

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

Injury No.: 04-085542

Employee: Richard Grill
Employer: Cedar Creek Hardwoods (Settled)
Insurer: Indiana Lumbermens Mutual Insurance Company (Settled)
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 November 1, 2011. The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued November 1, 2011, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 12th day of April 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Richard Grill Injury No. 04-085542
Dependents: N/A
Employer: Cedar Creek Hardwoods (settled)
Insurer: Indiana Lumbermens Mutual Insurance Company (settled)
Additional Party: Second Injury Fund
Appearances: Sam Eveland, attorney for employee.
Gregg Johnson, Assistant Attorney General for the Second Injury Fund.
Hearing Date: June 22, 2011 (commenced) Checked by: LCK/rf
July 26, 2011 (completed)

SUMMARY OF FINDINGS

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? February 16, 2004.
5. State location where accident occurred or occupational disease contracted: Madison 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 happened or occupational disease contracted: The employee was lifting a 55 gallon drum of glue and injured his lower back.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Low back and body as a whole.
14. Nature and extent of any permanent disability: 35% permanent partial disability of the body as a whole referable to the low back.
15. Compensation paid to date for temporary total disability: \$9,111.28
16. Value necessary medical aid paid to date by employer-insurer: \$122,803.62
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$349.16
19. Weekly compensation rate: \$232.77
20. Method wages computation: By agreement.
21. Amount of compensation payable: Permanent total disability against the Second Injury Fund.
22. Second Injury Fund liability: Permanent total disability.
23. Future requirements awarded: See Rulings of Law.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Sam Eveland.

FINDINGS OF FACT AND RULINGS OF LAW

On June 22, 2011, the employee, Richard Grill appeared in person and with his attorney, Sam Eveland, for a final award hearing. The Second Injury Fund was represented at the hearing by Assistant Attorney General Gregg Johnson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issue that was in dispute. These undisputed facts and issue, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. Cedar Creek Hardwoods was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Indiana Lumbermens Mutual Insurance Company.
2. On February 16, 2004 Richard Grill was an employee of Cedar Creek Hardwoods and was working under the Workers' Compensation Act.
3. On February 16, 2004 the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$349.16. The rate of compensation for permanent total disability and permanent partial disability is \$232.77 per week.
7. The employee's injury was medically causally related to the accident.
8. The employer-insurer paid \$122,803.62 in medical aid.
9. The employer-insurer paid \$9,111.28 in temporary disability benefits for 40 5/7 weeks. The employer-insurer paid temporary total disability from February 19, 2004 through August 3, 2006; temporary partial disability from August 4, 2004 through August 7, 2004; and temporary total disability from August 8, 2004 through November 22, 2004.

ISSUE

1. Liability of the Second Injury Fund for permanent total or permanent partial disability.

EXHIBITS

Employee's Exhibits

- A. Stipulation for Compromise Settlement in Injury Number 04-085542.
- B. Deposition of Timothy Lalk which includes his CV and Vocational Evaluation.
- C. Deposition of Dr. Berkin which includes his CV and two reports.
- D. Records of the Social Security Administration.
- E. Medical records of Dr. Krettek.
- F. Medical records of Parkland Health Center.
- G. Medical records of Dr. Lange.
- H. Medical records of Dr. Vaught.
- I. Medical records of Dr. Ritter.

- J. Medical records of St. Luke's Hospital.
- K. Medical records of Dr. Holder.
- L. Therapy records of Work Solutions.
- M. Physical therapy records of Farmington Sports and Rehabilitation Center.
- N. Therapy records of Madison Physical Therapy Center.
- O. Medical records of Southeast Missouri Hospital.
- P. Medical records of Dr. Smith.
- Q. Medical records of Dr. Guiley.
- R. Medical records of Dr. Damba.

Second Injury Fund Exhibits

- I. Report of Sherry Browning. (The record was left open for the submission of this exhibit which was received on July 26, 2011. On that date, a telephone conference was held between the parties, the exhibit was admitted into evidence, and the record was closed.)

Judicial notice of the contents of the Division's files for the employee was taken.

WITNESS: Richard Grill.

BRIEFS: The parties did not file briefs.

FINDINGS OF FACT

The employee was born in 1958. The last day he worked was February 16, 2004, the day of the primary accident. The employee had several pre-existing conditions. In 1986, when he was working for Biltwell, he fell down steps and injured his lower back and neck. The employee saw Dr. Krettek in August of 1986 for low back pain and bilateral lower extremity pain and numbness. The employee injured himself on July 2, 1986 when he landed on his sacrum. Dr. Krettek admitted the employee to the hospital for a low back myelogram and CT scan and diagnosed a L4-5 herniated disc. Surgical alternatives including chemonucleolysis and discectomy were discussed.

The employee saw Dr. Holder in August of 1986 for the L4-5 herniated disc. Dr. Holder thought the employee should have a surgical laminectomy or a chemonucleolysis under local anesthesia. Dr. Holder performed a chemonucleolysis of the L4-5 disc. In October, the employee told Dr. Holder that his discomfort in his legs has been relieved.

In January of 1987 the employee saw Dr. Krettek who noted that the employee wanted to avoid having an open surgical discectomy of the L4-5 disc and had a chemonucleolysis by Dr. Holder. Subsequently, the employee continued to have low back pain and bilateral lower extremity aching sensations but did not have the same pre-operative numbness. Due to neck pain, Dr. Krettek ordered a cervical and thoracic MRI which showed a herniated disc at C5-6. In February, a cervical myelogram with post myelogram CT showed a large central disc herniation

at C5-6 with mild compression of the spinal cord and a central bulging disc at C6-7. In February of 1987 Dr. Krettek performed a C5-6 anterior discectomy and fusion.

