

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

Injury No. 09-029705

Employee: George Hackler
Employer: Texas Book Company (settlement pending)
Insurer: Hartford Underwriters Insurance (settlement pending)
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 9, 2015. The award and decision of Administrative Law Judge Robert J. Dierkes, issued November 9, 2015, 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 20th day of June 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: George Hackler

Injury No. 09-029705

Employer: Texas Book Company (settlement pending)

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Hartford Underwriters Insurance
(settlement pending)

Hearing Date: September 15, 2015

Checked by: RJD/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: April 10, 2009.
5. State location where accident occurred or occupational disease was contracted: Boone County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was lifting and carrying an 85-pound box of books when he felt a sharp pain in his neck.
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: Cervical spine, body as a whole.
14. Nature and extent of any permanent disability: 30% permanent partial disability of the body as a whole.

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15. Compensation paid to-date for temporary disability: Unknown.
16. Value necessary medical aid paid to date by employer/insurer? Unknown.
17. Value necessary medical aid not furnished by employer/insurer? Unknown.
18. Employee's average weekly wages: \$972.80.
19. Weekly compensation rate: \$648.33 for permanent total disability benefits; \$404.66 for permanent partial disability benefits.
20. Method wages computation: Section 287.250.1(3).

COMPENSATION PAYABLE

21. Second Injury Fund liability:

61.2 weeks of permanent partial disability benefits	\$24,765.19
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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:

Allen & Nelson, P.C.

Employee: George Hackler

Injury No. 09-029705

FINDINGS OF FACT AND RULINGS OF LAW:

Employee: George Hackler

Injury No. 09-029705

Employer: Texas Book Company (settlement pending)

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

Additional Party: Second Injury Fund

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(settlement pending)

Hearing Date: September 15, 2015

PRELIMINARIES

These cases (Injury Nos. 09-029705 and 10-011567) were consolidated for hearing. The hearing was scheduled for September 15, 2015, in Columbia. George Hackler (“Claimant”) appeared personally and by counsel, Truman Allen. The Treasurer of the State of Missouri, as custodian of the Second Injury Fund, appeared by counsel, Erin Smith, Assistant Attorney General. In Injury No. 09-029705, Texas Book Company (“Employer”) and Hartford Underwriters Insurance appeared by counsel, John Palombi. In Injury No. 10-011567, Employer and Federal Insurance Company appeared by counsel, Jeffrey Bloskey.

Prior to the commencement of the hearing, counsel for Claimant and counsel for Employer and both insurers announced that each case was settled, in principle. Details of the proposed settlements were read into the record. As of November 4, 2015, those proposed settlements had not been presented in writing to the Division of Workers’ Compensation.

The evidentiary hearing in these cases proceeded to hearing on September 15, 2015, against the Second Injury Fund. Post-hearing briefs were filed on October 16, 2015.

ISSUES TO BE DECIDED IN INJURY NO. 09-029705

In Injury No. 09-029705, the hearing was held to decide the following issues:

1. Average weekly wage and compensation rates; and
2. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

STIPULATIONS IN INJURY NO. 09-029705

In Injury No. 09-029705, the parties stipulated to the following:

Employee: George Hackler

Injury No. 09-029705

1. The Missouri Division of Workers' Compensation has jurisdiction to hear this case;
2. Venue for the hearing is proper in Boone County;
3. The Claim for Compensation was filed within the time allowed by the statute of limitations, Section 287.430;
4. Both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. Claimant sustained an accident arising out of and in the course of his employment with Texas Book Company on April 10, 2009, in Boone County, Missouri; and
6. The notice requirement of Section 287.420 does not serve as a bar to the Claim for Compensation.

ISSUES TO BE DECIDED IN INJURY NO. 10-011567

In Injury No. 10-011567, the hearing was held to decide the following issues:

1. Average weekly wage and compensation rates;
2. Whether the work accident of January 22, 2010, is the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence; and
3. The liability, of any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

STIPULATIONS IN INJURY NO. 10-011567

In Injury No. 10-011567, the parties stipulated to the following:

1. The Missouri Division of Workers' Compensation has jurisdiction to hear this case, as Claimant's employment was principally localized in Cole County, Missouri;
2. Venue for the hearing is proper in Boone County;
3. The Claim for Compensation was filed within the time allowed by the statute of limitations, Section 287.430;
4. Both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. Claimant sustained an accident arising out of and in the course of his employment with Texas Book Company on January 22, 2010, in Des Moines, Iowa; and

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6. The notice requirement of Section 287.420 does not serve as a bar to the Claim for Compensation.

