

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

Injury No.: 09-055474

Employee: Richard Gilpin

Employer: Advantech Solutions

Insurer: National Union Fire Insurance Company of Pittsburgh

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 22, 2013. The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued January 22, 2013, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 10<sup>th</sup> day of July 2013.

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

## AWARD

Employee: Richard Gilpin

Injury No. 09-055474

Dependents:

Employer: Advantech Solutions

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: National Union Fire Insurance Company

Hearing Date: October 29, 2012

Checked by: RJD/cs

### 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: July 13, 2009.
5. State location where accident occurred or occupational disease was contracted: Boone 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 was pushing a cart containing demolished sheetrock up an inclining sidewalk when he felt a sharp stabbing pain in his back and knees, causing him to fall. As the cart came rolling back towards him, Employee was able to catch the cart and again felt the sharp, stabbing pain.
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: permanent total disability.
15. Compensation paid to-date for temporary disability: \$63,878.87.
16. Value necessary medical aid paid to date by employer/insurer? \$201,190.33.

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17. Value necessary medical aid not furnished by employer/insurer? Unknown.
18. Employee's average weekly wages: \$967.85.
19. Weekly compensation rate: \$645.23 for temporary total disability and permanent total disability; \$422.97 for permanent partial disability.
20. Method wages computation: Stipulation.

### COMPENSATION PAYABLE

20. From Employer:

Employer and Insurer are ordered to pay Claimant weekly permanent total disability benefits of \$645.23 per week beginning June 24, 2011 for Claimant's lifetime.

Employer and Insurer are also ordered to provide Claimant with future medical benefits to cure and relieve Claimant from the effects of the work-related injury, pursuant to Section 287.140. RSMo.

21. Second Injury Fund liability:

None.

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

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

Van Camp Law Firm LLC

Employee: Richard Gilpin

Injury No. 09-055474

## **AWARD**

Employee: Richard Gilpin

Injury No. 09-055474

Dependents:

Employer: Advantech Solutions

Additional Party: Second Injury Fund

Insurer: National Union Fire Insurance Company

Hearing Date: October 29, 2012

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

## **ISSUES DECIDED**

The evidentiary hearing in this case was held on October 29, 2012 in Columbia. Claimant, Richard Gilpin, appeared personally and by counsel, Douglas Van Camp and Elizabeth Skinner; Employer, Advantech Solutions, and Insurer, National Union Fire Insurance Company, appeared by counsel, George Floros; the Second Injury Fund appeared by counsel, Assistant Attorney General Curtis Schube. The parties requested leave to file post-hearing briefs, which leave was granted. The case was submitted on December 4, 2012. The hearing was held to determine the following issues:

1. The liability, if any, of Employer-Insurer for permanent partial disability benefits or permanent total disability benefits; and
2. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits; and
3. The liability, if any, of Employer-Insurer for future medical benefits pursuant to §287.140, RSMo.

## **STIPULATIONS**

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue for the evidentiary hearing is proper in Boone County;

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3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Claimant's average weekly wage is \$967.85, resulting in compensation rates of \$645.23 for temporary total disability and permanent total disability and \$422.97 for permanent partial disability;
6. That Claimant, Richard Gilpin, sustained an accident arising out of and in the course of his employment with Advantech Solutions on July 13, 2009 in Boone County;
7. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation herein;
8. That National Union Fire Insurance Company fully insured the Missouri Workers' Compensation liability of Advantech Solutions at all relevant times;
9. That Employer-Insurer paid \$201,190.33 in medical benefits and \$63,878.87 in temporary total disability ("TTD") benefits.

### **EVIDENCE**

The evidence consisted of the testimony of Claimant, Richard Gilpin; the testimony of Gary Weimholt, a vocational rehabilitation consultant; extensive medical records; the deposition testimony and narrative report of Phillip Eldred, a vocational rehabilitation consultant; the narrative report of Dr. David T. Volarich; the narrative report of Dr. Donald DeGrange; and certain records of the Missouri Division of Workers' Compensation.

