

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

Injury No.: 00-180083

Employee: Robert Groves
Employer: Trans World Airlines, Inc.
Insurer: Self-Insured c/o Gallagher Bassett Services, Inc.
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 September 20, 2011. The award and decision of Administrative Law Judge John K. Ottenad, issued September 20, 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 29th day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Robert Groves

Injury No.: 00-180083

Dependents: N/A

Employer: Trans World Airlines, Inc.

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Self-Insured
C/O Gallagher Bassett Services, Inc.

Hearing Date: June 7, 2011

Checked by: JKO

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: March 27, 2000
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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: Claimant was a ramp service agent for Employer who injured his low back and body as a whole as a result of the heavy, repetitive lifting from awkward positions, such as in the bellies of airplanes, which was required in his job.
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 and Body as a Whole
14. Nature and extent of any permanent disability: Permanent total disability against Employer from the injury in this occupational disease
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$1,631.00

Employee: Robert Groves

Injury No.: 00-180083

- 17. Value necessary medical aid not furnished by employer/insurer? \$21,576.03
- 18. Employee's average weekly wages: \$497.60
- 19. Weekly compensation rate: \$331.75 for TTD/ \$303.01 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Past medical expenses	\$21,576.03
266 1/7 weeks of temporary total disability from 03/27/00 to 05/03/05	\$88,292.89
\$331.75 per week for Claimant's lifetime starting 05/04/05, subject to review and modification by law	

22. Second Injury Fund liability:

Denied	\$0.00
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TOTAL: \$109,868.92 THROUGH 05/03/05 PLUS CONTINUING WEEKLY BENEFITS AS DESCRIBED

23. Future requirements awarded: **Continued and ongoing future medical care for Claimant's low back condition, including but not limited to chronic pain management, physical therapy, medications, medication management (doctors' visits), management of the spinal cord stimulator, and any other testing, treatment or evaluation that the treating doctors deem necessary to cure and relieve Claimant of the effects of the injury, as well as ongoing permanent total disability benefits, as described in the award.**

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: Rick A. Barry.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Robert Groves	Injury No.: 00-180083
Dependents:	N/A	Before the
Employer:	Trans World Airlines, Inc.	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Self-Insured	Department of Labor and Industrial
	C/O Gallagher Bassett Services, Inc.	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JKO

On June 7, 2011, the employee, Robert Groves, appeared in person and by his attorneys, Mr. Rick A. Barry and Mr. Mark Akers, for a hearing for a final award on his claim against the employer, Trans World Airlines, Inc., which is duly Self-Insured under the statute C/O Gallagher Bassett Services, Inc., as well as the Second Injury Fund. The employer, Trans World Airlines, Inc., which is duly Self-Insured under the statute C/O Gallagher Bassett Services, Inc., was represented at the hearing by its attorney, Ms. E. Joye Hudson. The Second Injury Fund was represented at the hearing by Assistant Attorney General Michael T. Finneran. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) Leading up to March 27, 2000, Robert Groves (Claimant) allegedly sustained an occupational disease.
- 2) Claimant was an employee of Trans World Airlines, Inc. (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage of \$497.60, resulting in applicable rates of compensation of \$331.75 for total disability benefits and \$303.01¹ for permanent partial disability (PPD) benefits.

¹ The record will reflect that the parties at the hearing stipulated to, what they believed to be, the maximum applicable rate of compensation for the date of injury for permanent partial disability benefits of \$314.26. However, upon review, I find that the parties were mistaken in the maximum rate of compensation for permanent partial disability benefits for an injury on March 27, 2000. By statute, the maximum rate of compensation for permanent partial disability benefits for an injury date of March 27, 2000 is \$303.01. Therefore, since I believe the intent of the parties was to stipulate to the maximum and since any higher rate would be contrary to the statute, I find that a rate of \$303.01 is the appropriate rate to use for the payment of any permanent partial disability benefits in this matter.

- 7) Employer paid no temporary total disability (TTD) benefits in this case.
- 8) Employer paid medical benefits totaling \$1,631.00.

ISSUES:

- 1) Was there an occupational disease under the statute?
- 2) Did the occupational disease arise out of and in the course of employment?
- 3) Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to his alleged occupational disease at work?
- 4) Is Claimant entitled to payment for past medical expenses in an amount to be determined?
- 5) Is Claimant entitled to future medical treatment?
- 6) Is Claimant entitled to the payment of temporary total disability benefits for a period of time to be determined?
- 7) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this alleged occupational disease?
- 8) What is the liability of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Medical treatment records of the Unity Health Medical Group (Dr. Leonard Lucas)
- B. Certified medical treatment records of Family Medical Group (Dr. Leonard Lucas)
- C. Certified medical treatment records of Creve Coeur Pain Control (Dr. Bakul Dave)
- D. Medical treatment records of Dr. Paul Sheehan
- E. Certified medical treatment records of Premier Care Orthopedics
- F. Certified medical treatment records of Pain Management Services
- G. Prescription receipts
- H. Medicare Explanation of Benefits forms
- I. ***Withdrawn prior to admission***
- J. Deposition of Dr. Jacques Van Ryn, with attachments, dated May 28, 2010
- K. Deposition of Ms. Delores Gonzalez, with attachments, dated July 23, 2010
- L. Summary of Employee's prescription costs

- M. Billing statement from Signature Health Services (Dr. George Schoedinger)
- N. Certified medical treatment records of Pain Management Services

Employer/Insurer Exhibits:

- 1. Deposition of Dr. David Raskas, with attachments, dated August 18, 2009
- 2. Deposition of Ms. June Blaine, with attachments, dated November 17, 2010
- 3. Employee's wage statement from Employer/Insurer
- 4. Certified medical treatment records of BarnesCare
- 5. Certified medical treatment records of Orthopedic Associates, LLC
(Dr. John Wagner)

Second Injury Fund Exhibits:

- I. Deposition of Dr. Barry Feinberg, with attachments, dated July 31, 2009

Notes: 1) A number of the deposition exhibits were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence. Specifically on the Seven Day Rule objections, the party making that objection did not then request a continuance to reconvene the deposition after having had a chance to review the new opinion, and instead continued cross-examination, thus, that objection was effectively waived.

2) Any stray markings or writing on the Exhibits in evidence in this case were present on those Exhibits when they were admitted into evidence on June 7, 2011. No additional markings have been made since their admission on that date.

FINDINGS OF FACT:

Based on a comprehensive review of the substantial evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational opinions and depositions, the medical records and bills, and the testimony of the other witness, as well as my personal observations of Claimant and the other witness at hearing, I find:

- 1) **Claimant** is a 47 year old, currently unemployed individual, who last worked for Trans World Airlines, Inc. (Employer) as a ramp service agent in 2000. Claimant admitted that he remained technically employed by Employer until May 2, 2000. Claimant had worked for Employer for about six years. Some of his job duties included loading and unloading baggage, cargo and mail on airplanes. He has not worked anywhere else since he last worked for Employer.
- 2) Claimant testified he was a high school graduate and had some college (one year) studying computer science. After high school, he spent two years in the United States

Coast Guard on the Aids to Navigation Team, primarily changing lighthouses from generator power to solar power.