EVIDENCE

The evidence consisted of the testimony of George Hackler (“Claimant”), as well as the deposition testimony of Claimant taken October 31, 2011; medical records; deposition testimony of Dr. David Volarich taken April 8, 2014; deposition testimony of Dr. Michael Chabot taken July 18, 2014; letter from Employer’s HR Director regarding Claimant’s salary and commissions.

DISCUSSION

Claimant, George Hackler, was born November 15, 1956. He left school in the eleventh grade and joined the U.S. Navy. He served in the Navy for a year, earning his GED during that time.

Claimant was employed by Employer as a book buyer for just over two years. Claimant’s prior work history includes construction and manual labor jobs, nine years working in a warehouse, and several years in route sales. Immediately prior to his work for Employer, Claimant was employed for two years as a bank manager in Texas and two years as a receipt/expenditure auditor for a county clerk’s office in Texas.

These cases involve work accidents with Employer on April 10, 2009, and on January 22, 2010. The 2009 accident caused injury to Claimant’s cervical spine resulting in surgery. The 2010 accident allegedly caused injury to Claimant’s right shoulder; Claimant had subsequent surgery on his right shoulder.

Claimant had a number of injuries prior to April 10, 2009. In 1975, Claimant suffered an open comminuted fracture of his right tibia and fibula and underwent an open reduction/internal fixation. Claimant testified that his leg was casted for over a year. In 1996, Claimant had arthroscopic surgery on his right knee. Dr. Volarich opined that these two prior injuries to Claimant’s right lower extremity constituted a 30% permanent partial disability of the right knee.

In December 1988, Claimant injured his low back and was eventually diagnosed with a disc herniation at L5-S1. In March of 1990, Claimant underwent surgery consisting of laminectomy, bilateral discectomy, and posterior fusion at L5-S1. He was taken back to surgery fifteen days later to remove the graft from the disc space. Claimant continued to undergo lumbar spine injections over the years prior to April 10, 2009. Dr. Volarich opined that Claimant’s lumbar spine injury/condition constituted a 35% permanent partial disability of the body as a whole.

Claimant injured his neck in September 1983 and underwent a C5-6 discectomy and fusion in December 1983. In 2005, Claimant underwent a C6-7 discectomy and fusion. Claimant has continued to undergo cervical spine injections over the years. Dr. Volarich opined that Claimant’s cervical spine injury/condition constituted an additional 35% permanent partial disability of the body as a whole.

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Claimant's work for Employer as a book buyer required him to drive a van in ten states visiting college and university professors and buying books from the professors. Claimant estimated that he would drive in excess of thirty hours per week. Prior to the April 10, 2009 accident, Claimant would pack the books in large boxes, weighing as much as 100 pounds when full. Claimant packed the boxes into the van. He would take the boxes out of the van at the end of the week to have them shipped to Employer's office in Texas.

April 10, 2009, was a Friday. Claimant had returned to Missouri from his week of book-buying and was at the Fed Ex office in Columbia to ship the boxes of books to Texas. As Claimant was lifting and moving a box of books weighing approximately 85 pounds, Claimant felt a sharp pain in his neck, causing him to drop the box. Claimant tried to work the following week in Kentucky, but the pain was too much. Claimant requested medical treatment. Employer had Claimant evaluated by Dr. Michael Chabot, a St. Louis spine surgeon. In addition to the neck symptoms, Claimant also had significant right upper extremity symptoms, and a right shoulder injury was also investigated. A disc herniation at C4-5 and cervical radiculopathy were diagnosed, and on May 13, 2009, Dr. Chabot performed a C4-5 discectomy and fusion with instrumentation from C4 to T1.

Claimant had a long but basically successful recovery from the surgery, including a significant amount of therapy. Most of Claimant's right upper extremity symptoms had resolved, but Claimant developed left shoulder and left neck pain post-surgery; this was treated successfully with injections. Claimant was able to lift 72 pounds from floor to waist and could lift 45 pounds repeatedly. Claimant was allowed to return to work for Employer without restrictions on November 20, 2009.

Claimant testified that, upon return to work, he used smaller boxes for the books; these boxes, when full, would weigh no more than 50 pounds. Claimant testified that he also would pay college students to help him load the boxes into the van.