### **DISCUSSION**

Richard Gilpin ("Claimant") was born March 5, 1958. Claimant currently resides with his sister in Columbia, Missouri. He previously resided in an apartment on Waugh Street in Columbia which had been provided to him by his employer as a condition and benefit of employment. At the time of his accident, Claimant was employed by Advantech Solutions (hereinafter "Employer") which was known to Claimant as Premier Property Service. Claimant

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was employed in the position of caring for and maintaining apartment buildings on the Stephens College Campus in Columbia. In approximately September 2009, while Claimant was treating for his injuries, he was asked by Employer to leave the apartment and has since resided with his sister.

Claimant graduated from high school in 1976 and also accumulated several hours of college level credit during three to four attempts to obtain a college degree over the last 15 to 20 years. Following high school, Claimant enlisted in the Marine Corps in 1979 and continued to serve until 1987, when he received an honorable discharge.

While in the Marine Corps, Claimant served as a supply clerk, a fiscal clerk, a recruiter and an interior guard. He began working for the Boone County Sheriff's Department following the Marine Corps and worked as both a patrol officer and a corrections officer during his three years of employment. Claimant was then employed at Heilig-Meyers Furniture Store where he began as a part-time warehouse clerk and worked his way up through delivery, collections, and on to a management position. He then went to work at Blattner Furniture in a similar capacity.

Following his employment at Blattner Furniture, Claimant began working at Harry S. Truman Veterans Hospital in Columbia as a purchase and hire manager with responsibilities in the construction and remodeling of the facilities. He worked in that capacity for five years before beginning as a project superintendent for Boone Construction, a company involved in commercial construction. In addition to bidding and supervising the jobs, Claimant was also responsible for working directly on the projects. After that employment, he then held down a similar job at Keith Contracting before becoming employed at Boone Hospital in Columbia, with job duties of monitoring and installing HVAC and large power equipment. Claimant worked at Boone Hospital Center for almost three years before going to work at Lowe's Home Improvement store to be a project manager in the plumbing department. As project manager, Claimant was still required to lift products from shelves, operate heavy equipment and be in high areas. He worked at Lowe's for approximately two years before going to work for Employer.

In 2003 and 2004, Claimant sustained work-related motor vehicle accidents when he was twice rear-ended while stopped at stop-lights, which accidents caused pain and injury to his neck, shoulder, lower back and legs. Claimant treated for a period of time continuing through 2007, but then experienced a cessation of symptoms enabling him to train for the Senior Olympics and run three miles in twenty-four minutes. He testified that while he had suffered muscle spasms and minor pains following the car accidents, he had an absence of pain for the 12 to 18 months prior to July of 2009.

Claimant began working for Employer in January of 2008. Claimant's duties included trash collection, helping move students in and out of the buildings, maintaining the physical aspects of the building, along with the HVAC, plumbing and electrical systems, providing

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security, and also serving as a liaison with the parents. Although hired in January, the apartment was not provided until May or June of 2008 and included paid utilities.

As stipulated, Claimant sustained a work-related accident while working for Employer on July 13, 2009. The accident occurred as Claimant was pushing a cart containing demolished sheetrock up an inclining sidewalk when he felt a sharp stabbing pain in his back and knees, causing him to fall. As the cart came rolling back towards him, Claimant was able to catch the cart and again felt the sharp, stabbing pain. He reported the injury to Employer.

Claimant testified that he eventually underwent several surgeries due to his injuries. Although there were only three occasions upon which surgery performed, the first two being done by Dr. Abernathie and last performed by Dr. DeGrange, Claimant testified that he considered himself to have undergone four procedures due to the third surgery being two connected procedures of removal of hardware from a posterior approach followed by a multi-level fusion from an anterior approach.

Medical records document that Claimant requested a referral from the VA Hospital following the accident and then saw Dr. James Corbett at Boone Convenient Care on July 27, 2009, who noted that Claimant had sustained an injury two weeks prior which resulted in immediate onset of sharp pain that continued to worsen. Dr. Corbett noted a lumbar disc injury with right leg radiculopathy due to the work injury and ordered an MRI of the lumbar spine. That MRI report noted a disc protrusion at L5-S1 with a possible disc fragment and recommended a CT myelogram for further correlation.

On August 4, 2009, Claimant saw Dr. Dennis Abernathie of Columbia Orthopaedic Group for an initial visit after he developed increased muscle weakness of his right leg and bladder and bowel incontinence following the MRI. Dr. Abernathie noted the fragments shown on the MRI images were of significant concern due to the risk of paralysis, and a decision was made to move forward with a microdiscectomy at L5-S1. That surgery was performed on August 5, 2009 at Boone Hospital Center, and following surgery Claimant regained three to three and one-half of the four muscle groups that had been lost prior to surgery along with control of his bowels and bladder. He was discharged to return home following the surgery.