In April of 1987 the employee saw Dr. Krettek with continued neck and low back pain with radiating pain to both thighs particularly after prolonged sitting and bending. Dr. Krettek prescribed a different muscle relaxant and Elavil for neck stiffness and difficulty sleeping. Dr. Holder noted the employee was doing well with the chemonucleolysis; was remarkably improved with regard to his lower back; and may enter vocational rehabilitation or return to gainful employment with restrictions of no lifting more than 35 pounds. In June, Dr. Holder stated the employee could be considered to be employed in a limited capacity provided he does not have to lift more than 35 pounds on a repeated basis. The employee saw Dr. Krettek and additional physical therapy was ordered. The employee had restrictions of no standing greater than one hour, alternating with sitting and no continuous walking on concrete and no work above shoulder level. He recommended vocational rehabilitation and prescribed medications including Darvocet.

In July, Dr. Holder talked to the employee by telephone about vocational rehabilitation and training. The employee was attempting to get the state to send him to computer school. Dr. Holder stated that the employee should get into an occupation which did not allow heavy manual labor due to the low back and neck surgery. It was Dr. Holder's opinion that the employee was at maximum benefit with regard to the lower back and his final limitation was increased to a lifting capacity of no more than fifty pounds which would probably be a permanent condition for both his back and neck. It was Dr. Holder's opinion that the employee sustained a 15% permanent partial disability of the body as a whole due to the herniated disc and subsequent chemonucleolysis procedure. It was possible that the employee may have future treatment.

In August of 1987, the employee and Dr. Holder discussed by phone a fifty pound capacity working on light duty on a permanent basis. In September, Dr. Holder released the employee to be seen on an as needed basis. Dr. Krettek stated the employee was overall improving slowly with his neck, but had some minor current neurologic damage due to his cervical disc disease. The employee wished to return to work previously but was told there was no light duty.

In October of 1987, the employee settled his claim by compromise settlement in Injury Number 86-77722. The employee was paid 55 5/7 weeks of temporary total disability. The settlement was for 15% permanent partial disability of the body as a whole referable to the neck and 15% permanent partial disability of the body as a whole referable to the low back.

In July of 1990, the employee called Dr. Holder for his lower back. Dr. Holder noted that occasionally the employee called for a limited amount of medication. The employee requested Darvocet and six tablets were prescribed. In September of 1990, the employee called and six more Darvocet tablets were prescribed. Four days later the employee saw Dr. Holder who noted that since the August 1986 injection for the L4-5 disc he did very well, had changed jobs several times and periodically required some pain medication.

In September of 1990, the employee saw Dr. Krettek due to an increase in neck and low back pain. The employee changed jobs approximately five months ago which was more of a labor position. Dr. Krettek prescribed Darvocet for pain, Valium for muscle spasms and an anti-inflammatory; and was given exercises for his low back and neck.

The employee testified that the enzyme injection to his lower back helped for 12-18 months and then started getting worse. The low back pain would shoot to the right or left. If he did too much bending he had problems. His pain varied depending on what he lifted and delivered. The worst pain was 10 out of 10 if he worked hard all day and did a lot of bending and standing on concrete and did too much. He could not sit down at work so when he got home he would lay down in a recliner, sofa or bed. Prior to his neck fusion, he had neck stiffness and pain with numbness and tingling in the right arm from his wrist to shoulder. The fusion surgery helped the arm numbness but he still had loss of motion in his neck along with stiffness and pain. At work, he had problems lifting and looking down and movement bothered his neck. Sometimes he would lie down during lunch at work. When he started working at Cedar Creek in the late 1990's, he listed his prior problems on the application.

The employee testified that in the early 1990's, he injured his left knee when he stepped off a tractor while working for the City of Fredericktown. He tore his ACL and had surgery.

The employee injured his left knee on October 1, 1990. The employer-insurer paid temporary total disability for 24 4/7 weeks. The employee settled his claim in December of 1991 for 26% permanent partial disability of the left knee in Injury Number 90-145691. The employee testified that he continued to have problems in his left knee including pain, stiffness and swelling until the February 16, 2004 accident. He had trouble walking and could not squat or stand for a long period of time.

In April of 1992, the employee saw Dr. Holder with a lot of difficulty with his emotional health; had been hospitalized several times for depression and stress; and was taking medication. The employee had intermittent low back pain without sciatic radiation. X-rays of the lumbar spine revealed the expected moderate narrowing of the L4-5 disc space compatible with chemonucleolysis. It was Dr. Holder's opinion that the employee was unable to work at any heavy manual labor ever again and should seek employment in an office environment so that he does not have to lift more than ten pounds on any one occasion; and repeated stooping, bending and lifting should be held to a minimum.

The employee testified that from 1992 until sometime in 1996 he was on social security disability for depression and back problems including his neck and entire spine. He was taken off social security disability by a social security administrative law judge. After that the employee tried to do anything to pay the bills.

The employee testified that in the mid 1980s he began having problems with his hands and wrists with numbness and had bilateral carpal tunnel surgery in 1995. After the surgery the problems basically resolved. Around 2001 or 2002 his numbness came back like it was before the surgery and he was having problems in his hands and wrists in February of 2004. His hands

made it inconvenient to drive trucks; and the numbness woke him up at night. In 1997 the employee injured his left shoulder while doing roofing. He dove after a tar roll to prevent it from hitting another employee. The only treatment that he received was ibuprofen. Since 1997, he has had loss of motion in his shoulder and has been unable to lift arm above his shoulder. He has pain with movement and has limitations in lifting, overworking at home, and doing dishes.