January 22, 2010, was also a Friday. Claimant testified in his deposition that he was in Iowa, "throwing boxes" of books into his van (Claimant testified that "throwing boxes" was just jargon for moving or handling boxes, and did not involve actual throwing or tossing), when he felt a "real bad twinge" in his neck and right shoulder area. Claimant notified Employer immediately and requested medical treatment. Employer sent Claimant back to Dr. Chabot. Dr. Chabot saw Claimant on February 3, 2010. Dr. Chabot testified that Claimant's right shoulder examination was different than his previous examinations. Dr. Chabot testified that right shoulder x-rays suggested that Claimant had a large rotator cuff injury or chronic rotator cuff problem. Dr. Chabot diagnosed a right shoulder strain, with a possible rotator cuff tear. A shoulder injection and physical therapy were ordered by Dr. Chabot. Apparently, due to Employer's change in workers' compensation insurance companies, Claimant's treatment was transferred to Dr. Herbert Haupt, who also diagnosed a strain caused by the January 22, 2010 accident. Dr. Haupt prescribed work hardening and released Claimant on April 6, 2010, with restrictions of no lifting over 45 lbs. from floor to waist, no lifting over 35 lbs. from waist to shoulder, and no carrying over 45 lbs.

In the interim, Claimant was terminated by Employer. Claimant has not returned to any employment since the January 22, 2010 accident. Claimant was still experiencing significant right shoulder symptoms after his release by Dr. Haupt, and Claimant sought treatment on his

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own. Eventually, on October 3, 2011, Dr. Timothy Galbraith performed surgery to repair a subscapularis tear, a biceps tendon tear and a SLAP tear.

Regarding the causation of the right shoulder injuries, Dr. Chabot opined that Claimant sustained a right shoulder strain as a direct result of the January 22, 2010 accident, although Dr. Chabot suspected that Claimant had sustained a cuff tear. Dr. Haupt also opined that Claimant sustained a right shoulder strain as a direct result of the January 22, 2010 accident. Dr. Volarich opined that the January 22, 2010 accident was the “prevailing or primary factor causing the right shoulder rotator cuff tear and impingement that required” the surgery. Dr. Erich Lingenfelter performed a one-time evaluation on behalf of Federal Insurance Company, and initially opined that Claimant’s rotator cuff tear was caused by the January 22, 2010 accident; however, Dr. Lingenfelter later opined that causation was unclear as Claimant gave conflicting histories. My review of all the evidence is that Claimant did not give conflicting histories. Dr. Lingenfelter’s about-face is unpersuasive. All of the other physicians involved in the case came to the conclusion that Claimant did, indeed, sustain an acute right shoulder injury on January 22, 2010.

Regarding the average weekly wage issue, Employee Exhibit 38, a letter from Employer’s HR Director, appears to be dispositive. Exhibit 38 shows that Claimant’s salary was \$41,000 annually (which corresponds exactly to Claimant’s testimony), and that Claimant received \$7,717.52 in commissions in June 2009 for spring semester 2009, and \$1,868.24 in commissions in January 2010 for fall semester 2009. There was no other evidence of Claimant’s earnings. Section 287.250.1(3) states: “If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two”. Claimant’s income for the year was \$50,585.76; when divided by 52 yields an average weekly wage of \$972.80. This yields a TTD/PTD rate of \$648.33. The PPD rate in Injury No. 09-029705 is the maximum (\$404.66), the PPD rate in Injury No. 10-011567 is the maximum (\$422.97).

Regarding Claimant’s claim of permanent total disability, there were no vocational evaluations in evidence. The only expert opinion regarding total disability is that of Dr. Volarich. In that regard, Dr. Volarich testified:

It is my opinion that Mr. Hackler was unable to engage in substantial gainful activity nor could he be expected to perform in an ongoing capacity in the future. It is my opinion that he cannot be reasonably expected to perform in an ongoing basis eight hours a day, five days a week throughout the work year. It is also my opinion that he was unable to continue in his line of employment that he last held for the senior buyer for the Texas Book Company nor could he be expected to work on a full time basis in a similar job. Bases on my medical assessment alone, it is my opinion that Mr. Hackler was permanently and totally disabled as a direct result of the work-related injuries after 4/10/09 and 1/22/10 in combination with his pre-existing medical conditions. I noted he was 56 years old, had an education that was limited to the 10th grade. He left school in the 11th grade, but earned a G.E.D. Noted that he worked multiple different (sic) over the recent years including two and a half years with the Texas Book Company, but he had been unable to get back to work since January 22nd, 2010, and has received Social Security benefits. (Exhibit 37, pages 13-14.)