A repeat MRI with and without contrast was performed due to Claimant having a right foot drop following the surgery. The MRI noted continued disc protrusion with enhancement and an annular tear at L5-S1. Dr. Abernathie noted soft tissue reaction as well and performed an epidural steroid injection at L5-S1. Dr. Abernathie saw Claimant for follow-up on November 9, 2009 and noted continued weakness and problems in his right foot and ankle for which he requested an EMG of Claimant's lower extremities, which was performed on November 23, 2009 and showed subacute right L5 radiculopathy. Claimant continued to follow up with Dr. Abernathie and received an additional epidural steroid injection on December 7, 2009. On

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January 13, 2010, with Claimant's condition getting worse, Dr. Abernathie ordered a myelogram CT. He also encouraged Claimant to use a cane for walking at this time. The CT was completed on February 8, 2010, and Dr. Abernathie recommended a posterior fusion at L5-S1.

Claimant was seen on February 11, 2010 by Dr. Donald DeGrange for a second opinion. At that time, Claimant had complaints of "intractable low back pain with radiation into the right lower extremity." Dr. DeGrange noted no signs of symptom magnification and no non-organic causes of his pain. After examination, Claimant was diagnosed with herniated nucleus pulposus (HNP) at L5-S1 and Dr. DeGrange opined that the mechanism of injury was consistent with this diagnosis. He recommended that a spinal fusion at L5-S1 be completed and stated that "there is little else to offer the patient."

Dr. Abernathie performed a posterior fusion of L4-S1 on February 22, 2010. Claimant again returned to Dr. Abernathie for continued care following the surgery and, although there was improvement following the surgery, an epidural steroid injection was completed on March 17, 2010 and physical therapy was continued.

On April 29, 2010, Dr. DeGrange again evaluated Claimant for a second opinion. At that time, Claimant was reporting back pain that had not improved since the last surgery, right lower extremity pain, tingling and numbness, weakness in his right foot and ankle, and an increase in the ventral hernia that had developed after completing core exercises completed in physical therapy. Dr. DeGrange recommended a CT and care was transferred from Dr. Abernathie to Dr. DeGrange by Employer/Insurer. The CT myelogram was completed and reviewed by Dr. DeGrange on June 28, 2010. According to the diagnostic scan, a pedicle screw at L5 violated the lateral cortex into the psoas muscle and the bone graft was obliterating the lateral recess at L5-S1 and depressing the S1 nerve root. He also noted that the screws at S1 were shown to be misplaced and had perforated the anterior cortex and were contacting or in close proximity to the common iliac artery. Dr. DeGrange recommended removal of the hardware, decompression of the spine, and fusion through a retroperitoneal approach.

Claimant underwent a third and final surgery on July 9, 2010, which was performed by Dr. Scott Westfall and Dr. DeGrange. The operative note shows a fusion exploration, hardware removal, revision decompression at L5-S1, removal of extruded bone into spinal canal, revision of posterior spinal fusion at L5-S1 with partial vertebrectomy/corpectomy of L5, anterior lumbar interbody fusion of L5-S1, application of anterior instrumentation at L5-S1 and insertion of allograft at L5-S1. Claimant returned to Dr. DeGrange following the surgery and, although there were complicating concerns of a deep venous thrombosis, he was improved and by August 5, 2010, was noted to feel much better in terms of his back and was without significant neurological complaints in his leg although there was some swelling in his right leg. Claimant remained off of work but on a walking program. On October 21, 2010, Dr. DeGrange noted that Claimant continued to have discomfort in his back with occasional symptoms down his leg. He had some

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continued swelling and decreased sensation in his right foot. Dr. DeGrange ordered physical therapy at Rusk Rehabilitation Center at that time and placed Claimant on a 25 pound lifting limit with restrictions as to twisting, stooping and bending.