- 3) After leaving the Coast Guard, Claimant worked for the University of California at Irvine travel department as a temporary employee. He then worked at a building materials supply company and also selling insurance at an insurance company. Immediately prior to working for Employer, Claimant worked for Continental Airlines for approximately six to seven years. He worked as a ticket agent and gate agent, basically loading people onto airplanes for their flights.
- 4) Claimant denied having any low back problems or issues prior to his work for Employer. He never received any treatment for his low back and was never hospitalized for any low back complaints prior to his work for Employer.
- 5) When he began working for Employer, Claimant testified that his first job was as a ramp service agent. He basically was responsible for loading and unloading the baggage, cargo, freight and mail on airplanes as they entered and left the airport. Claimant explained that he generally worked on the inner gates, which were the long cross-country flights with lots of bags, freight and mail. Claimant testified that the vast majority of the time he was on his knees, bent over, in the belly of the airplane throwing bags to the door and then placing them on the cargo ramp. He said that he would not know if a bag weighed 15 pounds or 100 pounds until he lifted it to throw or move it. He estimated that there were approximately 100-200 bags he would have to load and unload per aircraft for each flight. Additionally, there was usually 2,500-10,000 pounds of mail and similar amounts of freight. In addition, he was responsible for handling items like bags, wheelchairs, scooters, etc., that had to be checked at the gate. Generally, he was responsible for performing these activities on six to eight airplanes per day. Other than their scheduled breaks, Claimant testified that there really was no time to rest between flights. He noted that they also worked overtime all the time, especially if it rained and flights were delayed. He said that they were responsible for staying until the job was done, regardless of the time. He estimated that with overtime, he perhaps worked an additional one to two planes per day.
- 6) Claimant's low back problems started about seven to eight months into his job with Employer. He said that he was unloading aircraft brakes that weighed approximately 475 pounds each and he had difficulty sliding the wooden pallet with the brakes on it. Claimant said that he noticed immediate pain in the low back and he was unable to continue working. He said that he went to BarnesCare and he was diagnosed with a low back strain. They took X-rays of his back and then gave him pain medication and physical therapy. He said that he was off work for two weeks and then returned to light-duty work.
- 7) According to the medical treatment records from **BarnesCare** (Exhibit 4), Claimant was injured on November 19, 1995 when he was on his knees in the belly of a 727 airplane pushing a 425 pound piece of cargo, when he felt pain in the low back that went into the right groin. The report indicated that he had been handling baggage and lifting heavy boxes and cargo and he had had prior episodes of mild low back pain,

but nothing this severe. X-rays of the lumbar spine were “negative.” He was given medications and physical therapy. While still treating for the November 1995 incident, the BarnesCare records document an additional re-injury of his low back on December 11, 1995, because he had been working on his hands and knees. He reported the same pain from the low back into the right groin. By January 4, 1996, Claimant apparently reported no further pain in his low back, so he was released back to full-duty work with the diagnosis of a resolved low back strain.

- 8) Claimant testified that the light-duty work he was given while treating for his low back, was on a cleaning crew. He said there was a lot of going up and down stairs and he only performed this work for a couple of weeks to a month. When he was released back to full-duty work, he went to the stores job. He said this job dealt with the airplane parts that were needed for repairs and catering for the airplanes, among other things. Overall, he said that it was a little bit of an easier job than the ramp service agent position, because there was no loading and unloading of bags and freight on a daily basis. However, he still had to lift and move heavy aircraft parts, some of which weighed 100 pounds or more. He said that he was lifting perhaps two to three heavy parts per hour. Claimant explained that the main difference between the lifting in the stores job and the lifting in the ramp job, was that he was able to lift while standing up in the stores job. He thought that he may have had one injury while at the stores job, but he was not sure. He admitted that he was receiving treatment for his back from Dr. Lucas while he was working in the stores job position.
- 9) Claimant testified that he returned to the ramp job because he got better days off and it was easier to get vacation. He said that he returned to the same tasks as described above. He was back on the job a couple of months when he starting having significant back symptoms again. He believed that he missed some days from work on account of his back, but he had no specific recollection. He testified that he started having the same symptoms he had before when he worked the ramp job. He said that he began receiving medical treatment for his low back again. He suffered another significant incident involving his low back, when he was carrying a scooter for a disabled person, which was checked at the gate, and he experienced extreme low back pain. He said that he could not straighten up. He reported it and went for medical treatment. He explained that he had already done six or seven planes that day, and, so, he was already in a bit of pain, even before the scooter incident occurred.
- 10) The medical treatment records from **Dr. Leonard Lucas at Unity Health Medical Group** (Exhibit A) document a visit on March 27, 2000, when Claimant complained of low back pain and indicated that he had a back injury. Although the handwritten notes from the doctor are admittedly difficult to completely decipher, I see that Dr. Lucas writes about back pain for five days, with no specific trauma and he seems to indicate “lifting at work.” Claimant received medication and was taken off work. In a follow-up visit dated April 7, 2000, Dr. Lucas notes that Claimant’s low back pain was slightly better, but he was still having tingling into both legs. Dr. Lucas recommended a lumbar MRI and a referral to an orthopedic doctor. He saw Claimant again on July 18, 2000 and noted that he has not worked since March 2000. He noted that Claimant had an epidural steroid injection that helped his complaints, but pain

management was apparently denied by his insurance, so he had not had any others. Dr. Lucas recommended a referral to an anesthesiologist for another injection.

- 11) Claimant began treating with **Dr. Bakul Dave at Creve Coeur Pain Control** (Exhibit C) on July 31, 2000. Dr. Dave's first report contained a consistent history of back pain radiating to the right gluteal area from a lifting incident in March 2000. The pain has been getting progressively worse and he notes that Claimant has not worked since March 2000. The report references an MRI of the low back that showed degenerative changes from L3 to L5, worse at L5-S1 with minimal flattening of the right thecal sac. Dr. Dave diagnosed right sciatica and right S1 radiculopathy. By August 16, 2000, Claimant returned complaining of left gluteal pain and left ankle numbness. Claimant eventually had epidural steroid injections from Dr. Dave, but by September 11, 2000, Claimant was reporting that the injections had not helped his complaints at all. Dr. Dave suggested consideration of a surgical opinion.
- 12) Claimant came under the care of **Dr. Paul Sheehan** (Exhibit D) on October 6, 2000 for his low back and left leg complaints. Dr. Sheehan's first note indicates that, "The onset was in March when he did some lifting at a friend's house." Dr. Sheehan ordered a myelogram and post-myelogram CT scan, which showed a small but broad-based ventral defect at L4-5 centrally and to the left of midline that flattens the ventral sac on the left. There were also small ventral extradural defects seen at L5-S1. After provocative discography on November 14, 2000 for abnormalities at the L4-5 and L5-S1 levels, Dr. Sheehan recommended low back surgery.
- 13) **Dr. Paul Sheehan** (Exhibit D) took Claimant to surgery at **Christian Hospital Northeast-Northwest** (Exhibit D) on January 26, 2001. He performed an L4-5 anterior lumbar interbody fusion with radical discectomy and bone effusion, as well as an L5-S1 anterior lumbar interbody fusion with radical discectomy, placement of BAK cages and bony fusion (bone harvest from the left anterior superior iliac crest). He performed this surgery to treat Claimant's discogenic low back pain with lumbar spondylosis at L4-5 and L5-S1.
- 14) In follow-up visits with Dr. Sheehan (Exhibit D) after surgery, Claimant seemed to be improving with decreasing pain and improved function. In a report dated February 8, 2001, Dr. Sheehan suggested that Claimant pursue other employment opportunities on a long-term basis to try to get out of the heavy labor market. Claimant was doing reasonably well and the reports contain examples of Claimant performing activities around the house and walking up to 3 miles at a time. In his report dated July 20, 2001, Dr. Sheehan wrote that Claimant was not capable of returning to his prior occupation as a baggage handler. He suggests work hardening, but comments that "since this is not a job related injury it is not a covered benefit." Instead he suggests a functional capacity evaluation with physical therapy to determine any appropriate restrictions and Claimant's ability to return to work.
- 15) The medical treatment records from **Dr. Leonard Lucas at Unity Health Medical Group** (Exhibit A) document continued visits there from October 1, 2001 through November 20, 2001. The report from the October 1, 2001 visit indicates that

Claimant's work will not let him come back on light duty. It also indicates that Dr. Sheehan ordered a functional capacity evaluation that was not yet done.