Obviously, Dr. Volarich did not perform a vocational analysis. When looking at Dr. Volarich’s actual activity restrictions for Claimant, they primarily involve the upper extremities: restrictions

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on lifting, pushing and pulling. Dr. Volarich does state that Claimant “is advised to avoid remaining in a fixed position for any more than about 30-45 minutes at a time including both sitting and standing.” However, the 4/10/09 and 1/22/10 work injuries involve Claimant’s neck and right shoulder; Dr. Volarich does not attempt to explain whether and how these injuries would have any effect on Claimant’s ability to sit or stand. Considering that Claimant was able to drive in excess of 30 hours each week prior to 4/10/09, and again for several weeks from November 20, 2009, through January 22, 2010, it would certainly appear that Claimant would have absolutely no problem handling a sedentary job. Claimant’s most recent positions prior to the Texas Book Company were sedentary jobs: bank manager and auditor. There was nothing in the evidence to suggest that Claimant was no longer qualified to be a bank manager or auditor.

I note that Dr. Volarich’s report contains the following language regarding the January 22, 2010 right shoulder injury:

I asked him how this injury impacted his ability to work now, and he explained he cannot lift now, *and any kind of movement causes migraine headaches which put him out of commission for two or three days at a time.* (Italics mine.)

Interestingly, Dr. Volarich did not mention migraine headaches at all during his direct examination deposition testimony. (He was asked briefly about Claimant’s *prior* history of migraine-type headaches in cross-examination.) It would appear that, if Claimant indeed was experiencing migraine headaches that “put him out of commission for two or three days at a time”, this would be a key component in a permanent total disability analysis, yet Dr. Volarich does not even mention it in his testimony.

A finding that Claimant has severe migraine headaches as a result of the January 22, 2010 accident (or as a result of the April 10, 2009 accident, or both) is simply at odds with all the other evidence in the case. When Claimant’s deposition was taken on October 31, 2011, he was questioned exhaustively about his symptoms and complaints; headaches were not mentioned. Claimant was given two open-ended opportunities to make additional complaints, as follows:

Q. Any other physical problems that you’re currently having?

A. Besides all the ones I have?

Q. Besides everything that we have talked about?

A. No.

Q. Any other physical problems that you currently have that you attribute to the January 22nd injury up in Iowa? Is that a no?

A. That’s a no. I mean other than the ones that we have described. (SIF Exhibit 2, pages 74-75.)

Nor does it appear that Claimant was taking medications for migraines on October 31, 2011. He was asked:

Q. Are you taking pain medications?

Employee: George Hackler

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A. The doctor has me on pain medications.

Q. Have you taken any today?

A. No.

Q. Okay. What medications has the doctor prescribed?

A. Vicodin. And at night he's prescribed -- I forget what it's called. Not Valium. But, Lorazepam. One milligram at night to help me sleep. (SIF Exhibit 2, page 74.)

Claimant's medical records for the October 3, 2011 right shoulder surgery show Claimant's medications as only vicodin and valium; nothing for migraines.

When asked on direct examination at the hearing what problems he continued to have from the 2010 right shoulder injury, Claimant did not mention headaches. When asked on direct examination at the hearing what problems he continued to have from the 2009 neck injury, Claimant included "headaches", but did not elaborate.

Therefore, to the extent that Dr. Volarich considered migraine headaches in finding Claimant to be permanently and totally disabled, I simply do not believe the evidence supports such a finding.

In summary, Dr. Volarich's conclusion that Claimant cannot compete in the open labor market for *any* job is simply not borne out by the evidence. While there is little question that Claimant can no longer return to his job with Texas Book Company, there is no evidence to support a conclusion that Claimant could not return to previous work as a bank manager or as an auditor. I find that Claimant is not permanently and totally disabled.

Claimant has made a submissible, and indeed, compelling case for permanent partial disability benefits against the Second Injury Fund. As noted above, Claimant had been working with significant disabilities to his right lower extremity, low back and neck prior to April 10, 2009. Further, Dr. Volarich stated in his report: "(t)he combination of his disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness, and a loading factor should be added."

FINDINGS OF FACT AND RULINGS OF LAW IN INJURY NO. 09-029705

In Injury No. 09-029705, in addition to those facts and legal conclusions to which the parties stipulated, I find the following:

1. Claimant's average weekly wage is \$972.80.
2. Claimant's compensation rate for permanent partial disability benefits is the statutory maximum rate of \$404.66.
3. Claimant is able to compete in the open market for employment.

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4. Claimant is not permanently and totally disabled.
5. Claimant's work injury of April 10, 2009, resulted in a permanent partial disability of 30% of the body as a whole rated at the cervical spine.
6. On April 10, 2009, Claimant sustained a compensable "last injury" of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, and which resulted in permanent partial disability equivalent to 30% of the body as a whole/cervical spine (120 weeks).
7. As of the time the last injury was sustained, Claimant had a preexisting permanent partial disability to the lumbar spine, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 30% of the body as a whole/lumbar spine (120 weeks).
8. As of the time the last injury was sustained, Claimant also had a preexisting permanent partial disability to the cervical spine, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 30% of the body as a whole/cervical spine (120 weeks).
9. As of the time the last injury was sustained, Claimant also had a preexisting permanent partial disability to the right lower extremity, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 30% of the right knee (48 weeks).
10. The credible evidence establishes that the last injury combined with the pre-existing permanent partial disabilities causes greater overall disability than the independent sum of the disabilities, and that a 15% loading factor should be applied. The Second Injury Fund liability is calculated as follows: 120 weeks for last injury + 288 weeks for the preexisting disabilities = 408 weeks x 15% = 61.2 weeks of overall greater disability.

FINDINGS OF FACT AND RULINGS OF LAW IN INJURY NO. 10-011567

In Injury No. 10-011567, in addition to those facts and legal conclusions to which the parties stipulated, I find the following:

1. Claimant's average weekly wage is \$972.80.
2. Claimant's compensation rate for permanent partial disability benefits is the statutory maximum rate of \$422.97.
3. Claimant is able to compete in the open market for employment.
4. Claimant is not permanently and totally disabled.
5. The work accident of January 22, 2010 was the prevailing factor in the cause of Claimant's right shoulder rotator cuff tear.
6. Claimant's work injury of January 22, 2010 resulted in a permanent partial disability of 25% of the right shoulder.

Employee: George Hackler

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7. On January 22, 2010, Claimant sustained a compensable “last injury” of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, and which resulted in permanent partial disability equivalent to 25% of the right shoulder (58 weeks).
8. As of the time the last injury was sustained, Claimant had a preexisting permanent partial disability to the lumbar spine, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 30% of the body as a whole/lumbar spine (120 weeks).
9. As of the time the last injury was sustained, Claimant also had a preexisting permanent partial disability to the cervical spine, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 60% of the body as a whole/cervical spine (240 weeks).
10. As of the time the last injury was sustained, Claimant also had a preexisting permanent partial disability to the right lower extremity, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 30% of the right knee (48 weeks).
11. The credible evidence establishes that the last injury combined with the pre-existing permanent partial disabilities causes greater overall disability than the independent sum of the disabilities, and that a 15% loading factor should be applied. The Second Injury Fund liability is calculated as follows: 58 weeks for last injury + 408 weeks for the preexisting disabilities = 466 weeks x 15% = 69.9 weeks of overall greater disability.

ORDER IN INJURY NO. 09-029705

In Injury No. 09-029705, the Second Injury Fund is ordered to pay Claimant the sum of \$24,765.19 for permanent partial disability benefits. Claimant’s attorney, Allen & Nelson, P.C., is allowed 25% of the benefits awarded herein as and for necessary attorney’s fees, and the amount of such fees shall constitute a lien on those benefits.

ORDER IN INJURY NO. 10-011567

In Injury No. 10-011567, the Second Injury Fund is ordered to pay Claimant the sum of \$29,565.60 for permanent partial disability benefits. Claimant’s attorney, Allen & Nelson, P.C., is allowed 25% of the benefits awarded herein as and for necessary attorney’s fees, and the amount of such fees shall constitute a lien on those benefits.

Employee: George Hackler

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Made by _____
/s/ Robert J. Dierkes 11-9-15
Chief Administrative Law Judge
Division of Workers' Compensation