According to the notes of Dr. DeGrange, Claimant had continued improvement in physical therapy, but experienced an increase in symptoms when he would lie down or stand for any length of time and this was causing Claimant difficulty in sleeping. Claimant was determined to have the ability to perform duties at a medium demand level during a functional capacity evaluation done on February 22, 2011. Those findings included a recommendation that Claimant take frequent rest breaks, and it was noted that his pain increased during the evaluation from a six out of 10 to an eight out of 10 at completion. Claimant's restrictions from Dr. DeGrange remained the same through April 7, 2011, and there continued to be decreased sensation and weakness in Claimant's right foot along with back pain.

Claimant's final visit with Dr. DeGrange was on June 23, 2011, when he was released at maximum medical improvement. Dr. DeGrange noted persisting right lower extremity symptoms and continuing but improved back pain. Dr. DeGrange gave Claimant restrictions which he named as medium demand capacity, but specifically limited him to lifting on an occasional basis from 21 to 50 pounds, on a frequent basis from 11 to 25 pounds, and on a constant basis up to 10 pounds. He also advised Claimant to avoid repetitive bending and twisting and intermittently to sit, stand, and walk. Dr. DeGrange subsequently stated that Claimant had a permanent partial disability rating of 25% as a result of the work-related injury and the subsequent surgeries.

Claimant testified that he cannot sit or stand for any prolonged time as it becomes uncomfortable and painful. He states that he experiences times when his back pain, consisting of a dull aching in the back and burning in the right leg, is limited to a five out of 10 which he describes as a good day. He typically has a good and bad portion of each day and tries to accomplish any small household chores, walking, or goes to church during the good portions of the day. He presently tries to remain as active as he can and often walks and rides his bike, which is part of the treatment outlined early in his treatment by Dr. Abernathie. A bad day, or a bad portion of the day, has pain levels near eight to nine on a scale of zero to 10. Claimant testified that he has gone to the emergency room in the past due to this pain and it is essentially "debilitating" and "excruciating". When the pain is increased and at its worst he testified that he has difficulty walking and does worry when he goes for walks during a good day that his pain will change during the walk and he will be stranded and unable to walk back home. Claimant testified that he has difficulty sleeping and takes two to three naps during the day which last from half an hour to two hours, but still leave him tired and not alert. He testified that he can and has pushed himself to remain awake during the day, but it negatively affects him the next day. Claimant testified that since being released by Dr. DeGrange he has not returned to employment and was approved for Social Security Disability.

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Claimant testified that he had experienced back pain prior to this injury. On February 22, 2005, Claimant was evaluated by Dr. David Kennedy for an independent medical evaluation and was diagnosed with a chronic cervical and lumbar strain. MRI and CT scans done prior to that exam were interpreted by Dr. Kennedy as normal. Claimant was also evaluated by Dr. Robert Bernardi in October 2006 following the two motor vehicle accidents that occurred in 2003 and 2004. Dr. Bernardi evaluated Claimant and recommended completion of six to eight weeks of physical therapy for his neck and back, after completion of which he would consider Claimant at maximum medical improvement.

Medical records from Harry S. Truman Memorial Veteran's Hospital also document that Claimant had treated for both depression and high blood pressure prior to the work injury and continued to treat for such medical issues while recovering from the work injury. Dr. DeGrange noted in June of 2010 that psychiatric help was needed and that the irritation of the great vessels and the psoas was the probable source of the spike in Mr. Gilpin's blood pressure during the previous months. However, after review of medical records, Dr. DeGrange then stated that there was a previous history of both clinical depression and hypertension and that the symptoms and problems that Claimant was experiencing at that time were an aggravation of the pre-existing conditions.

Records of Claimant's initial visit at Boone Convenient Care document that medication was taken at the time of the injury to treat both the depression and high blood pressure, and the continuation of medication use is documented through the VA records. At the time of the hearing, Claimant was on one medication for high blood pressure and a muscle relaxer, but no other medications. Claimant testified that he had been on medication for depression prior to the injury during "sad times" that occurred when family members died or he lost a job, but that he always overcame those times and they never stopped him from getting on with life. Claimant also testified that he generally recalled treating for his hypertension and depression together, but that it was not treatment that he sought out. Instead, he testified that it was part of the work-up that he received from the VA hospital when obtaining the necessary treatment for his asthma, which was a service-related disability. Claimant also acknowledged that he had been tested for sleep apnea and had received a C-Pap machine which he did not use because he found that the machine instead made it more difficult to fall asleep due to the air blowing on his face while he was in pain.