On March 9, 2001 a Social Security Administration Administrative Law Judge found that the employee was not under a disability as defined under the Social Security Act. It was noted that beginning on November 15, 1991, the employee had been found disabled with depression.

The employee testified that in 2002 or 2003, he fell and broke his left forearm. His arm was splinted but it did not heal completely. Prior to February 16, 2004 if he grabbed and pulled something it caused pain. His arm is not as strong and he has problems lifting.

The employee saw Dr. Damba on February 19, 2004 for a worker's compensation case with pain in the right side of the lower back radiating to the lower leg in the calf area. The pain started while he was moving a barrel. The employee's prior neck, low back, knee and carpal tunnel surgeries were noted. In addition to low back pain, the employee was having depression which he had been treated for in the past due to his father and sister's deaths. In March Dr. Damba ordered a lumbar MRI which showed a markedly prominent disc protrusion at L4-5 with significant spinal stenosis; and disc bulges at L3-4 and L5-S1.

On March 9, 2004 the employee saw Dr. Ritter for back and right leg pain. The employee had an episode some years ago when he had some back pain and had an injection and did better. The employee never had any significant sciatica. The employee was doing fine until February 16 when he was pulling on a barrel of glue and had sharp pain in his back and right leg. The MRI showed a comminuted disc protrusion at L4-5 with some spinal stenosis.

On March 15, the employee was distressed and had anxiety and depression. Dr. Damba increased his Lexapro and discussed sending him to Dr. Guiley.

On March 25, the employee saw Dr. Vaught for the February 16, 2004 accident when he was pulling a barrel of glue and felt a sharp pain in his low back and right leg. Approximately one and a half to two months before that, while putting on a tarp at work, he slipped and experienced some back and right leg pain but continued to work and the pain was not severe until February 16, 2004. In 1987, the employee had low back pain and an enzyme injection by Dr. Holder with relief of his back pain for approximately two years. After this two year period, he had some aching in his back but no leg symptoms until this accident. Dr. Vaught stated that the March MRI showed a L4-5 disc herniation and degenerative disc disease at L3-4, L4-5 and L5-S1. Dr. Vaught thought the large central disc protrusion at L4-5 was responsible for the pain, and recommended a lumbar epidural steroid injection and a right SI joint injection. He referred the employee to Farmington Sports and Rehabilitation Center.

In the physical therapy evaluation on March 30, the history showed that the employee had right leg pain occasionally and some low back pain for the past one to two months. On February

16, the employee pulled on a barrel and the right leg pain intensified. Prior to that, he had sharp pains in the low back throwing tarps over the loads on his truck.

On April 6, 2004 the employee had a psychiatric evaluation by Dr. Guiley. The February 16, 2004 back injury was noted. The employee has been out of work and has been depressed. He has been worried that he will lose his job and will be unable to return to work and support his family. The employee felt depressed about the loss of his sister who died five years ago of cancer. In the past psychiatric history it is noted that the employee had bipolar disorder but the medications did not help. Past medical history was low back, neck and knee problems. Dr. Guiley's initial diagnosis was to rule-out alcohol dependence, attention deficit-hyper activity disorder, impulsive type; and OCD versus OC personality disorder. The employee had an almost obsessive preoccupation with his deficits, irritability, anger, and impulsivity. Dr. Guiley increased the Lexapro, Neurontin and Strattera. The employee continued to treat with Dr. Guiley with a diagnosis of ADHD and depressive disorder, through the end of December of 2004.

On April 19, 2004, Dr. Vaught stated the employee had an appropriate course of conservative therapy for a large L4-5 herniated disc with significant leg pain and recommended a L4 laminectomy and bilateral L4-5 discectomy.

The employee saw Dr. Krettek on May 10, 2004 with low back pain and right lower extremity pain and numbness. Dr. Krettek noted that in 1986 the employee had undergone a L4-5 chemonucleolysis and an anterior cervical discectomy and interbody fusion at C5-6. Since that time, the employee had no difficulty with his neck or low back. His current symptoms began several months ago with an injury on February 16. About one and a half to two months before he had some leg pain and a couple months before that had some back pain. The employee was injured on February 16, 2004 when he was pulling a barrel of glue and had sharp low-back pain. The employee had a similar pain in his low back in January of 2004; and also had episodes of low-back pain which would resolve with rest. Dr. Krettek noted the 1991 left knee operation and carpal tunnel surgeries in 1997. Dr. Krettek concurred with Dr. Vaught's recommendation for a L4 laminectomy with a bilateral L4-5 discectomy for the large L4-5 disc herniation. The employee had a pre-existing disc abnormality leading to the 1986 chemonucleolysis; had a degenerative disc at L4-5; and was able to work in a normal fashion. The employee had an aggravation of the pre-existing condition due to the February 16, 2004 event. Dr. Krettek recommended a right L4-5 discectomy for the large L4-5 central disc herniation with right-side predominance into the neural foramen.

On June 3, 2004 Dr. Vaught performed a partial L4 laminectomy, bilateral L4-5 discectomy and foraminotomy, and a right medial facetectomy for the L4-5 herniated disc.

A progress note from work conditioning on August 5 stated that the employee did not demonstrate the ability to perform the essential demands of his job. The employee has made limited progress in work conditioning with some physical skills actually decreasing. Due to increased problems, Dr. Vaught ordered an MRI which was done on August 9 and showed a large recurrent disc extrusion at L4-5. Dr. Vaught recommended re-exploration and removal of

the disc. On August 12, Dr. Vaught performed a complete L4 laminectomy, a L4-5 foraminotomy and bilateral L4 discectomy.

