant testified that Katrina Powers, his family doctor, renewed his prescriptions and that she also prescribed Prozac for his depression. He stated that he continued to work at Ford between January and April 2004. He stated that every day was difficult. He stated that in March 2004 he contacted Dr. Blatt because his back pain had increased and that he scheduled an appointment with Dr. Blatt for April 2004.

Claimant testified that on April 13, 2004 he sustained another back injury at work. He stated that the injury occurred when he pulled and lifted a skid from a pallet and felt a "funny" felling in his low back. He stated that the pain was different than the pain he had previously experienced.

Claimant then identified a document from Ford's medical department dated April 13, 2004 which stated that he had provided a history of lifting a skid and feeling like something pulled in his back. He stated that the medical department sent him home on that day and instructed him to do no lifting until after he had seen Dr. Blatt. Claimant stated that he saw Dr. Blatt two days later and that the doctor placed him on a 15-pound lifting restriction. He stated that he saw Dr. Blatt on several other occasions after April 2004 as well as Dr. Edwards who prescribed epidural injections during the summer of 2004.

Claimant testified that on June 10, 2005, Dr. Blatt updated his work restrictions and told him to lift no more than 10 pounds and to not drive a fork-lift. He stated that Dr. Blatt told him that he was not a surgical candidate. He stated that on July 7, 2005, Dr. Blatt told him that he was at maximum medical improvement as a result of the work injury and that he should continue treating with his family doctor.

Claimant testified that after his April 2004 injury Ford had placed him on a different job. He stated that his new job was one where workers had performed the duties in the past, but no single person had been assigned to do only that job. He stated that in his new job he would go to various work stations and write down what parts were used and needed for the work. He stated that he made labels. He stated that he pressed buttons. He stated that he worked in his own room and that both Ford and Penske were satisfied with his work. He stated that he worked on the job for two years. He stated that his supervisor complimented him on doing a good job.

Claimant testified that his job did entail a lot of walking. He stated that Dr. Blatt had suggested that he walk as much as possible. He stated that if his pain got too bad he would take a break. He stated that if he had a long walk he would lean on the guardrails and rest. He also stated that he was taking Vicodin before during and after work during that period. He stated that his job involved no lifting over 10 pounds.

Claimant testified that his job after the April 2004 accident was never put up for bids. He stated that he could work at his own pace. He stated that none of his jobs had any time limits.

Claimant testified that during the two year period April 2004 to June 29, 2006 when he retired his back and leg pain was slowly getting worse. He stated that his medications were increased. He stated that he had epidural injections from 2004 through 2009. He stated that the epidurals did not relieve his pain. He stated that Dr. Edwards mentioned a dorsal column stimulator due to his pain. He stated that he chose not to get it due to fear.

Claimant testified that he did not want to retire until he had worked 35 years. He stated that he retired due to his pain. He stated that he lost money by retiring when he did. He stated that he was rarely working a 40-hour week when he retired. He stated that when he retired he needed pain medication to even function.

Claimant complained that he still had constant low back and right leg pain. He stated that it was difficult to sleep. He stated that he was depressed because he could not do anything. He stated that it was difficult to walk, sit or stand for extended periods. He stated that his pain was worse on cold and rainy days. He stated that on good days he did light housework and worked on small engines. He stated that he occasionally made a little money by working on small engines for friends and his neighbors. He stated that since his retirement he had inquired about jobs at a couple of small engine repair shops.

Finally, Claimant testified that Meridian had paid for his surgeries and his treatment with Drs. Powers, Edwards and Blatt. He stated that Ford had always paid the health insurance premiums for the Meridian coverage. He stated that Meridian wanted to be reimbursed for the money it paid. He stated that the treatment he received by the aforementioned doctors had helped with his pain.

On cross-examination by his employer, Claimant admitted that prior to March 2002 he had carpal tunnel syndrome. He admitted that in March 2002 he reported his back injury to the adjustor at Ford and that he did not do so following the alleged April 2004 injury. He stated that he did not report the alleged 2004 injury to the workers' compensation unit because he thought the medical department did "everything". He stated that he believed that the medical department sent him to the workers' compensation unit in 2002.

Claimant admitted that he did not file a claim for compensation for the alleged April 2004 injury until 2008. He stated that it was his understanding that he injured the L4-5 disk in 2004 and the L5-S1 disk in 2002. He acknowledged that in her August 2004 letter, Dr. Chandra had indicated that he was doing fine until he injured his back in April while lifting and twisting at work. He acknowledged that Dr. Edwards in September 2004 had indicated that Claimant had done "quite well" following his last surgery and was essentially pain free until he experienced a lifting incident which caused his pain to return.

Claimant admitted that Ford did not send him to Dr. Blatt. He stated that he did not recall asking Ford to send him to either Dr. Chandra or Dr. Edwards. He stated that he had made some co-payments for his treatment. He admitted that he had not received any bills from Meridian asking him to repay the difference between the amount billed by the medical providers and the amount of money Meridian had paid to the providers.

Claimant admitted that Ford had paid his entire health insurance premiums during the 28 years he worked there. He stated that after he retired Ford continued to pay the entire premium amount.

Claimant admitted that he believed that the plant ran more efficiently due to the work he performed at Ford after 2004. He admitted that he continued to receive his full salary of \$26.40 per hour and his full benefits package after 2004. He admitted that he was not forced to retire.

On cross-examination by the Second Injury Fund, Claimant stated that he had not been off his pain medication since 2002. He stated that prior to 2002 he had no limitations in walking, sitting or standing. He stated that he had no injuries or medical problems prior to March 2002.

Claimant testified that after the alleged April 2004 accident he sometimes went to his car to lie down during his lunch breaks. He stated that Ford allowed him to sit and stand as needed. He stated that Ford essentially created a job for him during the period 2004 to 2006.

On redirect examination Claimant testified that Ford had paid bills charged by Midwest Neurosurgery, Dr. Blatt's office for treating him. He stated that Dr. Blatt ordered x-rays, an EMG and an MRI after the alleged April 2004 injury. He stated that Dr. Blatt changed his lifting restriction from 20 to 10 pounds after April 2004. He stated that he retired because he could no longer take the pain.

Medical Evidence

Claimant offered into evidence two depositions of P. Brent Koprivica, M.D., and numerous other medical reports and records. In the September 2007 deposition, Dr. Koprivica

testified that he was board certified in emergency medicine and by the American Board of Preventative Medicine in the subspecialty of occupational medicine. He stated that his original report was dated January 29, 2004.

Dr. Koprivica noted Claimant's history. He stated that the three surgeries were necessary. He stated that Claimant was still taking two Vicodins per day in January 2004 and that Claimant complained of ongoing back soreness and pain and numbness in his right leg and foot.

Dr. Koprivica concluded that Claimant had sustained a permanent partial disability of 50 percent to the body as a whole due to the injuries Claimant sustained in the March 2002 accident at work. He stated that in January 2004 he had concluded that Claimant was not totally disabled. He stated, however, that after reviewing Mr. Dreiling's February 4, 2007 vocational evaluation he wrote an addendum to his initial report and concluded that Claimant was permanently and totally disabled.

On cross-examination by Claimant's Employer, Dr. Koprivica admitted that he did not re-examine Claimant prior to changing his opinion three years later when he concluded that Claimant was permanently and totally disabled. He admitted that he did not change his opinion based on any new medical findings or restrictions. He admitted that Claimant was still working when he examined him in January 2004.

Dr. Koprivica admitted that he had not recommended a vocational assessment in January 2004 to aid in his evaluation of the case. He admitted that he had done so in cases he considered close. He acknowledged that there were notations in Claimant's medical records showing that Claimant had done fine after the fusion and until April 2004 when he pulled on the skid at work and complained of a significant increase in his back pain.

Claimant's Exhibit FF was Dr. Koprivica's May 26, 2010 deposition testimony. Dr. Koprivica testified that he had re-examined Claimant on March 3, 2010. He stated that based on new information provided to him he had concluded that Claimant had sustained a subsequent injury to his low back in April 2004.

Dr. Koprivica described the April 2004 injury as "significant". He concluded that the April 2004 accident had resulted in a disk protrusion at L4-5 and an aggravation of Claimant's pre-existing low back problems. He concluded that Claimant had sustained a permanent partial disability of 15 percent to the body as a whole as a result of the April 2004 injury. He concluded that the disability from the April 2004 injury had combined with Claimant's pre-existing 50 permanent partial disability to the body as a whole from Claimant's March 2002 accident to render Claimant permanently and totally disabled.

Dr. Koprivica concluded that Claimant had a failed back syndrome. He concluded that Claimant would need ongoing pain management as a result of the April 2004 injury and noted that Claimant was taking Ms Contin, a very potent sustained release morphine derivative as well as Vicodin. He stated that the treatment Claimant had received was reasonable and necessary.

On cross-examination by Claimant's Employer, Dr. Koprivica testified that he had made a mistake in 2007 when he changed his opinion after reviewing Mr. Dreiling's vocational

assessment and concluded that Claimant was permanently and totally disabled due to the injuries Claimant had sustained in the March 2002 accident at work. He reiterated that in his opinion Claimant was totally disabled due to a combination of the disability from the March 2002 and April 2004 injuries.

On cross-examination by the Second Injury Fund, Dr. Koprivica testified that Claimant had reached maximum medical improvement for the alleged April 2004 injury in July 2005 when Dr. Blatt rated Claimant's disability.

Claimant's Employer offered into evidence the deposition testimony of Geoffrey L. Blatt, M.D., of Midwest Neurosurgery Associates. The deposition was taken on January 7, 2008. Dr. Blatt testified that he had been with Midwest Neurosurgery since completing his residency in 1992. He stated that his specialty was neurological surgery.

Dr. Blatt stated that he had "probably" performed 200 to 250 surgeries a year since he became a practicing neurosurgeon. He stated that he performed "about" 500 surgeries a year while he was in his residency program. He stated that he remembered Claimant.

Dr. Blatt testified that he initially saw Claimant on December 23, 2002. He stated that his diagnosis was foraminal stenosis, which he believed was causing an L5-S1 radiculopathy. He recommended a decompression and removal of scar tissue and a fusion to take pressure off the nerves. He stated that he performed the fusion on April 10, 2003 and that it involved the insertion of cages to lift the disk spaces to prevent another collapse downward and a re-pinch of the nerve roots.

Dr. Blatt concluded that Claimant had a limited pain tolerance as demonstrated by Claimant's complaints during the removal of his sutures following the surgery. He stated that the removal of sutures should not have caused any pain. He stated that he released Claimant to limited duty on July 30, 2003. He stated that Claimant continued to improve and that on January 5, 2004 he released him from care. He stated that Claimant was at maximum medical improvement as of that date. He stated that Claimant could work with the restrictions he provided to him as of January 2004.

Dr. Blatt testified that on April 15, 2004 Claimant provided a history of "having more low back pain and right leg pain" after he pulled on a skid at work. He noted some inconsistencies on Claimant's straight-leg raising tests in the incumbent and sitting positions. He stated that an MRI showed no nerve root impingement but mild degenerative changes. He stated that the fusion was intact.

Dr. Blatt testified that Claimant continued to complain of pain over the next few months. He stated that in September 2004 Claimant had some give-away weakness, which was indicative of embellishment. He concluded that Claimant had sustained a permanent partial impairment of 10 percent to the body as a whole due to the March 2002 accident at work. He stated that after reviewing the records, Dr. Koprivica's deposition testimony and considering the history Claimant provided to him, he had concluded that there was probably a second injury in April 2004. He noted that Claimant had said, "I was doing well until I pulled a pallet the other day." Finally, he stated that he assumed that Claimant's employer's workers' compensation insurer had paid for the treatment he rendered to Claimant.

On examination by Claimant's employer, Dr. Blatt noted that both Claimant and Claimant's employer had sought an opinion from him regarding an apportionment of the disability between the March 2002 and April 2004 accidents. He indicated that in his opinion Claimant had a permanent partial impairment of 10 percent to the body as a whole due to his back impairment.

Dr. Blatt testified that foraminal and epidural injections were of no long term benefit to any patient and that he did not prescribe either for his patients. He stated that Claimant did not need a dorsal column stimulator which was not effective for axial spine pain such as Claimant's. He stated that intrathecal pain pumps were addicting. He stated that "I honestly think this country is screwed up when it comes to treating pain."

Dr. Blatt testified that it was reasonable to treat Claimant with nonsteroidal anti-inflammatory medications. He stated that he would approve up to two Vicodin per day for Claimant.

Claimant also offered into evidence three large volumes of exhibits. Most of the medical reports and records were cumulative of the testimony. On December 23, 2002 Dr. Blatt had noted in a letter to Dr. Reintjes: "I don't believe Mr. Fairfield was approved to come see me by workers' compensation". On April 21, 2003, Dr. Blatt noted that Claimant no longer had the sharp or radicular pains. On May 30, 2003, he noted that Claimant was "very" hesitant to go back to work too soon. On July 30, 2003 he released Claimant to limited duty. On January 5, 2004 he released Claimant to return to assembly line work.

A Ford Motor Company record dated November 15, 2004 noted that Claimant had stated that "I stepped in hydraulic fluids on the floor and slipped and hurt my back, I am helping train on a picker job in market area, I have been doing that just yesterday, I didn't fall as reported by Nurse Workentine."

Exhibit PP showed that on November 11, 2008, Claimant was admitted to St. Mary's Hospital with complaints of chest pain and dyspnea. It was noted that Claimant had a "somewhat atypical presentation." Under history it was noted that Claimant was at his workplace when he suddenly developed an onset of chest discomfort and shortness of breath which was quite severe.¹ It was also noted that Claimant was on early retirement from Ford Motor Company.

Claimant's Exhibit YY contained records from Meridian Resource Company, LLC showing that Blue Cross Blue Shield was Claimant's health insurance carrier. The records showed that Blue Cross had paid bills for treatment rendered by Drs. Blatt, Edwards and Powers.

Claimant's Exhibit ZZ was a medical bill summary prepared by Claimant and which stated that the Meridian lien was in the amount of \$13,022.65. Exhibit CCC contained bills from Midwest Neurosurgery Associates, P.C., or Dr. Blatt's office.

¹ None of the parties addressed whether Claimant was working in November 2008 or as to whether the record was in error. Claimant testified that he retired from Ford in June 2006.

Claimant's employer also offered medical records and other exhibits into evidence. Employer/Insurer's Exhibit 3 contained the curriculum vitae and medical records of Dr. Geoffrey Blatt. Dr. Blatt's curriculum vitae showed that he was board certified in neurological surgery. It also showed that he had been president of the Missouri State Neurological Society and that he had held various other offices. His numerous publications and presentations were listed.

Employer and Insurer's Exhibit 6 was entitled Ford Workers' Compensations System. The records showed that a check in the amount of \$75 was paid to Midwest Neurosurgery Associates on July 26, 2005. Seven payments were made to Midwest Neurosurgery Associates in the year 2004, including five on or after the date April 15, 2004.

Employer and Insurer's Exhibit 3 was a letter from Meridian Resource Company, LLC, dated July 24, 2007 addressed to Ford Motor Company. The letter stated that Blue Cross Blue Shield was Meridian's client and that Blue Cross Blue Shield's contract contained an exclusion for workers' compensation injuries. Included in the exhibit was a notice sent to Claimant's attorney advising that Blue Cross Blue Shield was seeking reimbursement for \$4,811.72.

Employer/Insurer's Exhibit 1 was a Report of Injury stating that Claimant was injured on April 6, 2004 and that the employer was notified of the injury on April 13, 2004.

Vocational Evidence

Claimant offered into evidence the October 17, 2007 and July 26, 2010 depositions of Michael J. Dreiling, a vocational rehabilitation counselor and the report of Bud Langston, also a vocational rehabilitation counselor. Mr. Dreiling concluded in the October 2007 deposition that Claimant could not do any of the non-accommodated jobs at Ford. He stated that based on the medical restrictions he did not believe that Claimant was a candidate for retraining. He concluded that it was highly unlikely that Claimant could realistically be employed in the labor market. He stated that he would not expect an employer in the usual course of business to employ Claimant. On cross-examination, he stated that he was not aware of any jobs in the labor market where a person could just push an electronic button on an MRT system and direct high-lows to move parts to different areas of a plant.

Claimant's Exhibit HHH was Mr. Dreiling's July 26, 2010 deposition testimony. Mr. Dreiling admitted that he had not evaluated Claimant since January 2007. He stated that on May 6, 2010, he wrote an addendum to his initial report after he reviewed some additional information and medical reports, including Dr. Koprivica's new restrictions. He stated that based on the new restrictions given by Dr. Koprivica Claimant was now functioning at less than a sedentary level due to the need to alternate positions and to lie down.

In Exhibit CC Mr. Langston indicated that he had evaluated Claimant on November 6, 2007 to assess the effects of the March 2002 accident. He concluded that Claimant could do jobs such as hand packager, light assembly worker, package courier and production worker. He stated that the jobs allowed a sit-stand option and were within Claimant's lifting restrictions

The remaining evidence was cumulative of the testimony and the other evidence as set out above.

Law

After considering all the evidence, including Drs. Koprivica and Blatt's depositions, the medical reports and records, Mr. Dreiling's depositions, Mr. Langston's vocational report, the other exhibits, Claimant's testimony and observing Claimant's appearance and demeanor, I find and believe that neither Claimant's employer nor the Second Injury Fund proved that the limitation period had expired prior to the filing of the claim. I find that Claimant proved that he provided actual notice of the alleged accident and injury on the day of their occurrence and that he proved accident as to his claim against the Second Injury Fund. I find that Claimant proved that he sustained a permanent partial disability of 15 percent to his body as a whole due to the injury he sustained in the April 2004 accident. He proved his employer's liability for future medical benefits as set out in the award. He did not prove his employer's liability for any additional past medical benefits. He also proved that he was rendered permanently and totally disabled due to a combination of the disability he sustained in the April 2004 accident at work and the preexisting disability to his low back. Claimant's employer and the Second Injury Fund are ordered to pay benefits as set out in the award.

Burden of Proof

Claimant had the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2nd 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3rd 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant met his burden of proof as set out above.

Limitation Period

Claimant's employer and the State Treasurer as Custodian of the Second Injury Fund, however, had the burden of proof on the affirmative defense that the limitation period had expired prior to the filing of the claim. Goff v. Fowler, __S.W.3d__ 2010, (W.D. Mo. 9-14-10) (No. W.D. 71825) WL 3540378; Clayton Center Associates v. W. R. Grace & Co. 861 S.W. 686 (Mo. App. E.D. 1993); Rule 55.08. Neither met its burden of proof.

The applicable statute pertaining to the limitation period provides in pertinent part as follows:

287.430. Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. . . . A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter,

whichever is later. . . The statute of limitations contained in this section is one of extinction and not of repose.

§ 287.430 RSMo. 1994.

Section 287.380 as referenced above provides in pertinent part:

287.380. 1. Every employer or his insurer in this state, whether he has accepted or rejected the provisions of this chapter, shall within thirty days after knowledge of the injury, file with the division under such rules and regulations and in such form and detail as the division may require, a full and complete report of every injury or death to any employee for which the employer would be liable to furnish medical aid, other than immediate first aid which does not result in further medical treatment or lost time from work, or compensation hereunder had he accepted this chapter . . .

§ 287.380 RSMo. 1994.

Thus, Claimant's employer had thirty days after knowledge of the alleged injury to file a report of injury with the Division of Workers' Compensation. Claimant's alleged injury at work occurred on April 13, 2004.² Claimant's employer had knowledge of the injury on that date. See Employer and Insurer's Exhibit 1, the report of injury, which states that Claimant notified his employer of the injury on April 13, 2004. Claimant's employer completed the report of injury. Claimant's employer did not file the report of injury with the Division of Workers' Compensation until February 2008. Therefore, the report of injury was not filed on a timely basis as set out in § 287.380. Claimant had three instead of two years from the date of injury or last payment in the case to file his claim for compensation.

Claimant filed his claim for compensation against both his employer and the State Treasurer as Custodian of the Second Injury Fund on February 4, 2008. That was more than three years after the alleged April 13, 2004 accident at work. Thus, the issue involved whether Claimant's employer had made any payments on account of the April 2004 injury and if so did it make any payments on or after February 4, 2005.

Employer and Insurer's Exhibit 6 was a document entitled Ford Workers' Compensation System. The document showed payments made by Ford on account of Claimant's alleged work-related back injury or injuries. The document showed that the injury reserves were for a March 21, 2002 accident. Claimant's employer appeared to argue that any payments listed in the document were made on account of the March 2002 accident and not the April 2004 accident. Claimant's employer, however, cited no cases or authority showing that if there were two injuries at work and that due to an employer's internal accounting error or error in treating the

² There was some confusion as to the exact date the alleged injury occurred. The report of injury and Claimant's claim for compensation listed an injury date of April 6, 2004. Claimant testified that the injury occurred on April 13, 2004 and requested leave to amend his claim at the hearing to reflect that date. The claim was so amended without objection by his employer or the Second Injury Fund.

injuries as one; that the payments had been found to be made on account of the earlier injury and not the later injury.

The evidence clearly showed that neither Claimant's employer nor Claimant initially treated the alleged April 2004 injury as a separate or new injury. Neither chose to do so until it became clear that it was in their best interest to do so.³ Thus, Claimant had no way of knowing whether his employer was paying the bills for his treatment rendered after April 2004 on the March 2002 case or on the April 2004 case. His employer never notified him that the April 2004 case was being denied or that treatment was being denied in that case. His employer never notified him that the bills it paid for treatment after April 2004 were being paid on account of the March 2002 case and not the April 2004 case.

Claimant, as noted earlier, also told his employer about the alleged April 2004 injury on the day it occurred. He saw Dr. Blatt about his back complaints two days later. Dr. Blatt ordered x-rays and an MRI on April 29, 2004. Claimant's employer paid for the treatment. Dr. Blatt saw Claimant on several other occasions in 2004 and on July 7, 2005 as a follow-up for Claimant's low back complaints.

Claimant's Employer's Exhibit 6 showed that a check was dated July 26, 2005 and paid to Dr. Blatt's office, Midwest Neurosurgery Associates for treatment rendered to Claimant on July 7, 2005. The cancelled check was not offered into evidence. Thus, it could not be determined whether the cancelled check showed on its face that Claimant's employer had characterized the payment as being made on account of the March 2002 accident as opposed to the alleged April 2004 injury.

The treatment in July 2005 and paid for by Claimant's employer on July 26, 2005 was rendered three years and four months after the March 2002 accident. It was rendered 15 months after the alleged April 2004 accident. The treatment was two years and three months after Dr. Blatt performed the fusion on Claimant's low back in the March 2002 case. The treatment was 18 months after Dr. Blatt found that Claimant was at maximum medical improvement for the March 2002 injury and released Claimant from treatment. The treatment was 18 months after Claimant's rating physician, Dr. Koprivica, had concluded that Claimant had reached maximum medical improvement for the March 2002 injury. Dr. Koprivica rendered a disability rating in January 2004.

Furthermore, at his deposition, Dr. Blatt testified on cross-examination by the Second Injury Fund that on July 7, 2005 he had found Claimant to be at maximum medical improvement for the April 2004 injury. That constituted evidence that Dr. Blatt considered the follow-up examination on that date as treatment for the April 2004 injury. He had found Claimant to be at maximum medical improvement for the March 2002 injury in January 2004.

Claimant's employer and the Second Injury Fund, as noted above, had the burden of proof on the affirmative defense that the limitation period had expired prior to the filing of the claim. Goff; Clayton Center Associates. For the reasons stated above, neither met its burden of proof. The evidence did not show that the payment made on July 26, 2005 for treatment rendered on July 7, 2005 was on account of the March 2002 injury and not the April 2004 injury.

³Two separate injuries meant that the Second Injury Fund could possibly be liable for permanent total disability benefits if Claimant proved that he was so disabled. See § 287.220 RSMo. 1994

The most credible evidence indicated that the treatment rendered in July 2005 and paid for on July 26, 2005 was on account of the April 2004 injury and not the March 2002 injury which occurred two years earlier. Thus, Claimant had three years from July 26, 2005 or until July 26, 2008 to file his claim for compensation against his employer. He filed his claim for compensation against his employer on February 4, 2008. The claim was filed on a timely basis. Claimant also filed his claim for compensation on a timely basis as to the Second Injury Fund. See § 287.420, which provides that the employee has one year from the date he files a timely claim as to his employer to file his claim against the Second Injury Fund. Claimant filed his claim against both his employer and the Second Injury Fund on the same date.

Notice

The applicable statute pertaining to notice provides as follows:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission finds that there was good cause for the failure to give the notice, or that the employer was not prejudiced by failure to receive the notice. No defect or inaccuracy in the notice shall invalidate it unless the commission finds that the employer was in fact misled and prejudiced thereby.

§ 287.420 RSMo. 1994.

Thus, pursuant to the statute Claimant had 30 days from the date of the injury to provide his employer with notice of the injury. Actual notice is sufficient if the employee did not provide written notice as set out in the statute. Doerr v. Teton Transp., Inc., 258 S.W.3d 514 (Mo. App. S.D. 2008); Pursifull v. Braun Plastering & Drywall, 233 S.W. 219 (Mo. App. 1993). Knowledge is imputed to the employer when it is given to a supervisor. Dunn v. Hussman Corp., 892 S.W. 2d 676 (Mo. App. 1994).

Employer and Insurer's Exhibit 1, the report of injury, was completed by Claimant's employer and stated that Claimant notified his employer of the April 13, 2004 injury on April 13, 2004. That was actual notice. It was provided within 30 days of the accident. Claimant's employer was not prejudiced in anyway by the failure to receive written notice. Claimant clearly proved that his employer had sufficient notice of the alleged injury as required by law. Doerr; Pursifull; Dunn.

Accident

The applicable statute pertaining to accident provides in pertinent part as follows:

2. 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. 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. An injury is not compensable merely because work was a triggering or precipitating factor.

§ 287.020 RSMo. 1994.

Claimant’s employer admitted that Claimant sustained an accident at work on April 13, 2004 as defined by Missouri law. The Second Injury Fund argued that Claimant did not sustain an accident as defined by Missouri law. Thus, Claimant needed to show that his injury was clearly work related and that his work was a substantial factor in the cause of his resulting medical condition or disability.

Claimant testified that he injured his back at work in April 2004 while he was lifting and pulling on a skid. He alleged that while lifting and pulling on the skid he experienced “a funny” feeling in his back and that the pain was different than the pain he had previously experienced. The plant nurse’s records from April 13, 2004 contained Claimant’s history of the injury given on that date. Claimant told the nurse that he felt as though he pulled something in his back when he lifted the skid.

Dr. Blatt had found Claimant to be at maximum medical improvement for the March 2002 injury in January 2004. Dr. Blatt had released Claimant to return to his regular duties at work in January 2004. Claimant testified that his regular duties involved heavy repetitive lifting, twisting and turning.

Dr. Koprivica, who testified on Claimant’s behalf, examined Claimant in January 2004. Dr. Koprivica concluded that Claimant was at maximum medical improvement for the March 2002 accident in January 2004. Dr. Koprivica concluded in January 2004 that Claimant had sustained a permanent partial disability of 50 percent to the body as a whole as a result of the injuries Claimant sustained in the March 2002 accident. Both Drs. Koprivica and Blatt concluded that the alleged April 2004 injury was a new injury. Dr. Koprivica concluded that the alleged April 2004 accident had resulted in a disk protrusion at L4-5 and an aggravation of Claimant’s pre-existing low back impairment.

The Second Injury Fund offered no medical opinions. The Second Injury Fund offered no evidence. Both Claimant and his employer offered a medical opinion that Claimant had sustained a new injury in April 2004. Based on the most credible evidence offered Claimant proved that his alleged April 2004 injury was clearly work-related. He proved that his alleged April 2004 injury was a new injury. He proved that his work was a substantial factor in causing the resulting medical condition and the disability. Claimant met his burden of proof on the issue of accident.

Nature and extent

Claimant proved that he sustained a disk protrusion at L4-5 and that he aggravated his preexisting low back impairment as a result of the alleged April 2004 accident at work. Dr. Koprivica concluded that Claimant had sustained a permanent partial disability of 15 percent to his body as a whole as a result of the injuries Claimant sustained in the April 2004 accident. Dr. Blatt rated Claimant's overall permanent partial impairment to the back at 10 percent to the body as a whole. Although Dr. Blatt made a very credible witness, his rating was not representative of the overall disability Claimant had sustained to his low back. As noted above, Claimant had three back surgeries plus the disability resulting from the April 2004 accident. Dr. Koprivica's rating was more credible. Based on the most credible competent evidence offered Claimant proved that he sustained a permanent partial disability of 15 percent to his body as a whole as a result of the injuries he sustained in the April 2004 accident at work. At a rate of \$347.05 per week for 60 weeks, Claimant's employer is liable for \$20,823. Claimant's employer is ordered to pay that amount to Claimant.

Permanent Total Disability

Total disability is defined in the statute as an inability to return to any employment and not merely . . . inability to return to the employment in which the employee was engaged in at the time of the accident. See § 287.020 (6) RSMO.2005; Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. 1995); Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo. App. 1982); Crums v. Sachs Electric, 768 S. W. 2d 131 (Mo. App. 1989).

The statute provides that the Second Injury Fund is liable for permanent total disability benefits if the permanent partial disability from the injury on the job combines with the employee's preexisting permanent partial disability to render the employee permanently and totally disabled. § 287.220 RSMo. 1994. The employee must also prove that his preexisting permanent partial disability was a hindrance or obstacle to his employment or reemployment. *Id.*

Missouri Courts have made it clear that the test for permanent total disability is whether any employer in the usual course of business would reasonably be expected to employ the injured worker in his present physical condition. Boyles v. USA Rebar Placement, Inc., 25 S.W.3d 418 (Mo. App. W.D. 2000); Cooper v. Medical Center of Independence, 955 S.W.2d 570 (Mo. App. W.D. 570); Brookman v. Henry Transportation, 924, S.W.2d 286 (Mo. App. 1996).

Thus, the question is whether Claimant is able to work and compete in the open labor market and whether any employer in the usual course of business could be reasonably expected to hire Claimant who was born in 1957 and had three recent back surgeries, including a fusion with cages at L5-S1, and a subsequent back injury which resulted in additional disability. Claimant also requires narcotic pain medication on a daily basis. He has a high school education with no additional schooling or training for thirty plus years. He has performed manual labor his entire working career and he can no longer do that type of work. He has no typing or computer skills. He has never done sedentary work. His vocational expert concluded that he was not a candidate for retraining.

Claimant alleged that he was rendered permanently and totally disabled by a combination of the disability he sustained in the April 2004 accident at work and his preexisting disability from the March 2002 accident. Dr. Koprivica concluded that Claimant was so disabled. Mr. Dreiling, Claimant's vocational expert, concluded that there were no jobs that Claimant could do considering Claimant's age, education, past work history, lack of any transferable work skills and the medical restrictions. He concluded that no employer in the usual course of business could reasonably be expected to hire Claimant.

Claimant's employer and the Second Injury Fund argued that Claimant was not permanently and totally disabled. Both argued that Claimant worked for two years after the April 2004 accident. The Second Injury Fund further argued that the cases, James Rector v. Gary's Heating and Cooling and the Treasurer of the State of Missouri as Custodian of the Second Injury Fund, 293 S.W.3d 143 (Mo. App. S.D. 2009) and Miller v. State Treasurer, 978 S.W.2d 808 (Mo. App. 1998) supported its position.

The evidence did show that Claimant worked for two years after the April 2004 accident. Claimant argued that his job during that two year period was "made" work created especially for him by his employer of nearly 30 years and that no other such jobs existed in the open labor market. Claimant's vocational expert noted that Claimant's job was accommodated. He too noted that there were no other such jobs in the open labor market.

Claimant argued that he could no longer do the job created especially for him. Claimant argued that in the job created for him by his employer of nearly 30 years he primarily pressed buttons and made labels. He argued that although he worked in a union shop the job made especially for him was not put out for bid by union members. He stated that in the job made especially for him he was allowed to work in a private office and to alternate between sitting, standing and walking as needed. He stated that his employer allowed him to rest as needed when he had to do any walking at the plant. He stated that during his breaks and lunch periods he would often go to his car and recline or lie down in an effort to relieve his pain. He stated that he missed a lot of days from work during the two year period due to his pain. He stated that he went home from work early during the two year period a lot of times due to his pain. He stated that he was on increased dosages of narcotic pain medication during the two years. He stated that a dorsal column stimulator was prescribed for him near the end of the two-year period. He stated that he worked as long as he could.

Neither Claimant's employer nor the Second Injury Fund offered any evidence to dispute Claimant's allegations. Neither offered the testimony of any supervisor or co-employee at Ford to dispute Claimant's testimony. Neither offered any personnel records or job descriptions to dispute Claimant's allegation that a job was created especially for him after the April 2004 accident and that on the job he primarily pressed buttons and made labels. Neither offered any attendance records to dispute Claimant's testimony that he missed a lot of days from work and went home early on many other days due to his pain. No explanation was offered by Claimant's employer or the Second Injury Fund as to why if Claimant's job were not made or created especially for him it was not put out for bids which would have allowed union employees with more seniority to bid on it. Neither Claimant's employer nor the Second Injury Fund offered any evidence to dispute Claimant's allegation that there were no jobs in the open labor market such as the one his employer created especially for him after the April 2004 accident at work.

Neither offered any evidence to dispute Claimant's allegation of severe disabling pain. Neither offered any evidence that Claimant could have continued to work on the job created for him.

In addition, the cases cited by the Second Injury Fund were clearly distinguishable from Claimant's. In Rector the employee sustained an injury at work in 2004. The employee returned to work on a part-time basis at an accommodated job. The accommodation only involved lifting and the part time duties. The employee alleged an injury at work in 2005. The Second Injury Fund in Claimant's case argued in its brief that "Given the part-time accommodated work that the employee was performing in the Rector case the Court essentially found the employee to be employable in the open-labor market prior to his 2005 work injury". Apparently, the Second Injury Fund was attempting to make an analogy with Claimant's case and to use the Rector case to show that Claimant's accommodated work in the job his employer made or created especially for him showed that Claimant was employable in the open labor market.

The analogy was misplaced. The facts in Claimant's case and the Rector case were clearly different. Mr. Rector's job when he returned to work after the 2004 accident clearly showed that he could work in the open labor market. Claimant's job did not. Mr. Rector's job was as a supervisor and he sustained the 2005 injury while drilling holes in concrete. There are numerous supervisor jobs in the open labor market and numerous jobs where the employee has to use drills and to drill holes in concrete. There was no evidence that any jobs existed in the open labor market where the employee primarily pressed buttons and made labels or performed similar duties as Claimant's job required him to do.

Similarly, the Miller case cited by the Second Injury Fund appeared to offer no support for the Fund's position. In Miller the employee had a disabling pre-existing condition. The employee sustained an injury on the job. The Labor and Industrial Relations Commission affirmed an administrative law judge's decision that the employee was permanently and totally disabled by her pre-existing condition alone. The administrative law judge's decision did not address the question of how the employee could be permanently and totally disabled and yet she was able to continue to work in the open labor market and to sustain a subsequent injury at work for which she received permanent partial disability benefits.

The Missouri Court of Appeals reversed the Labor and Industrial Relations Commission's decision and found that the employee's permanent total disability resulted from a combination of the employee's pre-existing permanent partial disability and the disability from her subsequent injury on the job. Thus, the Court found that the Second Injury Fund was liable for the permanent total disability benefits.

The Court noted that Ms. Miller's job during the year in which the judge erroneously found that she was permanently and totally disabled involved production work. Ms. Miller's duties were the same as those of the other production workers. She had no accommodations. The personnel manager for her employer even testified that had Ms. Miller failed to meet her production quotas she would have been "removed" from her position. She was not fired or removed from her position. She was clearly performing work available in the open labor market in direct contrast to Claimant's job during the disputed period.

Claimant had no production quotas. He primarily made labels and pressed buttons. He was allowed to work at his own pace and to rest, change positions or do whatever was necessary

for him to perform the duties of his accommodated job. Claimant's job was not work in the open labor market.

Claimant's case was clearly closer in the facts to the recent Labor and Industrial Relations Commission decision in Stancie Molder v. Bank of America and Treasurer of State of Missouri as Custodian of the Second Injury Fund, Injury No.: 02-103900 than to Rector or Miller. In Molder the Commission addressed the same exact arguments raised by the Second Injury Fund in Claimant's case and pointed out how the facts in Ms. Molder's case were distinguishable from those in Rector just as the facts in Claimant's case were distinguishable from those in Rector.

As the Commission noted in the Molder case, Ms. Molder was performing part-time work on a sporadic as-needed basis after her injury at work. Ms. Molder was working from zero to twenty hours per week. She had the option of not reporting to work if she did not believe that she could work on those days. She was allowed by her employer to alternate between sitting, standing and reclining as long as no customers were present. The Commission concluded that, "This irregular work is not employment in the open labor market".

Claimant's work as noted above was not employment in the open labor market. As the Commission noted in Molder it is an oversimplification of the law to address the issue as simply "Is employee able to work". The Commission noted that the law was can the employee compete in the open labor market and would an employer in the usual course of business be reasonably expected to hire the employee in the employee's present physical condition. The Commission cited Sullivan v. Masters Jackson Paving Co. 35 S.W3d 879 (Mo. App. 2001) as support for its position. See also Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. E.D. 1992).

Claimant proved that he could not compete in the open labor market with his three recent back surgeries including the fusion and his subsequent back injury. As noted earlier, he still required narcotic pain medication on a daily basis. The job he performed was made or created especially for him. The uncontroverted evidence showed that he could no longer perform heavy manual labor. He has no transferable work skills. He has never performed sedentary work in the open labor market. His vocational expert concluded that he could not be retrained to do light or sedentary work. Thus, Claimant proved that no employer in the usual course of business would be reasonably expected to hire him.

In addition, Dr. Koprivica testified that Claimant was rendered permanently and totally disabled due to the combined effect of the disability Claimant sustained in the April 2004 accident and Claimant's pre-existing disability from the March 2002 accident. Dr. Koprivica was credible in that opinion. The Second Injury Fund chose not to offer a medical opinion. The Second Injury Fund offered no evidence. Based on the most credible, competent evidence offered Claimant proved that he was permanently and totally disabled due to a combination of the disability he sustained in the April 2004 and March 2002 accidents. He proved that the disability from his March 2002 accident which resulted in three surgeries and a fusion at L5-S1 with cages was a hindrance or obstacle to his employment or reemployment as both Drs. Blatt and Koprivica concluded. Claimant proved the Second Injury Fund's liability for permanent total disability benefits. The Second Injury Fund is ordered to pay the benefits as set out in the award.

Start Date for Permanent Total Disability Benefits

Claimant, as noted earlier, proved that he sustained a permanent partial disability of 15 percent to his body as a whole due to his injury in the April 2004 accident. The 15 percent permanent partial disability represented 60 weeks of compensation. Dr. Blatt, Claimant's treating neurosurgeon, rendered a permanent partial disability rating on July 7, 2005. On cross-examination by the Second Injury Fund he testified that Claimant reached maximum medical improvement for the April 2004 injury on July 7, 2005.

Based on the most credible evidence offered Claimant proved that his disability from the April 2004 accident became permanent as of July 7, 2005 in accordance with Dr. Blatt's opinion. Thus, Claimant's employer's liability for the 60 weeks of compensation began on July 8, 2005 and ended on September 1, 2006.

Claimant did not, however, prove that he was permanently and totally disabled as of July 7, 2005 when Dr. Blatt rendered his opinion. Claimant worked until June 29, 2006. He was paid temporary total disability benefits for two days in May 2006. Thus, he did not meet the definition for total disability as defined in the statute until June 30, 2006. See §287.020 RSMo. 1994.

The evidence showed that Claimant completed a third in a series of epidural and foraminal injections in April 2006. His pain management specialist recommended a dorsal column stimulator in late April 2006. He was on increased dosages of pain medication in 2006. He testified that he could not function without the pain medication. He stated that he retired because he could no longer take the pain. The evidence supported his allegations. Neither Claimant's employer nor the Second Injury Fund offered any contradictory evidence.

Thus, Claimant proved that he in fact became permanently and totally disabled effective with June 30, 2006. The Second Injury Fund became liable for the differential between the permanent total disability rate of \$662.55 per week and the permanent partial disability rate of \$347.05 per week or for \$315.50 per week in benefits effective with June 30, 2006. The Second Injury Fund remained liable for the \$315.50 per week in benefits for nine weeks or through September 1, 2006 when Claimant's employer's liability for the 60 weeks of permanent partial disability benefits ended. The nine weeks of benefits equaled \$2,839.50. The Second Injury Fund became liable for permanent total disability benefits at the rate of \$662.55 per week effective with September 2, 2006 and it shall remain so liable for the benefits for so long as Claimant remains so disabled. The Second Injury Fund is ordered to pay the benefits to Claimant as set out in the award.

Past Medical Benefits

Claimant argued that his employer was liable for \$13,022.65 in past medical aid. Claimant offered no evidence showing that the \$13,022.65 was incurred for treatment in the 2004 case as opposed to treatment in the 2002 case. He offered no evidence showing that the treatment was rendered by authorized treating doctors. He offered no evidence showing that his employer was liable for the medical bills.

In addition, Claimant's employer argued that the \$13,022.65 was paid by Blue Cross Blue Shield of Kansas City, Claimant's health insurance carrier. Claimant's employer argued that because it paid the premiums for Claimant's health insurance that it was entitled to a credit for the \$13,022.65. Claimant's employer cited Ellis v. Western Electric Company, 664 S.W2d 639 (Mo. App. 1984) and Morris v. National Refractories & Minerals, 21 S.w.3d 866 (Mo. App. 2000) as support for its argument.

The Morris case specifically pertained to medical bills. The Court specifically found that if the employer were the direct source of the funds for the payment of the employee's medical bills that the employer would be entitled to a credit for any such payments. *Id* at 869. The burden of proving its entitlement to the credit is on the employer. Ellis; Morris.

Claimant's employer clearly proved that it was the direct source of the funds paid for Claimant's medical bills by Blue Cross Blue Shield. The uncontroverted evidence showed that Claimant's employer paid the entire premium for Claimant's health insurance with Blue Cross Blue Shield. Claimant's employer also paid \$96,127.09 for medical treatment in the two cases.

Furthermore, the statute provides that the employer has the right to direct the medical treatment. § 287.140 RSMo. 1994. There was no allegation and no evidence that Claimant's employer had ever refused to provide reasonable and necessary medical treatment leaving Claimant with no recourse but to seek the treatment on his own.

Claimant admitted that Blue Cross was only seeking reimbursement for \$4,811.72 in charges and not the entire \$13,022.65 it paid for medical treatment. He admitted that some of the bills in dispute were for treatment rendered by his family physician. He did not allege that his employer had ever authorized his family doctor to provide such treatment. The medical records showed that Claimant's family doctor provided treatment for a number of non work-related conditions during that period. Claimant did not prove his employer's liability for the bills.

Some of the medical bills in dispute were for prescriptions. Claimant offered no evidence showing that an authorized treating physician had prescribed the medication for the prescription bills in dispute. He did not offer sufficient evidence from which it could be determined for what reason or reasons the medication was prescribed. As noted above, Claimant was receiving treatment for a number of non work-related health problems during the period in which the bills were incurred.

Other bills in dispute were for pain management services. Again, Claimant offered no evidence showing that the medical providers were authorized or that his employer had refused treatment leaving him with no recourse but to obtain the treatment on his own. He admitted on cross-examination that he did not recall asking his employer to send him to Dr. Edwards who provided the pain management services.

One of the disputed bills was for \$67 and for treatment rendered by Dr. Blatt in 2006. The evidence showed that Claimant initially sought treatment with Dr. Blatt on his own. His employer had authorized Dr. Reintjes, a neurosurgeon, to provide treatment. Dr. Blatt released Claimant from treatment in July 2005. There was no credible evidence that Dr. Blatt was authorized to provide treatment in 2006 or that Claimant's employer was liable for the bill.

Finally, Claimant, in his brief failed to explain why or how his employer was liable for any of the disputed bills. He offered no explanation for the bills. He did not argue that any of the bills were for authorized treatment. He did not argue that his employer had ever refused to provide treatment leaving him with no recourse but to obtain it on his own. Claimant did not prove his employer's liability for any of the past medical bills in dispute.

Future Medical Aid

Drs. Koprivica and Blatt concluded that Claimant was in need of future medical aid to cure and relieve Claimant of the effects of the April 2004 accident. Dr. Blatt concluded that it was reasonable to treat Claimant with non steroidal anti-inflammatories and up to two Vicodins per day. Dr. Blatt is a neurosurgeon and a specialist. Dr. Koprivica is not. Dr. Koprivica is a specialist in emergency medicine.

Dr. Blatt's opinion was credible. Dr. Blatt's opinions as a specialist and Claimant's treating neurosurgeon were entitled to more weight than those of Dr. Koprivica. Thus, based on the most credible evidence Claimant's employer is ordered to provide future treatment in accordance with Dr. Blatt's opinion and to continue to provide all reasonable and necessary medical treatment needed to cure and relieve Claimant of the effects of the injury or injuries he sustained in the April 2004 accident. Claimant's employer shall have the right to direct the medical treatment.

Date: _____

Made by: _____

Kenneth J. Cain
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this ____ day of _____, 2010, by:

Naomi Pearson
Division of Workers' Compensation