Claimant testified that he had not gone back to work since the accident and did not believe he could be employable. He testified that he did review the help wanted and classified ads but had not found any employment that would allow him to work within his restrictions; especially, the need to lie in a recumbent position during the day. Claimant testified as to frustration over the inability to return to work, something which he had always done, and that it was aggravating to watch others go to work while he is just going to spend the day in pain.

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Claimant alleges that he is permanently and totally disabled and is seeking permanent total disability benefits from Employer or from the Second Injury Fund.

Under Section 287.020.7, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo.App. E.D. 2007). The primary inquiry is whether an employer can reasonably be expected to hire the claimant, given his present physical condition, and reasonably expect the claimant to successfully perform the work. *Id.*

Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that constitutes a hindrance or obstacle to employment or re-employment, that combines with a compensable injury to create a disability greater than the simple sums of disabilities. § 287.220.1 RSMo 2000; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576, (Mo.App.E.D. 1985). When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990). In order to find permanent total disability against the Second Injury Fund, it is necessary that Employee suffer from a permanent partial disability as a result of the last compensable injury, and that disability has combined with prior permanent partial disability(ies) to result in total disability. 287.220.1 RSMo 1994, *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990), *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo.App. 1985). Where preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability **after** the employer has paid the compensation due the employee for the disability resulting from the work related injury. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 366 (Mo.App. 1992) (emphasis added). In determining the extent of disability attributable to the employer and the Second Injury Fund, an Administrative Law Judge must determine the extent of the compensable injury first. *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-43 (Mo.App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is, therefore, necessary that the Employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.

Section 287.200.1 does not require a claimant to distinguish each disability and assign a separate percentage for each of several pre-existing disabilities to prevail on a claim for

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permanent total disability against the Second Injury Fund. Rather, a claimant must establish the extent, or percentage, of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo. App. E.D. 2007).

Dr. David Volarich evaluated Claimant on October 6, 2011 at the request of Claimant's attorney. Dr. Volarich conducted a physical examination, testing, reviewed the medical records and met with Claimant to discuss the medical history and his complaints. At the time that Claimant was seen, approximately 15 months had passed since his last surgery, and he had been at maximum medical improvement for over three months. Claimant noted low back pain of a moderate to severe nature that was located midline and to the right side, which increased upon any flexion, extension, twisting or when using stairs. He had weakness and reduced stability in his legs and noted to Dr. Volarich that he had fallen several times because of his leg problems. He was able to sit for approximately an hour and stand for 30 minutes before having to change positions. Claimant described an ability to assist with household chores, but did all work in short spurts of 10 to 15 minutes at a time. He also discussed that while getting to sleep is a problem due to sleep apnea, it is more of a problem due to the pain which causes him to toss and turn and eventually wakes him up once he has gotten to sleep.

Dr. Volarich diagnosed Claimant with disc herniation with an extruded fragment at L5-S1 to the right, recurrent disc herniation at L5-S1 with instability, hardware failure with persistent instability and right foot drop, status post removal of posterior spinal fusion followed by anterior lumbar fusion with instrumentation at L5-S1, and post laminectomy syndrome. He determined that Claimant is permanently and totally disabled as a direct result of the work related injury of July 13, 2009 standing alone. Dr. Volarich noted that the minor lumbar strains, asthma, and inguinal hernia were all asymptomatic or essentially asymptomatic prior to his accident and were far outweighed by the work accident.

As to any ability to return to work or other activities, Dr. Volarich advised Claimant to avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks on an as needed basis; to not handle any weight greater than 15-20 pounds and to limit this to an occasional basis with proper lifting techniques; to avoid handling any weight away from his body or overhead, and not to carry weight over any long distance or uneven terrain; to avoid remaining in any fixed position for any more than about 20-30 minutes at a time, including sitting and standing; to change positions frequently to maximize comfort and rest when needed, including resting in a recumbent fashion; and finally to pursue an appropriate stretching and range of motion exercise program and non-impact aerobic conditioning. He further found that no work restrictions were needed prior to the work accident on July 13, 2009.