An EMG/NCV in October showed bilateral L4 radiculopathy with acute denervation and chronic reinnervation seen with the left side more affected than the right; and chronic bilateral S1 radiculopathy.

After a functional capacity evaluation, the employee met with Dr. Vaught on November 22, 2004. Dr. Vaught felt that the employee was at maximum medical improvement and could return to work on light duty with the opportunity to change positions as needed with no frequent bending, stooping or twisting; no overhead work; and no lifting greater than 20 pounds. Dr. Vaught prescribed Oxycodone for pain. The employee was to contact his family physician if additional pain medications were needed.

On December 16, 2004 Dr. Damba noted that the employee has been laid off from work and was looking for a new job; and referred him to a pain clinic.

The employee continued to treat with Dr. Damba in 2005 including prescription medication. In August 2005 Dr. Damba stated that she was prescribing 500mg of Naprosyn, Celebrex, and Vicoprofen for back pain; and Neurontin for leg numbness and tingling. In October, Dr. Damba recommended a pain clinic evaluation. On November 3, Dr. Naushad ordered a lumbar MRI due to increased low back pain.

On August 26, 2005 a Social Security Administration Administrative Law Judge found that the employee was disabled under the Social Security Act and has been disabled since February 16, 2004. The employee treated with Dr. Damba several times during 2006.

The employee saw Dr. Berkin on February 25, 2005 with his report dated April 2, 2005. Dr. Berkin noted that in June of 2004 the employee had surgery for the L4-5 herniated disc and continued to remain symptomatic. A post-operative MRI scan revealed a recurrent L4-5 disc herniation. In August 2004, the employee underwent a second surgery by Dr. Vaught. Following that surgery he was released to return to work on limited duty restrictions but was not accepted back by his former employer due to the restrictions. The employee remained symptomatic and was not working at the present time. Dr. Berkin did not think the employee was at maximum medical improvement and recommended additional treatment.

The employee saw Dr. Lange on May 17, 2005. The employee had a past history of back difficulties and underwent chemonucleolysis in 1986. He worked subsequent to that with multiple restrictions. Dr. Holder placed a rather significant permanent lifting restriction on the employee but he had to make a living and was willing to lift more. The employee was on social security disability for about six years subsequent to the enzyme injection not only for residual back complaints but also due to psychiatric disease. The employee, at some point, lost his social security disability. Dr. Lange stated that the employee did not have a normal back at the time of the February 2004 incident. The employee acknowledged some on-going back problems subsequent to his 1986 enzyme injection and that Dr. Holder had given him significant lifting

restrictions. Despite these lifting restrictions, the employee obtained employment as a truck driver with the manipulation of heavy objects.

Dr. Lange stated that the employee would have reached maximum medical improvement approximately six months after his repeat surgery. Part of the permanency would be related to his previous disc herniation treated with enzyme injection; and a significant amount of his permanency would be associated with the newer disc problem beginning in February 2004. Dr. Lange estimated that the employee had an approximate 35-40% permanent partial impairment of the whole person. Approximately 15% was related to pre-existing issues and approximately 20-25% was related to his newer problems from the February 16, 2004 incident. It was Dr. Lange's opinion that the employee would need significant restrictions and those restrictions are very similar to those imposed by Dr. Holder many years ago, namely a maximum lifting amount on a frequent basis of perhaps 15-20 pounds with a rare lift of somewhat greater than this. Intermittent activities in regard to sitting, standing, and walking were suggested. Dr. Lange stated the employee had psychological disease; and one of the more common somatic complaints with affective disorders is low back pain. The employee would require medications on a permanent basis; and it would be desirable for his treating physician to wean him off morphine.

The employee saw Dr. Berkin on November 23, 2005 with his report dated January 4, 2006. Dr. Berkin's deposition was taken on August 26, 2010. Subsequent to the second surgery the employee was sent to a pain management specialist and was administered epidural steroid injections. He continued under the care of Dr. Naushad, never returned to work for his previous employer, and was placed on social security disability. It was Dr. Berkin's opinion that as a result of the February 16, 2004 injury, that the employee sustained a 50% permanent partial disability of the body as a whole referable to the lumbosacral spine.

With regard to the employee's pre-existing conditions, it was Dr. Berkin's opinion that the employee had an additional 10% permanent partial disability of the body as a whole to the lumbosacral spine from the 1986 lower back injury. Due to the pre-existing cervical condition with a February of 1987 cervical discectomy and anterior interbody fusion at C5-6, it was Dr. Berkin's opinion that the employee sustained a 35% permanent partial disability of the body as a whole at the level of the cervical spine. Due to the left knee injury and surgery in 1991, it was Dr. Berkin's opinion that the employee had sustained a 35% permanent partial disability of the left lower extremity at the knee. Due to the bilateral carpal tunnel releases in 1997, it was Dr. Berkin's opinion that the employee had a 35% permanent partial disability of each upper extremity at the level of the wrist. With regard to fracture of his left forearm in 1993, Dr. Berkin did not feel the employee sustained any permanent partial disability. For the prior injury to his left shoulder for which he received conservative treatment for a rotator cuff tear injury, it was Dr. Berkin's opinion that the employee sustained a 15% permanent partial disability of the left shoulder. With respect to the history of anxiety and bipolar disorder, Dr. Berkin deferred a disability opinion to the expertise of a psychiatrist.

Dr. Berkin put restrictions of avoiding excessive squatting, kneeling, stooping, turning, climbing or lifting. The employee should avoid standing or sitting for extended periods of time. He should have a 15 pound lifting restriction from the floor to the waist and a 10 pound lifting

restriction from the waist to the shoulder. If required to perform exertional activities for an extended period time, the employee should be permitted frequent breaks to recover, to avoid exacerbation of his symptoms and further injury to his low back.

It was Dr. Berkin's opinion that the pre-existing disabilities represented a hindrance or obstacle to employment or re-employment at the time of the February 2004 low back injury. It was Dr. Berkin's opinion that the pre-existing disabilities in combination with the disability to his lower back created a significantly greater disability than the sum of his individual disabilities and a loading factor should be applied. It was Dr. Berkin's opinion that irrespective of any disability due to his mental disease, that due to the nature and extent of the disability resulting from his orthopedic injuries, coupled with his age and limited education, the employee is incapable of competing for or maintaining gainful employment in the open labor market. It was Dr. Berkin's opinion that the employee was permanently and totally disabled.

Dr. Berkin stated that the employee being injured in 2004 moving a 55 gallon drum would be considered heavy work. When asked if the employee was capable of doing relatively heavy work after his prior chemonucliosis, neck surgery and knee surgery, Dr. Berkin stated he did the work but probably suffered with it based on the nature of his injuries. The employee had a job, a commitment and an obligation to do his job but a lot of the employee's work activities probably bothered him. When asked if he would defer to Mr. Lalk's opinion that the employee is unemployable in the open labor market due to a combination of his psychiatric difficulties and his back injuries insofar as it required him to lie down and recline during the day, Dr. Berkin stated he respected his opinion but he had an opinion and would not necessarily defer to it. Dr. Berkin stated sometimes in cases he thought were marginal he would defer strictly to a vocational rehabilitation person but he did not think that in this case. It was his opinion with everything that the employee had; he was disabled irrespective of any psychiatric problems.

Timothy Lalk performed a vocational rehabilitation evaluation on April 13, 2006, his report was dated May 19, 2006; and his deposition was taken on September 10, 2010. Mr. Lalk noted that the employee had difficulty responding to many of his questions; seemed to be quite distracted quite easily and gave responses only tangentially related to his questions; readily volunteered information but tended to get lost in minor details; and was unable to maintain a steady train of thought. The employee seemed to have a poor understanding of his medical condition but felt he had no restrictions for his low back after 1987 because he was taken off social security disability benefits. The interview took an exceptionally long time because his responses were either very limited in content, ambiguous or overly detailed with non-pertinent background information. Mr. Lalk observed the employee moaning and gasping whenever he changed positions or when he walked or stood. The employee got up several times during the interview and at one point leaned on the back of his chair for eight minutes. After two hours and forty five minutes, he stood up and remained standing for over twenty minutes. He requested a break and lied down on a sofa for about seven minutes.

With regard to his pre-existing low back and neck injury in 1986, the employee stated he was off work for about one year after his low back surgery and was off work another year from his cervical surgery. His symptoms decreased for about two years following the surgeries. He

does not recall receiving any restrictions from Dr. Krettek or Dr. Holder. In 1990, he experienced increased pain in his low back and needed medication about once a week to twice per month. It usually developed from bending too much or working too hard; or not taking his time. With regard to his left knee surgery for torn ligaments, after a year he had no problems. He was on social security disability from February of 1992 until 1997 when it was terminated. In 1997 or 1998, he had bilateral carpal tunnel surgeries and is still unable to hold a pencil very long and sometimes has numbness in his hands at night or when he drives.

The employee completed the ninth grade and attempted to obtain his GED three times but failed. In the late 1980s he took a course in computer programming but was unable to comprehend the Algebra and quit after two months. Mr. Lalk administered vocational testing. The employee scored at a fifth grade level in reading and a fourth grade level in arithmetic. Mr. Lalk administered the reading comprehension portion of the Adult Basic Learning Examination which the employee terminated after about eighteen minutes due to not being able to tolerate his symptoms and his need to lie down. He completed less than half of the problems but at the rate he was choosing items correctly, it would have been at a 3.7 grade equivalent. The test scores were consistent with the inability to pass the GED.

With regard to functional restrictions and limitations, Mr. Lalk noted the prior restrictions of Dr. Krettek and Dr. Holder from 1987 and 1992; and the current restrictions of Dr. Vaught, Dr. Lange and Dr. Berkin.

Mr. Lalk stated based upon the restrictions recommended by Drs. Vaught, Lange and Berkin, the employee is limited to sedentary or near sedentary jobs which allow an individual the opportunity to get up and move around as needed and to take breaks from activity as needed. The employee has no experience which would allow him to work in a skilled, sedentary position within the restrictions. Physically he is only able to work in an unskilled, entry level position at the sedentary level. Furthermore, the employee would need to be able to accommodate his need to change positions frequently according to the doctor's recommendations. If the employee could work up to the level of the restrictions, he could seek employment and positions such as an unarmed security guard or information clerk, desk clerk at a motel or retail store, cashier at a self-service or convenience store, and a variety of customer service representative positions. The employee described symptoms and limitations which would not allow him to work in those positions. He had increased symptoms, especially in his back and legs which he can only control by lying down which he does at least twice per day from one to three hours. The employee would not be able to secure employment as no employer would offer the employee an unskilled, entry-level position and at the same time provide accommodations allowing him substantial amounts of time to lie down as needed during the work day.