- 16) Claimant testified that prior to seeking the additional treatment discussed below from Dr. Schoedinger, he was experiencing bone-on-bone grinding constantly in his back. He said that he could not sit, stand, walk or do anything else for a long time. He was only comfortable lying down. He never returned to full-duty work.
- 17) Claimant was examined by **Dr. John Wagner at Orthopedic Associates, LLC** (Exhibit 5) for an independent medical examination on September 8, 2003. Dr. Wagner's report contains a history of an injury at work for Employer in March 2000, but apparently a denial by Claimant of any prior injuries to his back. From his review of the X-rays, Dr. Wagner opined that there is a significant possibility of a pseudoarthrosis at L4-5 and possibly also at L5-S1. He recommended a CT scan to further evaluate those levels and also asked for the X-rays, MRI and myelogram from the time of the injury before he commented on causation. After reviewing those additional documents, Dr. Wagner issued a report dated October 31, 2003 in which he opined that Claimant did have a pseudoarthrosis of the lumbar fusion. He also believed that Claimant had pre-existing degenerative disc disease and that degenerative disease was the reason for the need for the fusion. He opined that any incidents at work, such as the one in March 2000, were only triggering events that made the degenerative disease symptomatic. He wrote, "I do not think there is anything at work that caused his degenerative disease, which is the cause of his complaints."
- 18) When Claimant continued to have low back problems, despite the first surgery by Dr. Sheehan, he eventually came under the care of **Dr. George Schoedinger**. The records of **Premier Care Orthopedics** (Exhibit E) show that Claimant first saw Dr. Schoedinger on December 4, 2003 with a complaint of low back and lower limb pain. The report contains a history of an original injury to his low back at work for Employer in 1996, when he was pushing a pallet of 450-pound aircraft brakes that did not move easily on the sheet metal decking. He noted a number of exacerbations of his low back problems at work, culminating in March 2000, which led to his surgery with Dr. Sheehan in January 2001. Claimant reported that his symptoms have actually increased since the surgery and he saw Dr. Curylo, who suggested the possibility of an incomplete fusion. After some additional tests (MRI and CT scans of the low back), Dr. Schoedinger initially concluded that Claimant had stable fusions at L4-5 and L5-S1. However, he was concerned about the L3-4 level. Upon testing the L3-4 level, he became concerned again about the possibility of a pseudoarthrosis at L4-5 and suggested further surgery for that reason. He kept Claimant off work during this time.
- 19) Claimant was taken to surgery on February 16, 2004 at **St. Anthony's Medical Center** by Dr. Schoedinger and **Dr. John Williams** (Exhibit E) to address the pseudoarthrosis at L4-5 through an anterior spinal approach. However, when Dr. Williams opened up Claimant and attempted to approach the lumbar spine anteriorly, he found that Claimant's abdominal aorta was extremely densely scarred to the

anterior aspect of the L5 vertebral body, as a result of scarring from the prior spinal fusion surgery. Since they were unable to safely retract the aorta to perform the surgery, the surgery was aborted.

- 20) Claimant returned to **Premier Care Orthopedics** (Exhibit E) and saw **Dr. Ravi Shitut** on February 26, 2004. Dr. Shitut confirmed that the anterior approach surgery had to be aborted because of the significant postoperative scarring from the prior low back surgery. He also confirmed that Claimant had a solid fusion at L5-S1, but a nonunion at L4-5. He suggested further posterior spinal surgery to implant instrumentation at L4-5, to provide stability at that level without further violation of the spinal canal.
- 21) On April 6, 2004, Dr. Shitut (Exhibit E) took Claimant back to surgery at St. Anthony's Medical Center for his symptomatic nonunion at L4-5. Dr. Shitut performed a posterior spinal instrumentation by percutaneous route using Sexton instrumentation at L4-5. At a follow-up appointment with Dr. Shitut on April 15, 2004, Dr. Shitut noted that Claimant now had right L5 radiculopathy, which he did not have prior to the most recent surgery. He questioned whether there might be a problem with the positioning of the instrumentation, so he suggested a CT scan of the low back to check that. The CT scan taken that same date showed the right L5 transpedicular screw was slightly medial breaching the medial inferior cortex. Dr. Shitut determined that the screw would have to be repositioned to hopefully eliminate the right leg L5 radiculopathy.
- 22) Dr. Shitut took Claimant back to surgery at St. Anthony's Medical Center (Exhibit E) on April 27, 2004 to address the malposition of the right L5 pedicle screw. He performed a revision of the right instrumentation at L4-5 using the Sexton system. By May 7, 2004, the right leg radiculopathy was gone and Claimant was generally doing well, but he remained unable to work. Claimant seemed to be improving following the most recent surgeries. In the last report from Dr. Shitut dated November 1, 2004, he noted that the pain had improved but was not completely gone and Claimant was still taking Darvocet. X-rays showed that the interbody fusion at L4-5 still did not appear solidified. Dr. Shitut commented that Claimant's chances of returning to his pre-injury work "are very minimal." He encouraged Claimant to apply for other types of employment, including perhaps a gate agent, to see if he was able to return to that kind of a job. He recommended further follow up in three months with a CT scan to see if the fusion at L4-5 was healing.
- 23) A **billing statement from Signature Health Services (Dr. George Schoedinger)** (Exhibit M) shows that Claimant still owed \$4,568.84, apparently for the medical treatment he received from Dr. Schoedinger at Premier Care Orthopedics on account of his low back problems, as detailed above.
- 24) The medical treatment records and bills from **Dr. Gregory Smith at Pain Management Services** (Exhibit N) document the pain management services Claimant received for his low back pain from February 7, 2005 through December 19, 2007 at that facility. At the initial visit with Dr. Smith, Claimant reported a consistent history

of the onset of low back pain in 1995 with moving a pallet and lifting at work. Dr. Smith diagnosed post lumbar laminectomy syndrome with left S1 radiculitis. He prescribed Neurontin and recommended a trial of a spinal cord stimulator. The Stage I spinal cord stimulator trial was implanted on March 3, 2005. By March 7, 2005, Claimant reported a 50% pain relief from the stimulator, so, therefore, Dr. Smith recommended further implantation of Stage II, based on this successful trial. Implantation of Stage II of the spinal cord stimulator and a pulse generator was conducted on March 10, 2005. In follow-up visits with Dr. Smith, Claimant reported good, but not complete, control of his left leg pain with the stimulator, but continued mid-lumbar pain, for which he was continuing to take pain medications. Dr. Smith diagnosed chronic intractable back pain related to post lumbar laminectomy syndrome with left S1 radiculitis. He tried to adjust the stimulator some to see if the back pain could be lessened without increasing the left leg pain.

- 25) Continued medical treatment records from **Dr. Gregory Smith at Pain Management Services** (Exhibits F and N) confirm that Claimant had a spinal cord stimulator implanted in March 2005 that was helping to control his left leg S1 radicular pain. By January 18, 2006, Claimant was still complaining of back pain that could not be better controlled by the stimulator. Dr. Smith diagnosed left S1 radiculitis and post lumbar laminectomy syndrome. He recommended right and left L5-S1 facet joint injections for the continued complaints. Those injections were carried out under fluoroscopy on January 19, 2006.
- 26) Claimant returned to Dr. Smith (Exhibit N) on July 19, 2007 with continued low back complaints, but also now some neck complaints. By August 16, 2007, Dr. Smith was recommending a revision of the spinal cord stimulator, which he eventually performed on September 19, 2007. As of December 19, 2007, Claimant was reporting no relief of his pain complaints from the recent revision. However, Dr. Smith questioned whether Claimant was even using the stimulator and why he was not attending the ordered physical therapy. Dr. Smith suggested that Claimant was noncompliant with the treatment Dr. Smith had provided and wrote that he was pessimistic that Claimant was ever going to find long-term improvement in his pain.
- 27) According to the medical bills attached to the records from **Pain Management Services** (Exhibit N), Dr. Smith charged a total of \$11,875.00 for his treatment of Claimant as detailed above. Claimant paid \$160.00 out of pocket for this treatment. Claimant's various personal health insurers apparently paid \$3,225.61. There were also adjustments listed on the billing statements that totaled \$8,489.39.
- 28) Medical treatment records from the **Family Medical Group (Dr. Leonard Lucas)**, Claimant's family physician from 2001 through November 30, 2010 (Exhibit B), document the numerous visits Claimant had with Dr. Lucas during that time. Many of the visits were the result of ongoing back complaints. Claimant was getting checkups and medications refilled. There were some other conditions for which Claimant also sought treatment during that time, which did not appear to be directly related to the low back difficulties at issue in this case.