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On June 3, 2010, Claimant was evaluated by Phillip Eldred for a rehabilitation consultation and evaluation, and his deposition testimony was introduced by Claimant. Mr. Eldred previously placed rehabilitated workers in jobs through the Missouri Division of Vocational Rehabilitation for over 25 years and has been evaluating injured workers independently since 1990. He evaluated Claimant and reviewed Claimant's medical records. He noted that Claimant had difficulty standing or walking for periods of time and needed to change position frequently. He noted tremors and substantial complaints of pain. He listed the restrictions outlined by Drs. Volarich and DeGrange, as well as the conclusions by other treating doctors. Mr. Eldred testified that he did not disagree with the findings or conclusion of either Dr. Volarich or Dr. DeGrange; however, he stated that as a vocation rehabilitation counselor he must take all restrictions into consideration.

As to the restrictions of Dr. DeGrange, Mr. Eldred testified that the detailed restrictions on lifting allowed Claimant to be considered for light to medium capacity employment, but that the "special restrictions" (i.e., intermittently sitting, standing, and walking along with restrictions or bending, stooping or twisting at the waist) significantly reduce the number of jobs available to Claimant in the light to medium demand work level. As to Dr. DeGrange labeling the restrictions as medium capacity, Mr. Eldred testified as follows: "I don't believe that Dr. DeGrange is even aware of the special considerations or even the work levels so I'm not taking that into consideration." Further, depending on "how much intermittent sit, stand, walk you're talking about," it could reduce the number of jobs completely.

Mr. Eldred also noted that a worker unable to maintain posture while attending to work tasks, such as Claimant, cannot perform essential duties of many entry-level jobs generally available in the community unless special accommodations are made. Further, as Claimant was also approaching advanced age he would likely be significantly limited in adapting to new work when there are physical restrictions. During his deposition, Mr. Eldred testified as to Claimant's ability to maintain posture during the evaluation and stated that Claimant not only sat at the edge of his chair, but that breaks were taken "quite often" so that he could get up.

Mr. Eldred concluded that Claimant did have an impairment prior to July 13, 2009 that constituted an obstacle or impairment to his employment, but the injury of July 13, 2009 was severe enough in isolation to cause Claimant's current restrictions and limitations. He also noted that Claimant had been working without any restrictions prior to July 13, 2009. Based upon the restrictions and limitations of the physicians, Mr. Eldred concluded that Claimant was prevented from working in competitive employment and was permanently and totally disabled as a result of the July 13, 2009 injury in isolation.

Gary Weimholt evaluated Claimant's file and medical records on behalf of Employer and Insurer and testified at the hearing. Mr. Weimholt opined that the injury of July 13, 2009, did not prevent Claimant from returning to the open competitive labor market based upon the work

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restrictions given by Dr. DeGrange. Mr. Weimholt noted that those restrictions allow for some jobs in the light and sedentary physical demand level. He also noted that when considering the weight limits, positional limits and sitting and standing abilities indicated by Dr. Volarich, Claimant would still be employable in those same demand levels.

Mr. Weimholt did not evaluate Claimant in person. Mr. Weimholt testified that a person's appearance is an important part of the interview and that it is preferred to meet the person, Mr. Weimholt never met, saw, or spoke with Claimant. Mr. Weimholt also did not consider the full restrictions of either physician. He specifically did not address the need to recline or be in a recumbent position as stated by Dr. Volarich. Mr. Weimholt also based his report on restrictions from Dr. DeGrange of no lifting over 40 pounds despite the actual restrictions given by Dr. DeGrange being "more detailed" and, as stated by Mr. Weimholt in his testimony at the hearing, "more restrictive". He further did not address Claimant's inability to sleep for any length of time and thereby did not factor into his conclusion the impact that not being rested has on Claimant's ability to obtain or maintain employment. Mr. Weimholt testified that if Claimant made known his need to be recumbent during the day, employers would not offer him a job. He further testified that employers are looking for alert individuals who can perform their jobs, and that the inability to sleep well on a chronic basis does catch up to a person and affects his ability to perform.

Taking all the evidence into consideration, including my observations of Claimant at the hearing, I find that Claimant cannot compete in the open market for employment in his physical condition, and is thus permanently and totally disabled. Immediately prior to the work injury of July 13, 2009, Claimant was a very healthy 51-year-old. Claimant had successfully rehabilitated himself from the motor vehicle accidents of 2003 and 2004, and had no conditions which could reasonably be considered as a hindrance or obstacle to employment or reemployment. The July 13, 2009 accident required three surgeries; unfortunately, it does appear that the second surgery significantly increased Claimant's disability, thus necessitating a third surgery to attempt to mitigate the damage. The disability occasioned by the July 13, 2009 accident and the subsequent medical treatment has clearly rendered Claimant unable to compete in the open market for employment, notwithstanding any prior injuries or conditions. Employer-Insurer is liable for the payment of permanent total disability benefits, and the Second Injury Fund has no liability.

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

The standard for proof of entitlement to an allowance for future medical treatment cannot be met simply by offering testimony that it is "possible" that the claimant will need future medical treatment. (Citation omitted.) Neither is it necessary, however, that the claimant

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present conclusive evidence of the need for future medical treatment. (Citation omitted.) To the contrary, numerous workers' compensation cases have made clear that in order to meet their burden claimants such as Ms. Dean are required to show by a "reasonable probability" that they will need future medical treatment.

At the time of the hearing, Claimant was taking a muscle relaxer for his back, having weaned himself from all other medications with the advice and consent of his personal physician due to side effects. He testified that he had taken other medications in the past for his back, but currently treated with the physicians at the Veteran's Hospital and trusted them with his care. Dr. Volarich did recommend and opine that in addition to muscle relaxers, Claimant would need other ongoing care to provide him with symptomatic relief for his pain syndrome, including physical therapy, steroid and trigger point injections, TENS unit, and consideration for spinal cord stimulator. Additionally, Dr. Volarich stated that additional surgeries may be needed in the future to replace or remove the orthopedic fixative hardware in his lumbar spine.

Claimant has clearly met his burden of proof of entitlement to an allowance for future medical treatment. Claimant has been treating with the VA hospital since his release by Dr. DeGrange in June 2011, and is currently quite satisfied with the medical treatment he is receiving through the VA hospital and thus has not sought additional care and treatment from Employer-Insurer; this in no way negates Employer's and Insurer's responsibility for future medical treatment, particularly (but by no means limited to) surgeries to replace, remove or revise the orthopedic fixative hardware in the lumbar spine.

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

In addition to those facts and legal conclusions to which the parties stipulated, I find the following facts and make the following rulings of law:

1. The work accident of July 13, 2009 was the prevailing factor in the cause of an L5-S1 disc herniation and fragmentation which required three surgical procedures;
2. Prior to July 13, 2009, in 2003 and 2004, Claimant had been involved in two "rear-end" motor vehicle accidents which caused pain and injury to his neck, shoulder, lower back and legs;
3. Claimant sustained little or no permanent disability as a result of the two "rear-end" motor vehicle accidents;
4. Prior to July 13, 2009, Claimant was not working with any conditions which could reasonably be considered as a hindrance or obstacle to employment or reemployment;

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5. Claimant has been unable to work since the July 13, 2009 work accident;
6. Claimant is unable to compete in the open market for employment;
7. Claimant is permanently and totally disabled;
8. The injuries sustained by Claimant in the July 13, 2009 accident, considered alone, have rendered Claimant permanently and totally disabled;
9. Claimant's medical condition reached maximum medical improvement on June 23, 2011;
10. Employer and Insurer are responsible for the payment of permanent total disability benefits in the amount of \$645.23 beginning June 24, 2011;
11. Claimant has met his burden of proof regarding the need for future medical treatment;
12. Employer and Insurer are responsible for providing Claimant with future medical treatment in accordance with Section 287.140, RSMo; and
13. The Second Injury Fund has no liability in this case.

### **ORDER**

Employer and Insurer are ordered to pay Claimant weekly permanent total disability benefits of \$645.23 per week beginning June 24, 2011 for Claimant's lifetime.

Employer and Insurer are also ordered to provide Claimant with future medical benefits to cure and relieve Claimant from the effects of the work-related injury, pursuant to Section 287.140. RSMo.

The claim against the Second Injury Fund is denied in full.

Claimant's attorney, Van Camp Law Firm, LLC, is allowed 25% of the permanent total disability benefits awarded herein, including future benefits, as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits.

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

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Made by/s/Robert J. Dierkes – 1-22-13  
Robert J. Dierkes  
Chief Administrative Law Judge  
*Division of Workers' Compensation*