In addition to his physical limitations, Mr. Lalk noted that Dr. Guiley identified psychiatric conditions and due to that in April of 2004, indicated a severe functional limitation. In December of 2004, Dr. Guiley stated that the employee was suffering from a depressive disorder which was situational and ADHD. Dr. Lange acknowledged his affective disorder and that perhaps some of his somatic complaints were related. The employee has symptoms which were consistent with the diagnosis and opinions and presented in the interview in a manner

similar to those diagnosis and opinions. It was Mr. Lalk's opinion that the psychiatric condition is significantly limiting his ability to return to employment. It is Mr. Lalk's opinion that the combination of his psychiatric condition and his inability to be active throughout a day without lying down along with the behavior which is presented in his office would prevent any employer from considering him for a competitive position. Mr. Lalk could not recommend any vocational rehabilitation services for the employee unless he is better able to control his symptoms so that he is able to function through a full day on a regular basis without lying down while remaining active at a sedentary level.

Mr. Lalk stated that the employee was not employable and his conclusion was based on two factors. The first is the psychiatric condition and the other is the need to lie down during the day. The employee had dealt with psychological health issues for a great portion of his life at least prior to 2004; and there appeared to be deterioration in his mental health after his 2004 injury. Even prior to that there were periods of time when he showed deterioration in his mental health. With regards to the need to lie down, there was no indication that was a requirement prior to the injury in 2004. Mr. Lalk was asked if, irrespective of his psychiatric state, the fact that he needed to lie down several hours at least twice per day would take him out of consideration to be employable in the national economy. Dr. Lalk could not definitely say but if the need to lie down is purely based upon his physical condition then it would. Whatever the reason for lying down, that fact takes him out of the workforce.

In Injury Number 04-085542 the employee settled his claim against the employer-insurer in August of 2009 for 35% permanent partial disability of the body as a whole related to the low back.

Sherry Browning performed a vocational analysis on the employee in July of 2011 based on a records review including the employee's deposition. The employee injured his low back in the 1980s when he fell down steps. He was treated by Dr. Holder with an injection which did not give any relief. The employee's back got worse after the February of 2004 accident. The employee had a left knee injury in 1991 and after that it swelled now and then; and he also had bilateral carpal tunnel releases. It was Ms. Browning's analysis that the employee was forty-five years of age at the time of the injury, had completed the 9th grade and was unable to obtain a GED on three attempts. The employee had difficulty reading and required five attempts before passing the written examination to obtain a CDL. Based on vocational testing in 2006, the employee was reading at the 5th grade level and performing arithmetic at the 4th grade level. He did not complete a reading comprehension test but the evaluator's estimate is that he would have scored at the 3.7 grade level. Based on the restrictions of Dr. Vaught, Dr. Lange, and Dr. Berkin and the employee's education achievement scores and work history as well as his reports of and treatments for chronic pain and associated functional limitations, it was Ms. Browning's opinion that the employee is precluded from working in any capacity. The employee lacks education, reading proficiency and often computer skills needed for entry level sedentary jobs. The presence of chronic pain even with sitting would preclude him from all sedentary work. Ms. Browning stated the employee is not employable on the labor market as a result of the February 2004 work injury and consequent chronic pain and functional limitations alone. He has pre-existing neck and back injuries and a history of depression and clearly became depressed

following the 2004 injury, bilateral carpal tunnel surgeries and a left knee surgery and is presumed to have injured his left arm and shoulder. The 2004 injury and limitations would have precluded him from all work with or without these conditions and any residual symptomology.

The employee testified that he has had depression his entire life and has been on medications for a long period of time. He currently is on Celexa, an anti-depressant. He has times when it feels like his brain is racing, he gets a block on some things; and it hurts emotionally. Since the February 16, 2004 accident his overall mental health is worse. His stress, depression and anxiety got significantly worse after August of 2004. Prior to the last injury, he was still having problems with his low back. He has not been unable to work since February 16, 2004. The pain in his low back since the February 16, 2004 accident is worse and it hurts quicker. Twisting causes the pain to come on easier. The only way to control the back and leg pain is to lie down, which he does every day at least one to two hours at a time, twice a day. He does not generally take pain medication because they do not agree with him and it makes his pain worse and makes him irritable. He cannot tolerate Percocet, Oxycodone and Flexeril. He cannot associate with people due to the depression and pain. Since the last accident he has had to stop doing a lot of things including playing the drums in a band. He cannot lift the drums and would have trouble bending to set them up. Since the last back injury he can only play the drums fifteen to thirty minutes. The employee stated that it is impossible for him to work due to his low back pain and depression.

RULINGS OF LAW

Issue 1. Liability of the Second Injury Fund for permanent total or permanent partial disability.

The term “total disability” in Section 287.020.7 RSMo, means inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. The phrase “inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. See Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. See Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the “inability to return to any reasonable or normal employment.” An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of State of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990).

The question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person’s present physical condition, reasonably expecting the employee to perform the work for which he or she entered. See Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo. App. 1993), and Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995).

The first question that must be addressed is whether the employee is permanently and totally disabled.

I find that the employee was a very credible and persuasive witness on the issue of permanent total disability. The employee offered detailed testimony concerning the impact his condition has had on his daily ability to function in the work place or at home. His testimony supports a conclusion that the employee will not be able to compete in the open labor market. The employee was observed during the hearing. Almost immediately the employee started moving around in his chair, standing up and sitting down which continued for the remainder of the hearing which supports a finding that the employee was suffering from pain and discomfort. The observations and opinions of Mr. Lalk confirm my observations. Mr. Lalk stated that during his evaluation, the employee was moaning and gasping whenever he changed positions, walked or stood. The employee got up several times during the interview and leaned on the back of his chair, remained standing and requested a break to lie down on a sofa. The employee was unable to tolerate his symptoms during the reading portion of testing and had to stop and lie down. The testimony and observed behavior of the employee were important on the issue of permanent total disability.

There is both medical and vocational evidence that addresses whether the employee is permanently and totally disabled.

It was Dr. Vaught's opinion that the employee could return to work on a light duty basis with the opportunity to change positions as needed with no frequent bending, stooping or twisting; no overhead work; and no lifting greater than twenty pounds.

It was Dr. Lange's opinion that the employee had an approximate 35-40% permanent partial impairment of the whole person and that the employee would need significant restrictions of maximum lifting on a frequent basis of fifteen to twenty pounds with a rare lift of somewhat greater than this; and sitting, standing, and walking should be intermittent.

Dr. Berkin put restrictions of avoiding excessive squatting, kneeling, stooping, turning, climbing or lifting; avoiding standing or sitting for extended periods of time; a fifteen pound lifting restriction from the floor to the waist and a ten pound lifting restriction from the waist to the shoulder. If required to perform exertional activities for an extended period time, the employee should be permitted frequent breaks. It was Dr. Berkin's opinion that the employee is incapable of competing for or maintaining gainful employment in the open labor market; and that the employee was permanently and totally disabled to work.

Mr. Lalk stated based upon the restrictions of Drs. Vaught, Lange and Berkin, the employee is limited to sedentary or near sedentary jobs with an opportunity to get up, move around, and take breaks as needed. The employee would only be able to work in an unskilled, entry level position at the sedentary level but he would not be able to secure employment as no employer would offer such a position and at the same time provide accommodations to allow substantial amounts of time to lie down as needed during the day. It was Mr. Lalk's opinion that the employee was not employable.

Ms. Browning stated that the employee lacked education, reading proficiency and computer skills needed for entry level sedentary jobs, and his chronic pain even with sitting precluded him from all sedentary work. It was Ms. Browning's opinion that the employee is precluded from working in any capacity and is not employable in the open labor market.

Based on a review of all the evidence, I find that the opinions of Dr. Berkin, Mr. Lalk and Ms. Browning are more credible and persuasive than the opinions of Dr. Vaught and Dr. Lange on whether the employee is permanently and totally disabled.

Based on the credible testimony of the employee and the supporting medical and vocational rehabilitation evidence, I find that no employer in the usual course of business would reasonably be expected to employ the employee in his present condition and reasonably expect the employee to perform the work for which he is hired. I find that the employee is unable to compete in the open labor market and is permanently and totally disabled.

Given the finding that the employee is permanently and totally disabled, it must be determined whether the February 16, 2004 accident alone and of itself or the accident in combination with the pre-existing conditions resulted in permanent total disability.

Mr. Lalk stated that his opinion that the employee was not employable was based on two factors. The first was the psychiatric condition and the other is the need to lie down during the day. The employee had psychological issues for a great portion of his life prior to 2004; and there appeared to be deterioration in his mental health after his 2004 injury. Mr. Lalk stated that there was no indication that lying down was a requirement prior to the 2004 accident and injury. It was Mr. Lalk's opinion that irrespective of his psychiatric state, the need to lie down several hours at least twice per day would take the employee out of being employable. I find that the Mr. Lalk did not address whether the February 16, 2004 accident alone and of itself or that the accident in combination with the pre-existing conditions resulted in permanent total disability.

It was Ms. Browning's opinion that the employee is not employable in the labor market as a result of the February 2004 work injury and consequent chronic pain and functional limitations alone and that the 2004 injury and limitations precluded him from all work with or without these pre-existing conditions and residual symptomology.

It is important to note that in 1986, the employee had an accident and was diagnosed with a L4-5 herniated disc. Dr. Holder recommended either a surgical laminectomy or a chemonucleolysis under local anesthesia. A chemonucleolysis of the L4-5 disc was performed. Dr. Holder's first permanent restriction was no lifting more than fifty pounds and he rated the employee at 15% permanent partial disability of the body as a whole referable to the low back. In October of 1987, the employee settled his claim for the low back at 15% permanent partial disability of the body as a whole. In 1990 and 1992, the employee was again treated for his low back. After that it was Dr. Holder's opinion that the employee should not work at any heavy manual labor, should not lift more than ten pounds on any one occasion, and there should be minimal repeated stooping, bending and lifting. It was the employee's credible testimony that the chemonucleolysis helped his lower back but after a year and or year and a half it got worse

and he would have shooting low-back pain including when he bent too much. His pain varied depending on what he lifted and what he delivered with the worst pain being a 10 out of 10 if he worked hard all day and did a lot of bending and standing on concrete. The employee would lay down in a recliner, sofa or bed when he got home from work. Prior to the last injury, he was still having problems with his low back which got worse after February 16, 2004.

It was Dr. Krettek's opinion that the employee had a pre-existing L4-5 disc abnormality and on February 16, 2004 the employee sustained an aggravation of that pre-existing condition which caused a large L4-5 central disc herniation.

It was Dr. Lange's opinion that prior to February 16, 2004 the employee did not have a normal low back and had ongoing problems since 1986. It was his opinion that part of the permanency would be related to his previous disc herniation treated by enzyme injection; and a significant amount of his permanency would be associated with the newer disc problem beginning in February 2004. It was Dr. Lange's opinion that the employee had an overall approximate 35-40% permanent partial impairment of the whole person. Approximately 15% was related to the pre-existing condition and approximately 20-25% was related to the February 16, 2004 incident.

It was Dr. Berkin's opinion that as a result of the February 16, 2004 injury, that the employee sustained a 50% permanent partial disability of the body as a whole referable to the lumbosacral spine. The employee settled his claim against the employer-insurer for 35% permanent partial disability of the body as a whole referable to the low back.

Based upon the evidence, I find that the opinions of Dr. Krettek, Dr. Lange, and Dr. Berkin are credible and persuasive and are more credible and persuasive than the opinion of Ms. Browning regarding the extent of the disability from the last injury alone.

The overwhelming, persuasive and credible evidence was that the primary February 16, 2004 injury alone did not cause the employee to be permanently and totally disabled. I find that as a result of the February 16, 2004 accident and injury alone that the employee sustained permanent partial disability. I find that as a direct result of the February 16, 2004 accident and injury alone, the employee sustained a permanent partial disability of 35% of the body as a whole referable to the low back. I find that the employee's February 16, 2004 injury alone did not cause the employee to be permanently and totally disabled.

The next issue to be addressed is whether the employee's pre-existing conditions were a hindrance or obstacle to his employment or re-employment.

As a result of the 1986 low back and neck injury, the employee had a chemonucleolysis of the L4-5 disc and a C5-6 anterior cervical discectomy and fusion. Dr. Holder first put restrictions of no more than fifty pounds for both his back and neck. The employee was off work for over a year; and settled against the employer-insurer for 15% permanent partial disability of the body as a whole referable to the neck and 15% permanent partial disability of the body as a whole referable to the low back in 1987. The employee received treatment for his neck and low

back beginning in 1990; and in 1992 Dr. Holder stated that the employee was unable to perform heavy manual labor, should seek employment in an office setting; and not lift more than ten pounds on any one occasion; and repeated stooping, bending and lifting should be held to a minimum. The employee was on social security disability in part due to his neck and low back from 1992 until sometime in 1996. The employee continued to have problems with his low back. If he did too much bending he had problems with his low back and his pain increased with lifting. He had 10 out of 10 pain if he worked hard all day and did a lot of bending and standing on concrete, and did too much in one day. When he got home he would lay down. The employee continued to have problems with his neck including loss of motion, stiffness and pain. At work, he had problems lifting and looking down; and movement bothered his neck. Sometimes he would lie down during lunch at work. Due to the 1986 lower back injury, it was Dr. Berkin's opinion that the employee had 10% permanent partial disability of the body and was Dr. Lange's opinion that the employee had approximately 15% permanent partial disability of the body. Due to the 1986 neck injury, it was Dr. Berkin's opinion that the employee sustained a 35% permanent partial disability of the body as a whole at the level of the cervical spine.

As a result of the 1990 left knee injury, the employee had surgery and was off work for almost six months. The employee settled his claim against the employer-insurer for 26% permanent partial disability of the left knee. The employee continued to have problems with the knee including pain, stiffness and swelling; trouble walking; and problems squatting or standing.

As a result of the bilateral carpal tunnel syndrome surgery in the mid 1990s, the employee continued to have problems including numbness in his hands and wrists which woke him up at night and made it inconvenient to drive trucks. It was Dr. Berkin's opinion that the employee had a 35% permanent partial disability of each wrist.

As a result of the 1997 left shoulder injury, the employee continued to have problems including loss of motion; not being able to lift his arm above his shoulder; pain with movement; and limitations in lifting. It was Dr. Berkin's opinion that the employee sustained a 15% permanent partial disability of the left shoulder.

As a result of the early 2000s left forearm fracture, the employee continued to have problems with loss of strength and pain. Dr. Berkin did not feel the employee had sustained any permanent partial disability.

It was Dr. Berkin's credible and persuasive opinion that the pre-existing disabilities were a hindrance or obstacle to employment or re-employment at the time of the February 2004 low back injury. I find that the employee's pre-existing conditions to his low back, neck, left knee, left shoulder, and bilateral hands and wrists constituted a hindrance or obstacle to his employment or to obtaining re-employment.

It was Dr. Berkin's credible and persuasive opinion that the pre-existing disabilities in combination with the disability to his lower back from the primary work-related injury created a significantly greater disability than the sum of his individual disabilities and a loading factor should be applied. It was Dr. Berkin's credible and persuasive opinion that irrespective of any

disability due to his mental disease, due to the nature and extent of the disability resulting from his orthopedic injuries, coupled with his age and limited education that the employee is incapable of competing for or maintaining gainful employment in the open labor market. Based on the employee's overall condition irrespective of any psychiatric problems, it was Dr. Berkin's credible and persuasive opinion that the employee was permanently and totally disabled.

I find that the employee's pre-existing injuries and conditions to his body as a whole referable to his low back and neck, left knee, left shoulder, and bilateral hands and wrists combined synergistically with the primary injury to the low back and body as a whole to cause the employee's overall condition and symptoms. Based on the evidence, I find that the employee is permanently and totally disabled as a result of the combination of his pre-existing injuries/conditions and the conditions caused by the February 16, 2004 accident and injury.

On November 22, 2004 Dr. Vaught stated that the employee was at maximum medical improvement and released him from care; and the employer-insurer stopped paying temporary total disability benefits. I find that the employee was in his healing period and had not reached the point where further progress was not expected until November 22, 2004. I find that for the purpose of determining liability of the Second Injury Fund, the permanent partial disability of 35% of the body as a whole related to the low back would have been payable in 140 weekly installments commencing on November 23, 2004 at the end of the healing period, and continuing through July 31, 2007. Commencing on August 1, 2007 the Second Injury Fund is responsible for paying permanent total disability benefits to the employee at the rate of \$232.77 per week.

These payments for permanent total disability shall continue for the remainder of the employee's lifetime or until suspended if the employee is restored to his regular work or its equivalent as provided in Section 287.200 RSMO.

ATTORNEY'S FEE: Sam Eveland, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST: Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers' Compensation