- 29) Attached to the medical treatment records from **Dr. Leonard Lucas at the Family Medical Group** (Exhibit B), I found copies of billing statements for Claimant's visits with Dr. Lucas from August 13, 2007 through November 30, 2010. For those visits where there was clearly a diagnosis regarding Claimant's low back condition, I found total charges billed of \$1,685.57. The statements reflected payments made by Claimant totaling \$475.18 and payments made by Claimant's personal health insurance of \$1,108.53, as well as \$58.29 for which there is no accounting. The very last statement from November 30, 2010 also reflected an amount yet unpaid of \$43.57.
- 30) Claimant also submitted into evidence copies of his **prescription receipts** (Exhibit G), his **Medicare Explanation of Benefits forms** (Exhibit H) and a **summary of his prescription costs** (Exhibit L). These records document the various prescriptions Claimant was given in connection with his low back complaints from January 4, 2006 through September 26, 2010. In comparing the prescription receipts and Explanation of Benefits forms to the summary in Exhibit L, I found that Exhibit L contained three duplicate entries and errantly excluded one payment confirmed in the Medicare papers. I also found some entries in Exhibit H for prescriptions for Claimant's low back condition that Medicare paid, but which were not otherwise included in Exhibits G and L. For dates of service of January 2, 2009, July 24, 2009, October 16, 2009 and February 3, 2010, I found an additional \$198.92 in prescription costs, of which Claimant paid \$116.62 and insurance paid \$82.30. Making all those appropriate adjustments to the totals contained in Exhibit L, I find that Claimant's total prescription costs for this time period was \$3,446.62. I find that he paid \$1,734.18 and his insurance paid \$1,708.39, with \$4.05 for which there is no accounting.
- 31) The deposition of **Dr. Barry Feinberg** (SIF Exhibit I) was taken on July 31, 2009 by Claimant to make his opinions in this case admissible at trial. Although Claimant took Dr. Feinberg's deposition, the deposition testimony was offered at trial by the Second Injury Fund. Dr. Feinberg is board certified in anesthesiology and pain management. He examined Claimant on two occasions, December 9, 2003 and May 3, 2005, for the purpose of an independent medical examination at the request of Claimant's attorney. He provided no medical treatment. He testified consistent with the opinions contained in his reports dated October 3, 2005. By way of history, Claimant apparently originally reported to Dr. Feinberg that his low back pain dated back to an incident unloading an aircraft in 1996. He further explained that the plane had come in with 200 bags that had to be unloaded. In Dr. Feinberg's second report, the history dated back to an unloading incident in 1995. Claimant described multiple reinjuries (without providing any specific details of the reinjuries) between that time and March 2000, when he was carrying a scooter up a jetway and was unable to keep working. Following the original examination on December 9, 2003, Dr. Feinberg concluded that Claimant had lumbar radiculopathy as a result of multiple injuries at work from 1996 to 2000, which necessitated treatment and surgery. He thought Claimant needed further evaluation and treatment to determine if a pseudoarthrosis existed and if more surgery was needed. He specifically opined that Claimant's work (bending, lifting from awkward positions and working in confined and unusual positioning in the belly of planes), and the cumulative series of back injuries he

suffered while working for Employer, was a substantial factor in causing Claimant's back pain and need for treatment and surgery. He did not believe Claimant was able to be gainfully employed at that time.

- 32) Dr. Feinberg testified that by the time of his second examination of Claimant on May 3, 2005, Claimant had had the additional treatment and surgery for the pseudoarthrosis and the implantation of the spinal cord stimulator. Claimant reported increased pain with activity, including sitting, standing, walking, bending, kneeling or stooping. He also had abdominal pain from the aborted anterior spinal fusion surgery. Dr. Feinberg noted that Claimant shifted positions constantly to try to alleviate his complaints. On physical examination, Dr. Feinberg found core muscle weakness, sensory loss in the L5 distribution on the left side and restricted range of motion in the lumbar spine. He diagnosed lumbar radiculopathy, post laminectomy syndrome of the lumbar spine, abdominal pain status post anterior approach to lumbar surgery, sacroiliitis and musculoskeletal pain syndrome of the lumbar spine. He opined that Claimant would require ongoing medical treatment for chronic pain management, including physical therapy, medication management and management of the spinal cord stimulator. His causation opinion, as stated above, remained unchanged. As a result of the cumulative trauma Claimant suffered while working for Employer, Dr. Feinberg opined that Claimant had permanent partial disabilities of 70% of the body as a whole referable to the lumbar spine, 30% of the body as a whole referable to the thoracic spine on account of the spinal cord stimulator, 25% of the bilateral sacroiliac joints, and 20% of the body as a whole referable to the abdomen. He opined that Claimant was permanently and totally disabled from employment due to the cumulative injuries and continued complaints of pain. When asked specifically about the 1995 event as opposed to the 1996 beginning of his problems, Dr. Feinberg testified that there were two possibilities: 1) It is actually just the same injury Claimant was describing and he was just off by a year; or 2) It was another minor strain that occurred in 1995. He testified that if it was the same injury, with the date just off by a year, then his ratings would not change, but if it was another prior minor strain, then perhaps 5% would be related to that strain with the remaining 65% of the lumbar spine related to the cumulative trauma at work. However, if there was a separate 5%, he noted that there would be no combination between that alleged pre-existing rating and the other ratings he issued in this case.
- 33) The deposition of **Dr. David Raskas** (Exhibit 1) was taken on August 18, 2009 by Employer to make his opinions in this case admissible at trial. Dr. Raskas is board certified in orthopedic surgery. He limits his practice to spine surgery. He examined Claimant on two occasions, February 6, 2006 and June 16, 2008, for the purpose of an independent medical examination at the request of Employer's attorney. He provided no medical treatment. Dr. Raskas recorded a history from Claimant of initial low back problems following an injury in 1995 while unloading brakes from a plane, with periodic flare-ups of low back problems between that time and 2000. In reviewing the medical treatment records, Dr. Raskas found, what he believed were inconsistencies, in Claimant's history of low back problems, including the date of onset. He discussed the note from Dr. Sheehan mentioning an onset of back problems from doing some lifting at a friend's house in March 2000, and jumped to the conclusion that Claimant

was inconsistent since he never mentioned an injury to his back “moving furniture in March of 2000.” He recorded that Claimant was able to sit comfortably without shifting positions. After the first physical examination and review of the diagnostic studies, Dr. Raskas concluded that Claimant had chronic, longstanding degenerative disc problems in his low back at L4-5 and L5-S1. He believed that the degenerative non-work related process was what caused the need for the surgical treatment Claimant had received. He diagnosed failed back syndrome and suggested that Claimant could work in a sedentary capacity.

- 34) At the second physical examination on June 16, 2008, Dr. Raskas again wrote that Claimant sat comfortably in the room and was able to change positions without difficulty. He again diagnosed failed back syndrome, but now opined that Claimant was permanently and totally disabled. He did not believe the permanent total disability was related to the claimed work injuries. He opined that Claimant only sustained a lumbar strain referable to his work for Employer, for which he had 5% permanent partial disability of the body as a whole referable to the lumbar spine. He believed that the rest of Claimant’s disability related to pre-existing lumbar degenerative disc disease, and his poor surgical outcome from the surgery he needed on account of the degenerative disc condition. Dr. Raskas did not believe the degenerative disc disease was caused by Claimant’s employment.
- 35) On cross-examination, Dr. Raskas was asked his understanding of the claimed mechanism of injury in this matter and he responded that it was based on injuries to Claimant’s back in 1995 and 2000. When he was told the actual claimed mechanism of injury was repetitive trauma from work activities prior to 2000, not just two discrete accidents, Dr. Raskas responded that it still would not change his opinions in this matter. Despite admitting that he knew Claimant performed heavy, physical work as a ramp service agent, he testified that he believed Claimant’s smoking was a stronger predictive factor for his developing degenerative disc disease than that heavy physical work.
- 36) The deposition of **Dr. Jacques Van Ryn** (Exhibit J) was taken on May 28, 2010 by Claimant to make his opinions in this case admissible at trial. Dr. Van Ryn is board certified in orthopedic surgery. He examined Claimant one time, January 29, 2010, for the purpose of an independent medical examination at the request of Claimant’s attorney. He provided no medical treatment. He recorded a history from Claimant of first injuring his low back in 1995 or 1996 when he was moving airplane brakes in the belly of an airplane, and then continued low back pain and another exacerbation when carrying a motorized scooter up some stairs. Dr. Van Ryn recorded that Claimant shifted in his chair frequently during the examination. On physical examination, Dr. Van Ryn found limited range of motion in the lumbar spine, decreased sensation in the right leg in the L5 dermatome, but negative distraction testing. He explained that the physical examination showed very limited mobility of the low back, with pain in the back and right leg, but no markers of symptom magnification. He opined that Claimant had repetitive injuries to his low back, because the combination of his height and nature of his work imposed significant stresses that resulted in annular disruption and degenerative disc disease of L4-5 and L5-S1, necessitating a fusion.

Dr. Van Ryn explained in detail how Claimant's work for Employer on his knees, bent over, in the belly of an airplane, creates a tremendous mechanical disadvantage for the back, because of the awkward posture and repetitive movement of heavy weights. In other words, he opined that the work activities for Employer were a substantial factor in causing Claimant's low back injury. Dr. Van Ryn opined that all of the medical treatment Claimant had received was reasonable and necessary in light of this work injury. He believed Claimant would need future medical treatment, including pain medication and medical monitoring. He placed limitations on Claimant of no sitting, standing or walking for more than 30 minutes at a time, and no lifting, twisting, bending or climbing stairs. He opined that Claimant had a loss of use of 50% of the body as a whole referable to the lumbar spine on account of his repetitive trauma at work for Employer, but he also agreed that Claimant was permanently and totally disabled and unable to work as a result of the repetitive, occupational injuries.

- 37) The deposition of **Ms. Delores Gonzalez** (Exhibit K) was taken on July 23, 2010 by Claimant to make her opinions in this case admissible at trial. Ms. Gonzalez is a certified vocational rehabilitation counselor. She interviewed Claimant on September 15, 2006 and conducted testing with him on October 31, 2006, at the request of Claimant's attorney. She prepared a report dated December 9, 2006 that contained her findings and conclusions in this matter. She also reviewed the medical treatment records and reports and noted that none of the doctors returned Claimant to work, with most of them indicating that he was unemployable. She did not believe Claimant was capable of performing his past work, and, further, did not believe he had any transferrable skills to other jobs in the open labor market because of his limitations and continued significant need for medications. She opined that his residual capacity is less than sedentary work. She opined that Claimant was incapable of engaging in any substantial gainful activity and could not be expected to perform in an ongoing working capacity. Ms. Gonzalez concluded that Claimant was not capable of competing in the open labor market due to the effects and limitations he has on account of the cumulative injuries at work for Employer.
- 38) The deposition of **Ms. June Blaine** (Exhibit 2) was taken on November 17, 2010 by Employer to make her opinions in this case admissible at trial. Ms. Blaine is also a certified vocational rehabilitation counselor. She interviewed Claimant and administered tests on October 16, 2007, at the request of Employer's attorney. She prepared an original report dated August 29, 2008 and then a supplemental report dated September 2, 2010 that contained her findings and conclusions in this matter. Although she originally concluded, based primarily on the first report of Dr. Raskas, that Claimant was employable in a sedentary position in the open labor market, she changed that opinion in her supplemental report, because Dr. Raskas was also then of the opinion that Claimant was not employable. Her ultimate conclusion in this matter was that Claimant was not employable in the open labor market due to the combination of the November 1995 and March 2000 injuries.
- 39) In connection with this alleged injury, Employer paid \$1,631.00 in medical benefits. Employer never paid Claimant any temporary total disability (TTD) benefits.

- 40) Regarding his continued low back complaints, Claimant testified that he has severe pain with rainy weather. He said just getting out of bed hurts on those days and his painkillers do not even seem to help. On good days, he is still in pain, but he is able to get up and move around some. He estimated that he has an average of three to four good days in a week, unless it is raining. He said that he is totally restricted by the doctors now, to 5 pounds of lifting and no repetitive bending or squatting. He described daily chores around the house that he is able to perform, including doing the dishes and cleaning the house some. He said that he can mow the grass, but he is in a lot of pain doing it. He admitted that he does some grocery shopping. He said that he tries to walk, stretch out and stay as active as he can. He described difficulty with walking and steps because his left foot drops and his toes drag, even worse when he is hurting more or on rainy days. He estimated that he falls approximately eight times a year because of the foot drop. He still uses pain medications, including morphine sulfate, and his dorsal stimulator. He testified that he still has bilateral leg and foot pain, worse on the left. Claimant described his sleep as "terrible," with sometimes being up for a couple days with pain until he collapses out of sheer exhaustion. He said that he was very athletic before the injury, including skiing, but he has not been able to do any of that since the injury. He said that he can drive, but not for too long. He has to get out at every rest stop for about 15 minutes. Claimant also noted that he has almost no sex life, since the back pain, and pills, have basically left him impotent.
- 41) Claimant testified that he has not applied for other work, because he does not believe he is capable of working since he cannot sit or stand for any period of time. He said that he is also on too many pain pills.
- 42) On cross-examination from Employer, Claimant explained that his low back was injured over a period of time at work, but there were some memorable specific events, such as the airline brakes, lifting the scooter or changing seat covers. Claimant admitted that he technically continued to be employed by Employer until May 2, 2000. He received long-term disability from Employer for two periods, but he could not recall the exact dates. Claimant testified that he asked Employer for medical treatment quite a few times before getting the original surgery from Dr. Sheehan. He did not remember any lifting of furniture or telling anyone at Dr. Sheehan's office about lifting at a friend's house. He admitted that he is still a smoker. He said that he has tried to quit, but then starts again.
- 43) On cross-examination from the Second Injury Fund, Claimant confirmed that he had no physical or medical problems that compromised his ability to work prior to going to work for Employer. He said that he had also already been working for several months for Employer with no pain prior to the brake injury. He confirmed that he had back pain from the time of the brake injury until the scooter injury, and then it went downhill after the scooter.
- 44) I observed Claimant shifting around in the witness chair during his testimony in an apparent attempt to get more comfortable and relieve some complaints. He finally had to stand up approximately 50 minutes into his testimony during the trial.

45) Claimant's wife of 13 years, **Becky Groves**, also testified on his behalf at the hearing. She confirmed that he had no back complaints or injuries before he began working for Employer. After he started working for Employer, she remembered that there were numerous times that she heard him complaining about back pain, which all started with the brake incident. She said that her husband was very active prior to the injury, but he has been unable to do any biking, camping or skiing since that time. He cannot do much lifting and even has problems bending to get things out of the cabinets at home. She estimated that there are six to seven days per month when he cannot even get out of bed. Those days are normally precipitated by weather, walking too much or too much activity. Ms. Groves testified that the medications her husband takes for the pain make him scatterbrained, short-tempered and easily frustrated. She agreed that he does some light housework. Overall, Ms. Groves noted that she has seen no real improvement in his condition and instead it just gets worse and worse year after year, with more frequent and intense pain.

RULINGS OF LAW:

Based on a comprehensive review of the substantial evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational opinions and depositions, the medical records and bills, and the testimony of the other witness, as well as my personal observations of Claimant and the other witness at hearing, and based upon the applicable laws of the State of Missouri, I find:

Issue 1: Was there an occupational disease under the statute?

Issue 2: Did the occupational disease arise out of and in the course of employment?

Issue 3: Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to his alleged occupational disease at work?

Given that these three issues in this Claim are so inter-related, I will address them together in this section of the award.

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

Claimant alleges that he sustained an occupational disease involving his low back that was medically causally related to his employment for Employer. Under **Mo. Rev. Stat. § 287.067.1 (1994)**, occupational disease is defined as "an identifiable disease arising with or without human fault out of and in the course of the employment." Additionally, under **Mo. Rev.**

Stat. § 287.067.2 (1994), “an occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor.” An injury is defined as clearly work related under **Mo. Rev. Stat. § 287.020.2 (1994)** “if work was a substantial factor in the cause of the resulting medical condition or disability.”

The Court in *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo. App. E.D. 1999), explained the proof the employee must provide in order to make an occupational disease claim compensable under the statute. The Court held that first, the employee must provide substantial and competent evidence that he contracted an occupationally induced disease rather than an ordinary disease of life. There are two considerations to that inquiry: (1) Whether there was an exposure to the disease greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee’s job which is common to all jobs of that sort. The Court then held that the employee must also establish, usually with expert testimony, the probability that the claimed occupational disease was caused by the conditions in the workplace. More specifically, employee must prove “a direct causal connection between the conditions under which the work is performed and the occupational disease.” *Id.* at 48. Finally, the Court noted, “Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible.” *Id.*

In reviewing and weighing the evidence in this case, it is important to remember that according to **Mo. Rev. Stat. § 287.800 (1994)**, “All of the provisions of this chapter shall be liberally construed with a view to the public welfare...” All reasonable doubts as to an employee’s right to compensation should be resolved in favor of the employee. *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781, 783 (Mo. 1983).

Having thoroughly reviewed all of the evidence regarding Claimant’s low back condition, including Claimant’s testimony, the medical treatment records described above, and the independent medical reports and testimony from Dr. Feinberg, Dr. Raskas and Dr. Van Ryn, I find that Claimant has met his burden of proving the presence of an occupational disease that arose out of and in the course of his employment. I further find that he has proven that his low back condition and continuing complaints are medically causally related to his employment for Employer leading up to March 27, 2000.

In arriving at this conclusion, I considered the medical treatment records and the opinions and testimony submitted into evidence from Drs. Feinberg, Raskas and Van Ryn. I find that all three doctors are basically in agreement with the diagnosis of Claimant’s low back condition (some form of degenerative disc disease, failed back syndrome and lumbar radiculopathy) and all also at least acknowledge the heavy, manual repetitive back-intensive work Claimant did for Employer. The real dispute revolves around whether the degenerative disc disease was caused by, or at least made symptomatic by, Claimant’s work for Employer leading up to March 27, 2000. Drs. Feinberg and Van Ryn both opine that Claimant’s work for Employer was a substantial factor in the development of Claimant’s low back condition, while Dr. Raskas is of the opinion that work was not a substantial factor, and, instead, the degenerative disc disease represented a pre-existing condition unrelated to Claimant’s employment.

After thoroughly considering all of the evidence presented and also reviewing the findings and opinions of all three physicians, I find that Dr. Van Ryn has provided the most competent, credible and reliable opinion on these issues in this case. I find that both Drs. Van Ryn and Raskas are equally qualified as far as training and experience is concerned, since both are board certified orthopedic surgeons. Dr. Van Ryn's opinions, however, were more thoroughly and convincingly explained. His detailed explanation of the interplay between Claimant's height, the confined spaces he worked in under the airplanes and the weights he moved, as well as how Claimant's work for Employer on his knees, bent over, in the belly of an airplane, created a tremendous mechanical disadvantage for the back, because of the awkward posture and repetitive movement of heavy weights, was clear and convincing.

On the other hand, Dr. Raskas seemed so focused on pointing out perceived inconsistencies in Claimant's history of the onset of his low back complaints, that he offered no real, credible, explanation for his ultimate opinion that this was all degenerative and unrelated to work. His suggestion that Claimant's smoking was more of a substantial factor in the development of his low back condition than his repetitive heavy lifting from awkward positions, is simply not believable. I find Dr. Raskas' reasoning for his causation opinion is not as sound as Dr. Van Ryn's, and, thus, Dr. Raskas' opinion is not as credible. I should also note that Dr. Feinberg basically agreed with Dr. Van Ryn's conclusions in this case, and, so, to that extent then, Dr. Van Ryn's opinions are also supported by Dr. Feinberg's testimony in this matter.

Employer suggests, based on some of the treatment records and the opinions of Drs. Raskas and Feinberg, that there are too many inconsistencies in Claimant's history of the onset of his low back complaints for this to be a compensable occupational disease claim. Employer suggests that at most, this might be an isolated incident or two of low back strains that should be treated as individual accidents. I am unconvinced by this argument. Admittedly, there are some differences in the histories in some of the various records and reports in evidence, but I do not consider any of those differences so major that they defeat Claimant's occupational disease Claim.

I have found absolutely no dispute in the evidence that Claimant's job for Employer required extensive lifting and moving of sometimes heavy weights, as well as bending, kneeling and working in awkward positions, such as in the bellies of airplanes. I have similarly found no credible evidence to show that Claimant had any back complaints, problems, limitations or treatment prior to starting his employment with Employer. Therefore, it seems minor to me if Claimant originally, mistakenly told doctors his low back pain started with an event in 1996, when it was actually 1995, especially when at both times he was working for Employer and there are medical records documenting the 1995 injury. Additionally, I am not troubled by the fact that he had a number of other minor exacerbations over the years between 1995 and 2000 but did not provide specific details about them. I find that that is exactly the nature of an occupational disease Claim. While I am admittedly more troubled by the reference in Dr. Sheehan's records to pain in March 2000 while lifting at a friend's house, even if that is true (and I am not convinced that it is), Claimant had already had extensive exposure during the prior five years while working for Employer to the work activities that were already causing his low back problems and complaints.

Given Claimant's credible testimony and the credible medical evidence and testimony of Dr. Van Ryn regarding Claimant's occupational activities while working for Employer, I find that he has met his burden of proof to show that he sustained an exposure to an occupational disease greater than or different from that which affects the public generally. Furthermore, he has proven a recognizable link between the occupational disease and some distinctive feature of his job which is common to all jobs of that sort. His heavy, repetitive lifting from confined and awkward positions certainly meets this standard. Dr. Van Ryn credibly provided the necessary link between the work activities as described and the low back complaints and diagnoses, thus, showing that the occupational disease was caused by the conditions in the workplace. Therefore, I find Claimant has met his burden of providing substantial and competent evidence that he contracted an occupationally induced disease rather than an ordinary disease of life. I further find that Claimant has met his burden of showing that the disease arose out of and in the course of employment and was medically causally connected to his employment for Employer, by providing competent and credible medical evidence that there is "a direct causal connection between the conditions under which the work is performed and the occupational disease."

Having found that Claimant sustained an occupational disease that arose out of and in the course of his employment for Employer and which was medically causally related to it, I also need to make a finding at this point, for the sake of clarity as I move on to the other issues regarding permanent disability and Second Injury Fund liability, on the duration of that occupational disease. Based on the totality of the credible medical evidence, the medical records and Claimant's credible testimony, I find that all of Claimant's low back problems and complaints, beginning with the 1995 incident and continuing through the 2000 incident are all properly considered part of this same occupational disease, and, thus, all a part of Employer's exposure for permanency in this case. I do not see any credible way to divide out one certain incident as a separate accident or condition, when the same employment activities, the same mechanism of injury and the same occupational exposure caused them all.

In light of the above findings, I believe that the next two issues on past and future medical treatment can similarly be handled together in the same section of the award.

Issue 4: Is Claimant entitled to payment for past medical expenses in an amount to be determined?

Issue 5: Is Claimant entitled to future medical treatment?

Under **Mo. Rev. Stat. § 287.140.1 (1994)**, "the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment...as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." **Mo. Rev. Stat. § 287.140.3 (1994)** also states, "All fees and charges under this chapter shall be fair and reasonable..."

Just as Claimant must prove all of the other material elements of his claim, the burden is also on him to prove entitlement to future medical treatment. *Dean v. St. Luke's Hospital*, 936 S.W.2d 601, 603 (Mo. App. 1997) *overruled on other grounds by Hampton v. Big Boy Steel*

Erection, 121 S.W.3d 220 (Mo. 2003). Claimant is entitled to an award of future medical treatment if he shows by a reasonable probability that future medical treatment is needed to cure and relieve the effects of the injury. *Concepcion v. Lear Corporation*, 173 S.W.3d 368, 372 (Mo. App. 2005).

Other than the stipulated amount of \$1,631.00 in medical benefits, it is clear that Employer has not paid for any of the other more extensive medical treatment, doctors' visits, surgeries, hospitalizations or pain management that both Dr. Van Ryn and Dr. Feinberg have already credibly testified was reasonable and necessary treatment for Claimant's low back occupational disease, medically causally related to his work for Employer.

Regarding the past medical issue, Claimant submitted into evidence in this case medical bills from the following providers, which were not paid by Employer as a part of this Claim:

- 1) Signature Health Services and Dr. George Schoedinger (Exhibit M) showing that Claimant still owed \$4,568.84;
- 2) Dr. Leonard Lucas at the Family Medical Group (Exhibit B) showing that from August 13, 2007 through November 30, 2010, for those visits where there was clearly a diagnosis regarding Claimant's low back condition, there were total charges billed of \$1,685.57, with payments made by Claimant totaling \$475.18, payments made by Claimant's personal health insurance of \$1,108.53, \$58.29 for which there is no accounting and an amount yet unpaid of \$43.57;
- 3) Pain Management Services and Dr. Gregory Smith (Exhibit N), showing total charges of \$11,875.00 for his treatment of Claimant as detailed above, of which Claimant paid \$160.00 out of pocket, Claimant's various personal health insurers apparently paid \$3,225.61 and there were adjustments listed on the billing statements that totaled \$8,489.39; and
- 4) Total prescription costs (Exhibits G, H and L) for the time period from January 4, 2006 through September 26, 2010 of \$3,446.62, of which Claimant paid \$1,734.18 and his insurance paid \$1,708.39, with \$4.05 for which there is no accounting.

Therefore, the total for the medical bills Claimant submitted into evidence in this case is \$21,576.03, of which Claimant paid \$2,369.36 out of pocket, Claimant's personal insurance paid \$6,042.53, \$4,674.75 remains unpaid and \$8,489.39 was adjusted from the billing statements.

I find that in addition to the medical bills that were submitted into evidence as detailed above, Claimant also submitted the medical treatment records that correspond to those bills and the credible testimony of both Drs. Van Ryn and Feinberg, indicating that this medical treatment was related to Claimant's low back occupational disease injury and that the treatment and bills were reasonable and necessary. Therefore, I find that Claimant has met his burden of proof on the submission of the medical bills.

In the case of *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo. 2003), the Supreme Court discussed the liability an employer would have for medical bills and write-offs or adjustments, once the bills had been properly submitted into evidence in a Workers' Compensation case. The Court held that once the employee had met her burden of detailing the past medical expenses and that they were related to the compensable workplace injury, then the burden shifted to the employer to establish that employee was not actually required to pay the billed amounts and that her liability for the reductions or adjustments was extinguished. The import of the decision was to ensure that an employee received compensation

for all medical bills for which she might have any liability, which were shown to be related to the work accident, so that the cost of the medical expenses was properly borne by the employer and not shifted to the employee in any respect. The Court held that if the employee remains personally liable for any of the reductions or adjustments, then she is entitled to recover them under Section 287.140. If the reductions or adjustments were the result of collateral sources, independent of the employer, then they are not to be considered pursuant to Mo. Rev. Stat. § 287.270. However, if it is established that the healthcare providers allowed write-offs or reductions for their own purposes, and employee is not legally subject to further liability for them, then she is not entitled to a windfall recovery.

Applying this framework to the bills at issue in this case, I find no evidence in the record to show that Claimant is not still personally liable for the reductions, adjustments or amounts already paid by Claimant's personal health insurance. Therefore, I find that Employer is responsible for the payment of, and Claimant is entitled to recover, the whole amount of the medical bills submitted into evidence in this case, or \$21,576.03.

On the issue of the need for future medical treatment, since I have already found, based on Dr. Van Ryn's credible opinion, that Claimant's low back condition and need for treatment and surgery was related to an occupational disease at work, it is clear that Claimant will require ongoing future medical treatment to attempt to deal with the significant residual effects of his injury. Dr. Van Ryn believed Claimant would need future medical treatment, including pain medication and medical monitoring. Dr. Feinberg suggested that Claimant would require ongoing medical treatment for chronic pain management, including physical therapy, medication management and management of the spinal cord stimulator.

I find that Claimant has met his burden of proving the need for additional future medical treatment for his low back condition related to this March 27, 2000 occupational disease. Further, I direct Employer to provide continued and ongoing future medical care for Claimant's low back condition, including but not limited to chronic pain management, physical therapy, medications, medication management (doctors' visits), management of the spinal cord stimulator, and any other testing, treatment or evaluation that the treating doctors deem necessary to cure and relieve Claimant of the effects of the injury.

Issue 6: Is Claimant entitled to the payment of temporary total disability benefits for a period of time to be determined?

Pursuant to **Mo. Rev. Stat. § 287.170 (1994)**, an injured employee is entitled to receive temporary total disability compensation benefits for not more than 400 weeks during the continuance of such disability at the weekly rate of compensation in effect for the date of injury for which the claim is made.

I find, based on Claimant's credible testimony and the medical treatment records, that Claimant did not return to work for Employer following March 27, 2000. Although there was some indication in the evidence that he may have remained technically employed by Employer until May 2, 2000, there was no evidence presented that Claimant continued to receive his

regular wages or that he was actually working during that time. To the contrary, the medical treatment records from Dr. Lucas indicate he took Claimant off work as of March 27, 2000.

I find that following the initial conservative treatment from Dr. Lucas, Claimant then began the protracted course of treatment, including multiple surgeries and various pain management modalities that left him unable to work in the open labor market that whole period of time. When Claimant first saw Dr. Feinberg on December 9, 2003, Dr. Feinberg did not believe Claimant was yet at maximum medical improvement and he suggested a need for continued treatment and an inability to work on account of the work-related occupational disease. However, by the time Claimant was examined by Dr. Barry Feinberg for the second time on May 3, 2005, Dr. Feinberg offered opinions on Claimant's permanent disability and the need for future medical treatment. Consistent with Dr. Feinberg's opinion, I, therefore, find that Claimant reached maximum medical improvement for his work-related low back occupational disease on May 3, 2005.

I find that the medical treatment records and the diagnoses confirm that from the date of March 27, 2000, until May 3, 2005, Claimant was temporarily totally disabled and completely unable to work, directly as a result of the compensable low back occupational disease and subsequent treatment and surgeries.

Therefore, I find that Claimant should have received, and Employer has liability to pay, temporary total disability in the amount of \$331.75 per week for the period of March 27, 2000 through May 3, 2005, or 266 1/7 weeks.

Given that these final two issues are so inter-related in this claim, and further given Claimant's allegation that he is permanently and totally disabled, I will address these two issues together.

Issue 7: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this alleged occupational disease?

Issue 8: What is the liability of the Second Injury Fund?

Under **Mo. Rev. Stat. § 287.190.6 (1994)**, "permanent partial disability' means a disability that is permanent in nature and partial in degree..." The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. ***Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund***, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. ***Griggs v. A.B. Chance Co.***, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. ***Id.*** at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. ***Fogelsong v. Banquet Foods Corp.***, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Under **Mo. Rev. Stat. § 287.020.7 (1994)**, “total disability” is defined as an “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 test for permanent total disability is claimant’s ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo. App. E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In cases such as this one where the Second Injury Fund is involved, we must also look to **Mo. Rev. Stat. § 287.220 (1994)** for the appropriate apportionment of benefits under the statute. In order to recover from the Fund, Claimant must prove a pre-existing permanent partial disability, that existed at the time of the primary injury, and which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment should employee become unemployed. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo. App. E.D. 1999) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together.

In the second (permanent partial disability) combination scenario, pursuant to **Mo. Rev. Stat. § 287.220.1 (1994)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked. The pre-existing disability and the subsequent compensable injury each must result in a minimum of 12.5% permanent partial disability of the body as a whole (50 weeks) or 15% permanent partial disability of a major extremity. These thresholds are not applicable in permanent total disability cases.

When Employer and the Second Injury Fund are both involved in an alleged permanent total disability case, the analysis of the case essentially takes on a three-step process:

First, is Claimant permanently and totally disabled?;

Second, what is the extent of Employer’s liability for that disability from the last injury alone?; and

Finally, is the permanent total disability caused by a combination of the disability from the last injury and any pre-existing disabilities?

In determining this case, we will follow this three-step approach to award all appropriate benefits under the Statute.

Based on the competent and substantial evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational experts, as well as based on my personal observations of Claimant at hearing, I find that Claimant is permanently and totally disabled under the statute. In arriving at this conclusion it is necessary to make findings, not only on the credibility of Claimant, but also to weigh the medical evidence and the expert opinions to determine who among them provided the most competent and persuasive evidence regarding the nature and extent of Claimant’s disability from this injury.

There is very little dispute in the records and doctors' opinions about Claimant being permanently and totally disabled. I find that all three medical experts who testified by deposition (Dr. Van Ryn, Dr. Feinberg and Dr. Raskas), as well as both vocational experts (Ms. Gonzalez and Ms. Blaine), ultimately concluded that Claimant was permanently and totally disabled and unable to compete for work in the open labor market.

I also find that Claimant was credible when he testified about the continued problems and complaints that he attributes to this injury and the subsequent surgical procedures to his low back. Claimant's testimony regarding his complaints and functional limitations was generally consistent with the descriptions of his problems and complaints enumerated in the medical records.

Therefore, based on Claimant's credible testimony, the extensive functional restrictions from the physicians, and the doctors' and vocational experts' collective opinion that Claimant is permanently and totally disabled and unable to work in the open labor market, I find that Claimant has met his burden of proof to show that he is permanently and totally disabled under the statute. I find that no reasonable employer in the usual course of business could reasonably be expected to employ Claimant in his present physical condition.

The next step in the analysis then, is determining the extent of Employer's disability from the last injury alone, and specifically determining if Employer is responsible for the permanent total disability. Having thoroughly reviewed the evidence in the record, I find that Claimant is permanently and totally disabled as a result of the effects of the March 27, 2000 injury alone.

In preparing their comprehensive reports in this case, Drs. Van Ryn and Feinberg reviewed Claimant's complete medical history and extensive treatment records. Both of them ultimately concluded that Claimant was permanently and totally disabled and unable to work, as a result of the repetitive, occupational injuries sustained while working for Employer as a ramp service agent. Similarly, Ms. Gonzalez concluded that Claimant was not capable of competing in the open labor market due to the effects and limitations he has on account of the cumulative injuries at work for Employer. When considering my finding above that the 1995 incident is part of this same cumulative trauma occupational disease, then even Ms. Blaine essentially agreed that Claimant cannot work in the open labor market as a result of his back condition and residual complaints from the compensable occupational disease standing alone.

Essentially then, there are two vocational experts and two doctors who agree that Claimant's inability to be employed (or compete for work in the open labor market) is the result of the residual complaints, problems and restrictions from his lumbar spine occupational disease injury and the subsequent surgeries. I can find no credible evidence to suggest that the Second Injury Fund has any exposure for permanent total disability based on a combination of disabilities making Claimant totally disabled. Quite to the contrary, the competent, credible and persuasive evidence in the record points to Employer being responsible for the permanent total disability as a consequence of the last injury on March 27, 2000 standing alone.

I find that Employer's responsibility for temporary total disability benefits ended on May 3, 2005, when Claimant reached maximum medical improvement. According to the terms of this award, I find that Claimant became permanently and totally disabled as of May 4, 2005. Since

the permanent total disability is solely attributable to the March 27, 2000 injury, for which Employer has liability, I find that Employer is liable for the payment of those permanent total disability benefits to Claimant.

Accordingly, Employer is responsible for the payment of \$331.75 per week for Claimant's lifetime beginning on May 4, 2005, subject to review and modification as provided by law.

As Employer is responsible for the permanent total disability in this case, I further find that the Second Injury Fund has no liability for the payment of any benefits in connection with this injury. Claimant's Second Injury Fund Claim is, thus, denied and no benefits are awarded from the Second Injury Fund.

CONCLUSION:

Claimant sustained an occupational disease that arose out of and in the course of his employment, as a result of the heavy, repetitive lifting from awkward positions, such as in the bellies of airplanes, which was required in his job for Employer. Claimant's low back condition, his need for extensive treatment and multiple surgeries, and his continuing complaints are medically causally related to his employment for Employer leading up to March 27, 2000. Employer is responsible for the payment of, and Claimant is entitled to recover, the whole amount of the medical bills submitted into evidence in this case, or \$21,576.03. Employer is to provide continued and ongoing future medical care for Claimant's low back condition, including but not limited to chronic pain management, physical therapy, medications, medication management (doctors' visits), management of the spinal cord stimulator, and any other testing, treatment or evaluation that the treating doctors deem necessary to cure and relieve Claimant of the effects of the injury. Claimant should have received, and Employer has liability to pay, temporary total disability in the amount of \$331.75 per week for the period of March 27, 2000 through May 3, 2005, or 266 1/7 weeks. Claimant is permanently and totally disabled under the statute and Employer is responsible for the permanent total disability as a consequence of the last injury on March 27, 2000 standing alone. Compensation from Employer for permanent total disability is then payable from May 4, 2005 for the rest of Claimant's life in the amount of \$331.75 per week, subject to review and modification by law. As Employer is responsible for the permanent total disability in this case, the Second Injury Fund has no liability for the payment of any benefits in connection with this injury. Claimant's Second Injury Fund Claim is, thus, denied and no benefits are awarded from the Second Injury Fund. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Rick A. Barry, for necessary legal services.

Made by: _____
JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation