

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

Injury No.: 05-015019

Employee: Lowery L. Gray
Employer: Jack Cooper Transport Co. (Dismissed)
Insurer: Liberty Mutual Insurance Company (Dismissed)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) accident; (2) causation; (3) permanent disability; and (4) Second Injury Fund liability.

The administrative law judge found that employee's claimed injury was part of the off and on exacerbations and mild baseline symptoms referable to an earlier injury, and denied the claim.

Employee filed an Application for Review alleging the administrative law judge substituted his own opinion on the issue of medical causation for that of the testifying medical experts.

For the reasons set forth herein, we reverse the award of the administrative law judge.

Findings of Fact

Employee was 54 years of age at the time of the primary injury on January 31, 2005. He is a high school graduate with about 30 years of continuous employment as a car hauler. He also has some work experience as a welder and a mechanic.

Preexisting conditions

When employee was thirteen years old, he suffered an injury to his dominant left hand that required partial amputation of the middle finger, and left him with scarring and deformities affecting his thumb and other fingers. As a result of this injury, employee experienced increased sensitivity to pain in his left hand, and had to work more slowly and carefully. Cold weather especially aggravated employee's left hand. Employee presented expert medical testimony from Dr. Robert Poetz, who opined that this injury constituted a 45% permanent partial disability of the left hand. We find that employee's preexisting left hand injury amounted to a permanent partially disabling condition.

Employee has longstanding issues with depression and anxiety, for which he has received medical care including the prescription of medications since the 1980s. These conditions sometimes caused employee to take time off from work. Dr. Poetz opined that employee's

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preexisting depression and anxiety constituted a 10% permanent partial disability of the body as a whole. We find that employee's preexisting depression and anxiety constituted preexisting permanent partially disabling conditions.

In 1992 or 1993 employee suffered a hyperextension injury to his left elbow. Treating physicians diagnosed tendonitis, and employee underwent a course of treatment including steroid injections, after which his symptoms improved, but he continued to experience some residual pain with certain movements or if he overused the left arm. Employee sometimes had to take a break at work to rest his left elbow, especially after performing tasks such as pushing on a winch bar. Dr. Poetz opined that employee's left elbow condition constitutes a 10% preexisting permanent partial disability of the left elbow. We find that employee's left elbow injury resulted in a permanent partially disabling condition.

On June 26, 2003, employee suffered an injury to his low back while loading skids in the course of his work for employer. Employee's injury necessitated surgery, and on January 12, 2004, Drs. Robson and Kennedy performed a bilateral lumbar laminectomy, posterior spinal fusion with left iliac crest bone graft and Steffee instrumentation, and posterior lumbar interbody fusion with Brantigan cage at L5-S1. On September 28, 2004, Dr. Robson released employee to return to work without any permanent restrictions, and rated a 20% permanent partial disability of the body as a whole referable to the June 2003 low back injury. Employee experienced some intermittent low back pain, but mostly suffered from left leg radicular complaints. Employee worked slower than he did before, and ultimately had to switch to a different and less remunerative job with employer. Employee settled a claim against employer arising from the June 2003 injury for a lump sum consistent with a 44% permanent partial disability of the body as a whole. We find that employee suffered a preexisting permanent partial disability referable to the June 2003 low back injury and surgery.

Employee suffers from longstanding issues with hypertension, for which he has taken prescribed medications. Employee's high blood pressure caused him to experience symptoms such as headaches, blurred vision, and dizziness. On February 2, 2004, employee was admitted to Missouri Baptist Medical Center with complaints of chest discomfort. Treating physicians diagnosed a heart attack, and performed a cardiac catheterization and placed a stent in employee's artery. Dr. Poetz opined that employee's cardiovascular condition constituted a 20% permanent partial disability of the body as a whole. We find that employee's cardiovascular issues constituted a preexisting permanent partially disabling condition.

Primary injury

On January 31, 2005, employee was tasked with hauling a load of vans. In order to make sure the load did not exceed maximum height requirements, employee used a ratchet and chain assembly to compress the suspension on the vans. Employee was in the process of exerting pressure on this ratchet and chain assembly to secure the final van of the load when he experienced sudden and severe pain in his low back. Employee credibly testified (and we so find) that he felt pain that was much worse than he experienced in the prior June 2003 low back injury.

On February 10, 2005, employee saw Dr. Robson, who noted employee was suffering from increased complaints of low back pain after the event of January 31, 2005. Dr. Robson

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took employee off work and prescribed pain medications. On March 9, 2005, Dr. Robson again noted employee's increased low back symptoms, and also noted a new complaint of right leg pain. Employee asked Dr. Robson to release him to return to work, because he was anxious that his time off would affect his income. Dr. Robson was reluctant as he felt employee's duties were at the limit of what he could tolerate given the condition of his low back, but he ultimately did release employee to return to work. Employee worked for employer until approximately the end of November 2005, when he suffered another heart attack.

On January 3, 2006, Dr. Robson opined that employee had reached the point of maximum medical improvement from a surgical standpoint with respect to his low back, and opined that employee would not be able to return to his work for employer. Dr. Robson assigned permanent restrictions of no lifting over 30 pounds occasionally and 20 pounds repetitively.

Dr. Poetz opined that the event of January 31, 2005, is the substantial and prevailing factor causing employee to suffer a lumbar strain with exacerbation of lumbar discogenic disease and bilateral L5 pars defect, as well as a 10% permanent partial disability of the body as a whole referable to the low back. Dr. Poetz explained that the acute injury was a soft tissue strain/sprain, and that the presence of that strain in the area of prior lumbar pathology caused an exacerbation of employee's radiculopathy and low back pain.

The Second Injury Fund does not advance a contrary medical opinion, but instead points to the deposition of Dr. Robson as supportive of its argument that employee did not suffer any permanent disability as a result of the January 2005 event. We have carefully reviewed Dr. Robson's deposition. We note that Dr. Robson was never asked to offer any opinion regarding the January 2005 event during the entire course of that deposition. It follows that Dr. Robson has not provided any opinion that would contradict that of Dr. Poetz on the issue of causation.

We have also carefully reviewed the contemporaneous medical treatment records from Dr. Robson. As noted above, Dr. Robson documented employee's complaint of having suffered a significant traumatic event on January 31, 2005, that dramatically increased employee's low back pain, and that left him with a new symptom of right leg radicular pain. Dr. Robson's records reveal that employee continued to suffer from increased low back and right leg pain after the January 2005 event. These records are wholly supportive of a finding that employee suffered a new injury resulting in additional permanent partial disability on January 31, 2005. Especially in light of these records, we find Dr. Poetz's causation opinion to be persuasive. We find that employee reached maximum medical improvement on January 3, 2006, when Dr. Robson opined that employee had reached maximum medical improvement.

Permanent total disability

Dr. Poetz opined that employee should observe the following physical restrictions: avoid prolonged sitting, standing, walking, stooping, bending, squatting, twisting, or climbing; avoid pushing and pulling; avoid excessive and repetitive use of the upper extremities; avoid use of equipment that creates torque, vibration, or impact to the upper extremities; avoid stressful situations; avoid extremes of heat and cold; and avoid activities that required increased cardiac output. Dr. Poetz opined that employee is permanently and totally disabled as a result of the primary injury in combination with employee's preexisting

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conditions of ill-being. Dr. Poetz explained that he does not believe there is any work that would be safe for employee to perform within his physical limitations. Dr. Poetz made clear that he does not believe the primary injury is totally disabling considered in isolation.

The Second Injury Fund provided the expert vocational testimony of James England, who opined that, if one considers just the 20 to 30 pound lifting restriction from Dr. Robson for the low back, employee is capable of working as an auto parts clerk, a service writer in an auto repair facility, an office cleaner, security guard, cashier, or general retail clerk. Notably, Mr. England did not consider the effect of employee's preexisting conditions of ill-being in reaching his opinion that employee could successfully perform those jobs. Mr. England conceded that employee is permanently and totally disabled if one accepts the restrictions identified by Dr. Poetz.

Employee provided the expert vocational testimony of Delores Gonzalez, who opined that, as a result of a combination of the primary injury with employee's preexisting conditions of ill-being, employee is not capable of any competitive work for which there is a reasonably stable job market. Ms. Gonzalez explained that given employee's advanced age, his poor academic skills, and severely reduced physical functional capacity, it is not realistic to expect any employer to hire employee over an individual who was more suited for competitive work. Ms. Gonzalez noted that employee's long career as a car hauler does not leave him with any transferable skills that he will be able to perform in light of the permanent restrictions from Dr. Poetz. Ms. Gonzalez disagreed with Mr. England's opinion that employee could find work as a security guard or cashier; she explained that employee is unable to tolerate the prolonged standing, walking, or sitting that would be expected of those workers. Ms. Gonzalez also opined that employee could not perform light cleaning work, as this would exceed the restrictions identified by Dr. Poetz.

In his testimony at the hearing before the administrative law judge, employee thoroughly described the effects of each of his preexisting disabling conditions, as well as the effect of the primary injury upon his level of functioning. We find employee's testimony on these topics to be very credible. After careful consideration, we find most persuasive the opinions from Dr. Poetz and Ms. Gonzalez that employee is unable to compete in the open labor market owing to his preexisting disabling conditions in combination with his disability referable to the primary injury.

Conclusions of Law

Accident

The version of § 287.020.2 RSMo applicable to this claim provides, in relevant part, as follows:

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

We have found that on January 31, 2005, employee was tying down a load of vans when he felt a sudden and severe pain in his low back. We conclude that employee suffered an "accident" for purposes of the foregoing definition.

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Medical causation

Section 287.020.2 RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

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.

We have credited the causation opinion from Dr. Poetz. We conclude that work was a substantial factor in causing employee to suffer the resulting medical condition of a lumbar strain with exacerbation of lumbar discogenic disease and bilateral L5 pars defect, as well as permanent partial disability to the extent of 20% of the body as a whole referable to the lumbar spine.

Second Injury Fund liability

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

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

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

We have found that, as of the date of the primary low back injury, employee suffered from preexisting permanent partially disabling conditions referable to employee's dominant left hand, his left elbow, depression and anxiety, his cardiovascular condition, and a low back injury. When we apply the foregoing test, we are convinced that each of these conditions had the potential to combine with subsequent work injuries to cause greater disability than in the absence of these conditions. We conclude each of these conditions were serious enough to constitute hindrances or obstacles to employment for purposes of § 287.220.1 RSMo.

For the Fund to be liable for permanent total disability benefits, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with the prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the

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Second Injury Fund, is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have determined that employee sustained a 20% permanent partial disability of the body as a whole referable to the low back. We have also found, based on the persuasive testimony from Dr. Poetz and Ms. Gonzalez, that employee is unable to compete in the open labor market owing to his preexisting disabling conditions in combination with his disability referable to the primary injury. It follows that the primary injury, considered in isolation, does not render employee permanently and totally disabled.

We conclude employee met his burden of establishing Second Injury Fund liability for permanent total disability benefits under § 287.220.1. We conclude employee is entitled to, and the Second Injury Fund is obligated to pay, permanent total disability benefits. We have found employee reached maximum medical improvement on January 3, 2006. We conclude the Second Injury Fund is liable to pay permanent total disability benefits beginning January 3, 2006, at the differential rate of \$128.62 per week for 80 weeks, and thereafter at the stipulated permanent total disability rate of \$482.67.

Conclusion

We reverse the award of the administrative law judge. The Second Injury Fund is liable to employee for permanent total disability benefits beginning January 3, 2006, in the amount of \$128.62 per week for 80 weeks, and thereafter at the stipulated permanent partial disability rate of \$482.67. The weekly payments shall continue thereafter for employee’s lifetime, or until modified by law.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued October 18, 2013, is attached solely for reference.

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

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

Given at Jefferson City, State of Missouri, this 19th day of August 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Lowery L. Gray Injury No.: 05-015019
Dependents: N/A Before the
Employer: Jack Cooper Transport Co. (Dismissed) **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Liberty Mutual Insurance Company (Dismissed) Jefferson City, Missouri
Hearing Date: August 14, 2013 Checked by: EJK/kr

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: January 31, 2005
5. State location where accident occurred or occupational disease was contracted: St. Charles 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:
The claimant, an over-the-road trucker, developed severe low back pain while preparing a load of vans for delivery to a dealership in Mississippi.
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: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$724.00
- 19. Weekly compensation rate: \$482.67/\$354.05
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Dismissed

22. Second Injury Fund liability: No

None

TOTAL:

None

23. Future requirements awarded: None

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Lowery L. Gray	Injury No.: 05-015019
Dependents:	N/A	Before the
Employer:	Jack Cooper Transport Co. (Dismissed)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Liberty Mutual Insurance Company (Dismissed)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/kr

This workers' compensation case requires a determination of Second Injury Fund liability arising out of a work-related injury in which the claimant, an over-the-road trucker, developed severe low back pain while preparing a load of vans for delivery to a dealership in Mississippi. The issues for determination are (1) Accident arising out and in the course of employment, (2) Medical causation, (3) Past medical expenses, (4) Permanent disability, and (5) Second Injury Fund liability. The evidence compels an award for the Second Injury Fund.

At the hearing, the claimant testified in person and offered depositions of David Robson, M.D., Robert P. Poetz, D.O., and Delores E. Gonzalez, the claimant's claims for compensation and a Workers' Compensation settlements with his employer in this case, the claimant's contract of employment with his attorney, the claimant's W-2 forms and injury report, and various medical records. The defense offered a deposition of James M. England, Jr.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

This now 63 year old claimant, a high school graduate, began employment with this employer in April 2001, last worked in November 2005, and retired in February 2006. The claimant, a car hauler for 30 years, previously worked as a carpenter, welder, and mechanic. He became a certified master technician.

On June 26, 2003, the claimant injured his back while loading skids at work. The claimant testified that he experienced pain in his left hip and calf and below his belt line in his back that he never had back pain like this before the injury.

On July 31, 2003, Dr. Robson examined the claimant for back pain radiating into the left leg. Dr. Robson diagnosed acute low back pain with sciatica and recommended physical therapy. Dr. Robson opined that the incident on June 26, 2003, was the substantial factor in the claimant's symptoms involving low back pain and sciatica. See Exhibit G. On October 7, 2003, the claimant underwent an epidural steroid injection at the left L5-S1 level. On January 12, 2004, the claimant underwent an L5-S1 lumbar fusion with a diagnosis of spondylolisthesis at L5-S1

level. The claimant testified that he was still in pain while at work after the 2004 surgery and up until the 2005 injury. The claimant testified that sometimes he had to take pain medicine while at work after his surgery in 2004 and up until 2005.

On February 2, 2004, the claimant underwent a radial artery cannulation; left heart catheterization; left ventriculography, selective right coronary arteriography; right femoral artery cannulation; selective left coronary arteriography; and drug eluting stent placement. On May 11, 2004, Dr. Higano noted that the claimant had no past history of cardiac disease. See Exhibit L.

On April 15, 2004, Dr. Robson re-examined the claimant and recommended physical therapy. On September 8, 2004, the claimant returned to Dr. Robson after experiencing increased symptoms in his low back and left leg while working a particularly long day. Dr. Robson noted that the claimant went to physical therapy which helped the claimant. See Exhibit G. On September 28, 2004, Dr. Robson found the claimant at MMI and released the claimant without restrictions. Dr. Robson opined that the claimant had a 20% permanent partial disability as a result of the injury dated June 26, 2003, and his need to undergo a decompressive laminectomy and fusion at the L5-S1 level. See Exhibit G. On October 19, 2004, Dr. Robson re-examined the claimant for long standing left leg pain and foot numbness. Dr. Robson opined that the claimant was at MMI with the caveat that the claimant is going to have some off and on flare-ups over time and may require some intermittent medication. See Exhibit G.

On January 31, 2005, the claimant sprained his back while loading vans at work. The claimant testified that he began to have worse pain in his back than he ever felt before occurrence. The claimant testified that he notified the dispatcher. The claimant testified that he completed an incident report on February 10, 2005. The claimant testified that he did not have a copy with a supervisor's signature on the incident report. The claimant testified that Dr. Robson imposed restrictions that disqualified him from his car hauler job.

On February 10, 2005, Dr. Robson re-examined the claimant and noted increased back pain since the January 31, 2005, incident. Dr. Robson opined that the January 31, 2005, incident aggravated the claimant's underlying condition. See Exhibit G. Dr. Robson re-examined the claimant on April 14, 2005. Dr. Robson noted that the claimant had increased symptoms and was excused from work on April 7 through April 14, 2005. Dr. Robson noted that the claimant complained of low back pain and right leg radiating pain with no significant interval injury or abnormalities. Dr. Robson noted that the claimant continues to become increasingly symptomatic after working. Dr. Robson opined that the claimant's job is at the limit of his restrictions. Dr. Robson noted that the claimant has had several episodes in the last few months where the claimant has worked and had increased symptoms. Dr. Robson opined that if the claimant continues to be symptomatic, he will place more severe restrictions. See Exhibit G.

On June 27, 2005, Dr. Till found the claimant to be overweight and encouraged the claimant to lose weight. See Exhibit M. On November 28, 2005, the claimant was admitted for 2 days to St. Francis Medical Center with an acute inferior wall myocardial infarction. On December 6, 2005, Dr. Till examined the claimant and again found the claimant overweight. Dr. Till encouraged the claimant to lose weight again. See Exhibit M.

On December 20, 2005, the claimant underwent a left heart catheterization, left ventriculography, bilateral selective coronary arteriography, and a coronary physiology study. See Exhibit L. The claimant testified that after the stent placement in December 2005, he did not return to work. On January 1, 2006, Dr. Till examined the claimant and noted the claimant was having a lot of problems with anxiety. The claimant reported that both his feet and legs feel numb and asleep most of the time which has gone on since his back surgery in 2004. See Exhibit M. Dr. Till encouraged the claimant to lose weight again.

On January 3, 2006, Dr. Robson re-examined the claimant and noted that the claimant has become increasingly symptomatic and unable to work, that the claimant had a recent myocardial infarction a couple of weeks ago, and he opined that the claimant cannot work as a truck driver and recommended a FCE. See Exhibit G. On January 24, 2006, Dr. Till examined the claimant and encouraged him to try to seek employment elsewhere. See Exhibit M. On February 6, 2007, Dr. Till examined the claimant and noted that the claimant has been gaining weight. On February 28, 2006, Dr. Robson reviewed a recent FCE and opined that the claimant can work in the light to moderate work range which would be 30 pound occasional lifting and 20 pound repetitive lifting. See Exhibit G. On March 2, 2006, Dr. Robson found the claimant at MMI and found the claimant had a 30% permanent partial disability as a result of his injuries stemming from the June 26, 2003, incident. See Exhibit G.

On August 7, 2008, Dr. Higano re-examined the claimant and noted that the claimant had been diagnosed recently with diabetes mellitus. Dr. Higano found the claimant to be excessively overweight with a current body weight of 362 pounds. Dr. Higano recommended exercise and weight loss. See Exhibit L. On October 26, 2009, Dr. Till re-examined the claimant and noted a weight loss of 11 pounds since August 2009.

After Dr. Robson returned the claimant to work in August 2010, the claimant testified that he returned full duty. The claimant testified that he had some low back pain and left leg, but it did not prevent him from earning a living. The claimant testified that a few times he had to take off work and was sent to work hardening following his return to work. The claimant testified that he occasionally took personal days to rest. The claimant testified that before the 2003 injury, he was one of the quickest at work and won some awards before 2003. The claimant testified that after the 2003 injury, he needed a half day to load whereas normally he would only take one hour and that this reduced his income. The claimant testified that he took so long to load that he had to cheat to make a living to keep his wages up by not reporting his time accurately. He testified that he consistently fudged his time after June of 2003 to be within the legal limits. The claimant testified that the DOT doctor would not issue a 2 year certificate because of blood pressure. The claimant returned after 30 days, and the DOT doctor issued a certificate for 1 year only.

The claimant testified that when he experiences blood pressure symptoms, he has headaches, blurry vision, dizziness, and upset stomach. The claimant testified that his blood pressure would affect his productivity at work and that there were days at work that he had to double medications because of pounding headaches.

The claimant testified that he has experienced chest pains and anxiety since 1984. He took medication which helped to simmer him down. He testified that he could not work for

months following the incident in 1984. He testified that on the days he could not function, he would get a motel room and could not work and that this affected his income.

The claimant testified that he had frequent incidents of loss of energy which affected productivity because he would have to sit down. The claimant was diagnosed with diabetes in 2007. The claimant testified that he had symptoms at work and would get chips or candy and return to work and that this affected his productivity. The claimant sustained a left elbow injury in 1992 and learned to accommodate his left elbow over time.

The claimant testified that he now mows the lawn with a riding mower in portions. The claimant testified that he can drive 80-100 miles, and then he has problems, because he cannot get comfortable. The claimant sits in a chair and hunts with a shot gun at times. The claimant testified that he has limitations from his work injuries, that he cannot bend over, needs help dressing and that he can no longer do mechanic work. The claimant testified that he is in pain most of the days in his back, hip, and toes and that he does not sleep through the night. The claimant testified that he cannot squat and can only walk 50 yards. The claimant testified that after his first back injury, his level of pain was moderate. He testified that since the 2005 incident, he can hardly do anything. The claimant testified that he has gained 100 pounds since the series of accidents.

The claimant settled his 2003 workers' compensation claim with his employer on the basis of a 44% permanent partial disability to the body as a whole. See Exhibit E. The claimant dismissed his 2005 claim against the employer with prejudice. See Exhibit F.

Dr. David Robson

Dr. Robson, a board certified orthopedic surgeon, testified that after the surgery, the claimant came back with complaints on several occasions. See Dr. Robson deposition, pages 6, 15. Dr. Robson testified that on July 21, 2004, the claimant reported continued problems of low back pain and left leg radiating pain. See Dr. Robson deposition, pages 15-16. Dr. Robson testified that when he saw the claimant on January 3, 2006, he did not think the claimant could return to work as a truck driver as the claimant had tried to on several occasions and never could tolerate the physical demands of the job. See Dr. Robson deposition, page 18. Dr. Robson testified that in reference to whether the claimant will experience pain into the future as a result of the June 26, 2003, injury that the claimant will have off and on exacerbations and will have some mild baseline symptoms which would be subject to off and on waxing and waning. See Dr. Robson deposition, pages 20-21. Dr. Robson testified that the claimant's job was on the limits of what he would expect the claimant to be able to sustain for a long period of time. See Dr. Robson deposition, page 51.

Dr. Robson agreed that as of 2006, the claimant's three heart attacks cannot be ruled out as a potential factor in the claimant's motivation to return to work as a car hauler. See Dr. Robson deposition, page 40. Dr. Robson testified that the claimant's body habitus and general condition has an effect to some extent on the claimant's ability to recover from the kind of surgery the claimant had and the claimant's degree of activities. See Dr. Robson deposition, pages 42-43. Dr. Robson opined that the June 26, 2003, injury was the substantial factor in the creation of the claimant's symptoms and the need for surgery. See Dr. Robson deposition, page 58. Dr. Robson testified that after he released the claimant to regular duties, the claimant

returned with back pain. Dr. Robson testified that there was no substantial change in his objective physical examination. See Dr. Robson deposition, pages 72-73.

Dr. Robson testified that at the time of the second FCE in January 2006, they concluded the claimant was performing at a lower level as far as work ability. See Dr. Robson deposition, pages 73-74. Dr. Robson testified that the claimant's heart condition contributed to the conclusion in the report (of the 2nd FCE in 2006). See Dr. Robson deposition, page 74. Dr. Robson testified that there was no major change in the objective physical examination of the claimant from 2004 to 2006. See Dr. Robson deposition, page 75.

Dr. Robson testified that before surgery, he indicated the claimant will likely have restrictions in the moderate to medium work range. See Dr. Robson deposition, page 76. Dr. Robson testified that he did not ever think heavy work was sustainable on a long term basis. See Dr. Robson deposition, page 76. Dr. Robson testified that nothing changed from 2004 to 2006 in terms of x-rays or examination. See Dr. Robson deposition, pages 76-77.

Dr. Robson testified that he initially gave the claimant a 20% permanent partial disability. See Dr. Robson deposition, page 78. Dr. Robson testified that he does not know why he changed the rating to 30% permanent partial disability. See Dr. Robson deposition, page 79. Dr. Robson testified that this may be a typographical error and cannot explain that there is a reason for the change. See Dr. Robson deposition, page 79. Dr. Robson testified that it is possible that the claimant's heart condition could have impacted the results of the FCE. See Dr. Robson deposition, page 81.

Dr. Robert Poetz

On February 17, 2011, Dr. Poetz examined the claimant and noted that the claimant weighed 336 pounds. See Exhibit H. Dr. Poetz recommended:

- Avoid prolonged sitting, standing, walking, stooping, bending, squatting, twisting, or climbing;
- Avoid pushing or pulling;
- Avoid excessive and repetitive use of upper extremities;
- Avoid use of equipment that creates torque, vibration, or impact to the upper extremities;
- Avoid stressful situations;
- Avoid extremes of heat and cold;
- Avoid activities that exacerbates symptoms or known to cause progression of disease process;
- Avoid activities that require increased cardiac output;
- Follow up with orthopedic surgeon to monitor status of hardware or if symptoms out of ordinary develop. May be necessary to repeat diagnostic studies followed by surgery if indicated;
- the claimant should undergo a series of epidural steroid injections;
- The claimant's blood pressure was significantly elevated at time of exam. The claimant needs aggressive treatment to prevent further cardiovascular events. See Exhibit H.

Dr. Poetz found that the injuries, which occurred on June 26, 2003, and January 31, 2005, are the substantial and prevailing factor to the following disabilities: 50% permanent partial disability to the body as a whole measured at the lumbar spine directly resultant from the June 26, 2003, work related injury; 10% permanent partial disability to the body as a whole at the lumbar spine directly resultant from the January 31, 2005, work related injury; and 10% permanent partial disability to the body as a whole due to depression directly resultant from the June 26, 2003, and January 31, 2005, work related injury. See Exhibit H.

Dr. Poetz found the following pre-existing disabilities: 5% permanent partial disability to the body as a whole at the lumbar spine; 10% permanent partial disability to the body as a whole due to anxiety and depression; 10% permanent partial disability to the left elbow; 45% permanent partial disability to the left hand; 20% permanent partial disability to the body as a whole measured at the cardiovascular system; and 15% permanent partial disability to the body as a whole due to sleep apnea. See Exhibit H. Dr. Poetz concluded that the claimant is permanently and totally disabled as a direct result of the June 26, 2003, and January 31, 2005, work injuries and in addition to the claimant's prior injuries. Dr. Poetz opined that if absent the claimant's prior injuries and conditions and the claimant was suffering from the June 26, 2003, and January 31, 2005, injuries alone, the claimant would still be permanently and totally disabled. See Exhibit H.

Dr. Poetz opined that the claimant's prescriptions for Hydrocodone, Cymbalta, and physical therapy in June 2005, six months after the injury, indicated that "he has a second injury, a new onset of new symptoms, that the symptoms and the diagnosis is that of a rather significant or severe process." See Dr. Poetz deposition, pages 20, 21. Dr. Poetz testified that the fact that the claimant required three (sic) different kinds of mediations (Tylenol, Ibuprofen, Hydrocodone, and Cymbalta) that means that the claimant's pain mechanisms were complex and required multiple avenues of pain relief. See Dr. Poetz deposition, page 21. Dr. Poetz testified that the second injury to the claimant's back was the difference between the claimant being able to function in this capacity or not. See Dr. Poetz deposition, page 23. Dr. Poetz opined that the claimant could not have worked in some capacity following the second injury. See Dr. Poetz deposition, page 24. Dr. Poetz testified that the claimant's depression and anxiety increased as a result of the second accident. See Dr. Poetz deposition, page 24.

Dr. Poetz opined that the major spinal fusion would be considered a stress to the body physiologically, embarrassment, cardiovascular embarrassment having anesthetic, post-operative medications. See Dr. Poetz deposition, pages 25-26. Dr. Poetz opined that the first injury alone in isolation from any pre-existing conditions, injuries, or impairments would not have been severe enough to prevent the claimant from working. See Dr. Poetz deposition, page 28. Dr. Poetz opined that the second injury in isolation without any pre-existing conditions or injuries would not have been severe enough to prevent the claimant from working. See Dr. Poetz deposition, page 28. Dr. Poetz opined that the claimant was capable of returning to work after the first injury and taking into consideration the claimant's pre-existing injuries and conditions. See Dr. Poetz deposition, pages 28, 29.

Dr. Poetz testified that he based his opinions in part on the subjective complaints and physical examination of the claimant as of the date he examined the claimant. See Dr. Poetz deposition, pages 31-32. Dr. Poetz testified that his opinion is partly based on the treatment the

claimant had until February 28, 2006. See Dr. Poetz deposition, page 32. Dr. Poetz testified that the results of the March 9, 2005, CT myelogram did not reveal an acute injury. See Dr. Poetz deposition, page 33.

Dr. Poetz testified that he does not perform the type of surgeries that the claimant had to his back. See Dr. Poetz deposition, page 35. Dr. Poetz testified that he is not a psychiatrist and did not perform any psychiatric test such as an MMPI. See Dr. Poetz deposition, pages 37-38. Dr. Poetz testified he performed a test of an observation of the claimant's emotional behavior. See Dr. Poetz deposition, pages 37-38. Dr. Poetz testified that the claimant's psychiatric condition has significantly become worse since 2005. See Dr. Poetz deposition, pages 38-39. Dr. Poetz testified that he did not review any treatment records for depression before 2003. See Dr. Poetz deposition, page 39. Dr. Poetz did not review any records indicating the claimant received counseling, psychiatric treatment or was under medication for a psychiatric condition prior to 2003. See Dr. Poetz deposition, pages 39-40. Dr. Poetz opined that the claimant's metabolic processes do not allow the claimant to lose weight. See Dr. Poetz deposition, page 41.

Delores Gonzalez

Ms. Gonzalez, a vocational rehabilitation counselor, interviewed the claimant on December 19, 2011, and noted that the claimant weighed 250 pounds prior to his injury and gained weight due to inactivity but reported that he recently lost 45 pounds. See Exhibit I. Ms. Gonzalez reported that the claimant is a 61 year old with a high school education, impoverished academic skills, and permanent physical disabilities which prevent him from performing his past job or any job in the open labor market as a result of his severely reduced physical residual functional capacity. Ms. Gonzalez opined that the claimant is not a candidate for vocational rehabilitation because he is not currently capable of any competitive work for which there is a reasonably stable job market as a result of the primary injury in combination with his pre-existing disabilities/conditions. Ms. Gonzalez opined that the claimant would not be able to find employment given his advanced age, impoverished academic skills, and his severely reduced residual functional capacity. See Exhibit I.

James M. England, Jr.

On July 9, 2012, Mr. England performed a records review and noted Ms. Gonzalez' vocational testing results. Mr. England concluded that the claimant is able to understand and read at an 11th grade level and could handle math at the 6th grade level. Mr. England opined that these would certainly be more than adequate for a variety of work settings. See Exhibit I. Mr. England concluded that assuming only the physical restrictions connected with his back placed by the treating physician, the claimant could return to a variety of alternative work, including some which would utilize the skill and knowledge the claimant acquired in the past such as an auto parts clerk or functioning as a service writer in an auto repair facility. Mr. England found that under Dr. Robson's restrictions the claimant would be able to function in a number of positions such as office cleaning, security work, cashier positions, and general retail sales, etc. See Exhibit I.

Mr. England opined that if one assumes Dr. Poetz's restrictions, the claimant would be totally disabled from all forms of employment. Mr. England opined that taking into

consideration the claimant's description of his current functioning, the claimant appears to be suffering from a variety of medical problems including a number which have either started or worsened considerably since the last injury. Mr. England noted that the claimant was, in fact, working up to 70 hours a week before his last injury and was able to do the full requirements of his job. Mr. England concluded that if the claimant was totally disabled at this point, therefore, it would appear to be due to a combination of problems that have occurred since the primary injury rather than just due to the effects of the primary injury considering the limitations noted by his treating doctor for the "primary injury". See Exhibit I.

Mr. England testified that he had sufficient information in this case to render an opinion within a reasonable degree of vocational certainty. See England deposition, page 5. Mr. England testified that the claimant did not have any physical problems pre-existing the 2003 work injury in performing his job duties. See England deposition, page 11. Mr. England testified that assuming the claimant hypothetically was unable to physically maintain a consistent standing or sitting position for more than a few minutes and had to lie down frequently throughout the course of the day that the claimant would not be employable. See England deposition, page 15. Mr. England testified that he did not assess the extent to which the claimant's perception of pain and his reaction to pain could potentially interfere with the claimant's ability to perform substantial gainful employment. See England deposition, page 16. Mr. England testified that he did not have any conclusions regarding the extent to which pain interfered with the claimant's ability to concentrate. See England deposition, page 16.

COMPENSABILITY

Based on the entire record, the claimant suffered a compensable work-related injury in 2003 resulting in a 44% permanent partial disability to the low back (176 weeks). At the time the last injury was sustained, the claimant had:

- a 45% permanent partial disability to the left hand (78.75 weeks),
- a 20% permanent partial disability to the cardiovascular system (80 weeks),
- a 5% permanent partial disability to the lumbar spine (20 weeks),
- a 10% permanent partial disability due to anxiety and depression, (40 weeks),
- a 10% permanent partial disability to the left elbow (21 weeks), and
- a 15% permanent partial disability due to sleep apnea (60 weeks).

The claimant's pre-existing permanent partial disabilities as measured as a body as a whole equate to 399.75 weeks or 75% of the body as a whole. The permanent partial disability from the last injury combines with the pre-existing permanent partial disabilities to create an overall disability that exceeds the simple sum of the permanent partial disabilities. The claimant has received workers' compensation benefits from the 2003 accident from a settlement with the employer and an award of benefits from the Second Injury Fund.

The role of the January 2005 occurrence is an important consideration in analyzing this case. The defense argued very persuasively in its well written brief that the 2005 occurrence was not a compensable injury under the Missouri Workers' Compensation law:

The substantial and competent evidence in the settlement stipulation, the

medical records, and the testimony of Dr. Robson supports that the alleged injury in January 31, 2005, is not a compensable injury. Specifically, Claimant failed to meet his burden of proof to establish the extent and permanency of the alleged January 31, 2005, injury. Claimant's current back symptoms and limitations stem from the 2003 work injury and its sequelae. ...

[T]he opinions of Dr. Robson supports that Claimant did not sustain a compensable injury in 2005. Even though Dr. Robson initially found Claimant had an aggravation from the 2005 incident, Dr. Robson never placed any permanent partial disability as a result of the alleged injury. Dr. Robson clearly found that Claimant sustained permanent partial disability only as a result of the 2003 injury. Also, Dr. Robson found no changes in Claimant's objective physical examination or x-rays between 2004 and 2006. (EE Exhibit E, p.75, 76-77). Notably, Dr. Robson warned the Claimant that he would have off and on exacerbations and will have some mild baseline symptoms which would be subject to waxing and waning such as the incident in January of 2005. (EE Exhibit E, p.20-21).

In addition, Claimant was not placed at MMI for the 2003 injury until a year after the alleged January 31, 2005, work injury. Dr. Robson initially placed Claimant at MMI on September 28, 2004. However, Claimant continued to treat with Dr. Robson from 2004 until 2006. During this period, Claimant continued to have back and leg complaints particularly after working. Dr. Robson finally ordered a 2nd FCE and placed Claimant at MMI on March 2, 2006, as a result of his injury stemming from the June 26, 2003, incident. (EE Exhibit E). When Dr. Robson placed Claimant at MMI, he never mentions the 2005 alleged work injury.

On the other hand, Claimant asserts that the change in Claimant's capabilities from the first FCE to the second FCE is evidence of a 2005 compensable injury. However, Dr. Robson contends several times in his deposition that he did not ever think Claimant was capable of heavy work on a sustainable long term basis. (EE Exhibit E, p.76). Rather, Claimant was only able to sustain that type of heavy work for a short period due to the 2003 work injury. Even so, the medical records clearly demonstrate that Claimant had difficulty performing his job duties on a regular basis after the 2003 work injury up and until the alleged 2005 work injury.

[W]hen Claimant underwent the 2nd FCE in 2006, Claimant also had 1 heart attack that occurred since the 1st FCE. Dr. Robson agreed that certainly it is possible that Claimant's heart condition impacted the results of the 2nd FCE. (EE Exhibit E, p.81). Dr. Robson reiterated that the Claimant's heart condition contributed to the conclusion in the report of the 2nd FCE in 2006. (EE Exhibit E, p.75). Therefore, the evidence shows that Claimant's heart condition that worsened after the 2003 injury affected the 2006 FCE.

In support of a compensable 2005 injury, Claimant asserts that he was working without much difficulty up until the 2005 injury. However, the medical

records demonstrate Claimant had continued back and leg complaints from the 2003 injury. For example, Dr. Robson specifically testified that Claimant came back with continued complaints after returning to work following the 2004 surgery. (EE Exhibit E, p.72-73). On September 8, 2004, Dr. Robson examined Claimant for increased back symptoms in Claimant's low back and left leg after working a particularly long day. (EE Exhibit E). Thus, clearly this was not a situation where Claimant returned to work without complaints until the alleged January 31, 2005, work injury. Rather, Claimant had multiple occasions of treatment with complaints of back and leg pain following the 2004 surgery up and until the alleged 2005 injury.

Also, Claimant's testimony demonstrates that he continued to have complaints and limitations up and until the alleged 2005 work injury. Claimant testified that he continued to take pain medication at work following the 2003 work injury. Claimant testified that he had to take off work due to back pain after the 2003 work injury up until the 2005 work injury. Claimant testified that after the 2003 work injury, he would take a half a day longer to load.

Moreover, Claimant offered the opinions of Dr. Poetz to support a compensable 2005 injury. Dr. Poetz found that Claimant had a 10% permanent partial disability to the body as a whole directly resultant from the January 31, 2005, work injury. However, the opinions of Dr. Robson should be given more weight than those of Dr. Poetz. Notably, Dr. Robson is an orthopedic surgeon who performed Claimant's surgery to his back, whereas Dr. Poetz does not perform any type of surgery as a part of his practice. Dr. Robson treated the Claimant for 3 years, while Dr. Poetz saw the Claimant on one occasion at the request of his attorney. Dr. Robson treated the Claimant during the alleged 2005 injury and did not find that Claimant sustained any permanent partial disability as a result of the alleged incident. Dr. Poetz did not see the Claimant until 6 years after the alleged 2005 injury. Also, Dr. Poetz admitted that results of the 2005 CT myelogram did not reveal an acute injury. (EE Exhibit H, p.33). Dr. Poetz further testified that Claimant was capable of returning to work after the first injury. (EE Exhibit H, p.28-29). Yet, in the medical records, it is clear that Claimant continued to struggle performing his heavy type job and often sought treatment due to difficulties with his back during 2004 through 2006. Thus, Dr. Robson clearly was more familiar with Claimant's specific symptoms, limitations, and complaints regarding his alleged injuries. As a result, more weight should be given to the opinions of Dr. Robson than those of Dr. Poetz.

Based on the above, Claimant failed to meet his burden of proof in establishing a compensable injury from the alleged January 31, 2005, work injury. As a result, the SIF is not liable to Claimant for any benefits from the 2005 incident. See Defense Brief.

Defense counsel's point is well taken. The logical import of the facts in evidence is that the claimant had a severe low back injury at work in June 2003 that exacerbated his pre-existing congenital low back defect. The claimant was off work for over a year following the accident.

After conservative measures were unsuccessful, Dr. Robson performed a low back fusion in January 2004. The claimant had a cardiac stent in February 2004. On September 28, 2004, Dr. Robson opined that the claimant was at maximum medical improvement from the 2003 accident and could return to work in a heavy exertion occupation. The claimant received temporary total disability benefits from the employer until September 2, 2004. The claimant attempted to return to work after extensive medical and surgical care from Dr. Robson, but the return to work was not successful. On October 19, 2004, Dr. Robson reported that the claimant “has been working with intermittent left leg pain, foot numbness, and tingling, which is long standing in nature and he had prior to his surgical procedure. ... I think he is at the point of maximum medical improvement ... with the caveat that he is going to have some off and on flare-ups over time and may require intermittent medication. See Exhibit G, medical records. The claimant suffered a flare up in December 2004. See Exhibit G, medical records.

On January 31, 2005, the claimant strained his low back at work. On April 14, 2005, Dr. Robson examined the claimant and reported, “My impression is that his job is at the limits of his restrictions and we have had several episodes in the last few months where he has worked and had increased symptoms and I have put him off work.” See Exhibit G, medical records. On December 30, 2005, the claimant submitted an application for retirement pension benefits to his labor union and stated that he left his last employer due to a “back injury”. See Exhibit O. On January 3, 2006, Dr. Robson opined that the claimant “reached the point of maximum medical benefit surgically.” See Exhibit G, medical records. Dr. Robson found no changes in the claimant’s objective physical examination or x-rays between 2004 and 2006. See Dr. Robson deposition, pages 75-77. Dr. Robson warned the claimant that he would have off and on exacerbations and will have some mild baseline symptoms which would be subject to waxing and waning such as the incident in January 2005. See Dr. Robson deposition, pages 20-21.

Later in 2006, Dr. Robson opined that the claimant could not perform the duties in his prior occupation as a car hauler and ordered a functional capacity evaluation that essentially limited the claimant to sedentary or light work, given the lifting restrictions. This was based on a residual functional capacity evaluation performed by Ozark Physical Therapy in January 2006. This is the level of residual capacity relied upon by the defense. The claimant relies on a medical evaluation by Dr. Poetz five years later who concluded that the claimant had far greater restrictions. The vocational evidence suggests that the essential question is whether the claimant’s disability at that time was total and whether the condition resulted from subsequent deterioration in his health, such as his coronary heart disease.

Mr. England concluded that assuming only the physical restrictions connected with his back placed by the treating physician, the claimant could return to a variety of alternative work, including some which would utilize the skill and knowledge the claimant acquired in the past such as an auto parts clerk or functioning as a service writer in an auto repair facility. Mr. England found that under Dr. Robson’s restrictions the claimant would be able to function in a number of positions such as office cleaning, security work, cashier positions, and general retail sales, etc. See Exhibit I.

Based on the credible evidence in the record, the January 2005 occurrence is part of the “off and on exacerbations and will have some mild baseline symptoms which would be subject to

waxing and waning". Therefore, the claimant's recovery is based on the 2003 accident and is fully compensated in the Award rendered in the 2003 case. Therefore, the 2005 case is denied.

Made by: /s/EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation