

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge by Separate Opinion)

Injury No.: 02-102986

Employee: David Harris
Employer: Phillips Metals
Insurer: Lumbermen's Mutual Casualty Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: June 28, 2002 as the last exposure at work prior to filing claim
Place and County of Accident: St. Louis

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence and briefs, and we have considered the whole record.

Pursuant to section 286.090 RSMo, we issue this final award and decision modifying the December 27, 2004 award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Introduction

Employee filed three claims alleging work injury. On December 27, 2004, the administrative law judge issued awards in all three claims.

For Injury No. 01-166088, the administrative law judge awarded 60 weeks of permanent partial disability from employer based upon a finding that employee sustained 15% permanent partial disability of the body as a whole referable to a psychiatric condition as a result of a May 17, 2001, injury.

For Injury No. 01-166089, the administrative law judge awarded 240 weeks of permanent partial disability from employer based upon a finding that employee sustained 40% permanent partial disability of the body as a whole from deep vein thrombosis and 20% permanent partial disability of the body as a whole due to mood disorder, both as a result of an August 31, 2001, injury. The administrative law judge awarded an additional 45 weeks of permanent partial disability from the Second Injury Fund (SIF) on a finding that the combination of Injury Nos. 01-166088 and 01-166089 resulted in additional disability.

For Injury No. 02-102986, the administrative law judge awarded 120 weeks of permanent partial disability from employer based upon a finding that employee sustained 30% permanent partial disability of the body as a whole referable to the neck as a result of a June 28, 2002, injury. The administrative law judge determined that claimant attained maximum medical improvement from this injury on October 21, 2003. The administrative law judge awarded permanent total disability against the SIF with payment as follows: for 120 weeks (October 21, 2003, through February 7, 2006) the SIF shall pay \$80.08, the difference between the permanent partial disability rate and the permanent total disability rate. Thereafter, the SIF shall pay the full permanent total disability rate of \$409.50.

The SIF filed an Application for Review from the award of the administrative law judge in Injury No. 02-102986. The SIF alleges that the administrative law judge benefit payment timeline is contrary to § 287.220.4 RSMo. Specifically, SIF argues that the three permanent partial disability payment periods must run consecutively and not concurrently. SIF also argues that the periods of permanent partial disability from earlier periods are suspended during any period during which the employer was paying temporary total disability.

Discussion

Did the 2002 injury cause permanent partial disability?

Section 287.220.1 reads, in part:

If the previous disability or disabilities . . . and the last injury together result in total and permanent disability, . . . the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself. . .

Section 287.220.4 explains the timing of SIF payments in the event of successive work-related permanent disabilities:

If more than one injury in the same employment causes concurrent and consecutive permanent partial disability, compensation payments for each subsequent disability shall not begin until the end of the compensation period of the prior disability.

There is no dispute that employee suffered more than one injury in the same employment and that he thereby suffered concurrent and consecutive permanent disabilities. The question before us is *did employee's third injury cause a permanent partial disability?* If so, § 287.220.4 applies.

The SIF argues that the phrase, "causes concurrent and consecutive permanent partial disability" refers to the extent of disability resulting from the last injury alone. Employee does not directly address this argument. Rather, the employee argues that the reasoning of the SIF leads to a credit or offset not authorized by the Workers' Compensation Law. We accept the SIF argument.

The basis for our conclusion is found in the Missouri Supreme Court's opinion in *Stewart v. Johnson*, 398 S.W.2d 850 (Mo. banc 1966). The employee in *Stewart* suffered a work injury that combined with preexisting disabilities to render him permanently and totally disabled. The *Stewart* court explained the proper application of § 287.220.1 RSMo for apportioning liability between employer and the SIF. The court ruled it must "first consider *only the disability resulting from the last injury*; otherwise the words 'considered alone and of itself' are meaningless." *Id.*, at 854 (emphasis added). Applying this rule, the court found that "the disability resulting from the last injury alone was a permanent partial disability." *Id.* The court then concluded that employer's liability is calculated with reference to § 287.190 RSMo, the permanent partial disability statute. Then, the remainder that would be due for permanent total disability is apportioned to the SIF.

We are convinced the same reasoning applies to the interpretation of § 287.220.4. The subsection refers to the extent of disability suffered in successive individual injuries. We conclude that the plain language of § 287.220.4 requires that we consider the disability caused by each injury alone to determine if that subsection applies.

The employee in the instant case, like the employee in *Stewart*, suffered a work injury that combined with preexisting disabilities to render him permanently and totally disabled. The administrative law judge properly applied the rule enunciated in *Stewart* and found that the last injury, alone and of itself, caused a permanent partial disability of 120 weeks.

Based upon the foregoing, we conclude that employee suffered more than one injury in the same employment that caused concurrent and consecutive permanent partial disability. Therefore, § 287.220.4 applies to determine the timing of the compensation payments in this case.

Application of § 287.220.4 RSMo

According to § 287.220.4, compensation payments for each subsequent disability shall not begin until the end of the compensation period of the prior disability. SIF payment for permanent partial disability is not due until the employer has completed its permanent partial disability payments. § 287.220.1 RSMo. Further, because an individual cannot be partially disabled and totally disabled at the same time, it is appropriate to suspend the running of all permanent partial disability periods during periods of temporary total disability. See our discussion in *Maximum Weekly Benefit, infra*.

Applying the above rules, the employer's 60-week permanent partial disability period for the first injury ran from May 18,

2001, through June 28, 2002, a total of 58 weeks. At that time, temporary total disability from the third injury began to run. The temporary total disability ran until March 26, 2003. During the period of temporary total disability, the permanent partial disability from the first disability was suspended. On March 27, 2003, the permanent partial disability period from the first injury began to run again for the remaining 2 weeks. The employer's permanent partial disability period for the first injury ended April 10, 2003.

Employer's 240-week permanent partial disability period for the second injury began to run on April 11, 2003, but it was promptly suspended on April 24, 2003, when another period of temporary total disability began to run for the third injury. The temporary total disability period ended October 21, 2003, when employee reached maximum medical improvement from the third injury. As of October 22, 2003, employee was permanently and totally disabled. On October 22, 2003, employer's permanent partial disability liability period for the second injury resumed and runs for a total of 238 weeks and 2 days until May 16, 2008. On May 17, 2008, the SIF 45-week permanent partial disability liability period for the second injury begins to run and runs through March 28, 2009.

Employer's 120-week period permanent partial disability period for the third injury begins to run on March 29, 2009, and runs through July 17, 2011. On June 18, 2011, SIF liability for full permanent total disability benefits begins.

Permanent Total Disability

- Employee is permanently and totally disabled as of October 22, 2003. According to § 287.220.1 RSMo, when a combination of the primary injury and preexisting disabilities renders the employee permanently and totally disabled, the SIF liability is determined as follows:

[I]f the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, *the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund". . .*

SIF is liable for the remainder of the compensation that would be due for permanent total disability under § 287.200 after subtracting employer's payment. See *Laturno v. Carnahan*, 640 S.W. 2d 470 (Mo. App. 1982), *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919 (Mo. App. 1982). For the period from October 22, 2003, through May 16, 2008, the remainder is \$ 80.08.^[1] For the period from May 17, 2008, through March 28, 2009, the remainder is \$ 409.50.^[2] For the period March 29, 2009, through July 17, 2011, the remainder is \$ 80.08.^[3] Beginning June 18, 2011, and continuing for employee's lifetime or until modified by law, the remainder is \$ 409.50.^[4]

Maximum Weekly Benefit

The result of our conclusions is that employee never receives more than the statutory maximum weekly benefit for permanent total disability. See § 287.200 RSMo. This result is in accord with the majority view.

There is both a theoretical and a practical reason for the holding that awards for successive or concurrent permanent injuries should not take the form of weekly payments higher than the weekly maxima for total disability. The theoretical reason is that, at a given moment in time, a person can be no more than totally disabled. The practical reason is that if the worker is allowed to draw weekly benefits simultaneously from a permanent total and a permanent partial award, it may be more profitable for him or her to be disabled than to be well--a situation which compensation law studiously avoids in order to prevent inducement to malingering.

5-92 Larson's Workers' Compensation Law § 92.01.

Award

The Second Injury Fund shall pay to employee:

- o \$ 80.08 per week for the period October 22, 2003, through May 16, 2008;

- o \$ 409.50 per week for the period May 17, 2008, through March 28, 2009;
- o \$ 80.08 per week for the period March 29, 2009, through July 17, 2011; and,
- o \$ 409.50 per week beginning June 18, 2011, and continuing for employee's lifetime or until modified by law.

The award and decision of Administrative Law William L. Newcomb, issued December 27, 2004, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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 28th day of September 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I must respectfully dissent from the decision of the majority of the Commission. I would affirm the payment timeline determined by the administrative law judge.

Section 287.220.4 RSMo Inapplicable

By its terms, § 287.220.4 RSMo does not apply to the injuries in this case. Employee suffered successive injuries in the same employment. The first injury resulted in permanent partial disability, the second injury resulted in permanent partial disability, and the third injury resulted in permanent total disability. The majority's conclusion that the third injury caused permanent partial disability for purposes of the application of § 287.220.4 is in error. In the case of *Laturno v. Carnahan*, 640 S.W.2d 470 (Mo. App. 1982), which was cited by the majority, the court had occasion to characterize an injury such as the third injury we consider herein for purposes of § 287.220. The *Laturno* court characterized the final injury as one resulting in permanent total disability.

[W]e hold the clause "and after the completion of payment of the compensation by the employer" in Section 287.220 means that when benefits are awarded against an employer in a second injury case resulting in the worker's permanent total disability, the Fund shall not assume responsibility for paying that part of the permanent total disability compensation assessed against the employer until after the employer completes payment of that award against it.

Laturno, 640 S.W.2d at 472. (Emphasis added).

Section 287.220.4 simply does not apply to the instant case.

Even if § 287.220.4 applied to this case, the section would not operate as urged by the Second Injury Fund. The section would only permit us to lay end-to-end the Second Injury Fund's obligation for consecutive and concurrent permanent partial disabilities. The Second Injury Fund asks the Commission to use the section to affect the theoretical timeline of employer's payments. Section 287.220 does not apply to employer's obligations. Employer's obligations are determined under § 287.190 RSMo. *Stewart v. Johnson*, 398 S.W.2d 850, 854 (Mo. banc 1966).

I find no other statutory provision that would prevent the Second Injury Fund's obligation for permanent total disability benefits from running concurrently with the permanent partial disability period of the second injury. Absent a statutory provision requiring that the benefits for these two injuries run consecutively, the timing of payments must be determined independently for each injury.

No Weekly Maximum on Compensation for Separate Injuries

The Commission majority asserts that that an employee cannot receive more than his statutory permanent total disability rate for any one week. The Missouri Workers' Compensation Law does not so state. "A cardinal principle of all administrative law cases is that an administrative tribunal is a creature of statute and exercises only that authority invested by legislative enactment." *Farmer v. Barlow Truck Lines, Inc.*, 979 S.W.2d 169, 170 (Mo. banc 1998).

The plain language of § 287.190.5(5) RSMo, as it relates to weekly compensation for permanent partial disability, reads:

For all injuries occurring on or after August 28, 1992, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to fifty-five percent of the state average weekly wage. (Emphasis added).

Section 287.200.1(4) RSMo, as it relates to weekly compensation for permanent total disability, reads:

For all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage; (Emphasis added).

It is clear from the use of the phrase "the injury", that the language of these subsections applies only to the determination of the rate to be paid for the primary injury under consideration. These sections set no maximum weekly limit on the amount that may theoretically be paid to employee in any given week on account of multiple injuries.

Employee is not Fully Compensated

The practical effect of accepting the Second Injury Fund's argument is that employee is not fully compensated for his second injury. Employee will receive permanent total disability benefits from October 22, 2003, for his lifetime, as required by § 287.220. However, for his second injury, employee's benefits effectively stopped when he suffered the third injury. As a result, he will receive only 2 weeks of permanent partial disability benefits instead of the 285 weeks to which he is entitled under §§ 287.190 and 287.220. The decision of the majority shorts employee 283 weeks of benefits worth \$93,225.86. This is certainly contrary to the purpose of the Workers' Compensation Law to compensate employees for work-related injuries.

No Statutory Authority for Second Injury Fund Offset

Viewed another way, the Second Injury Fund effectively receives a credit for amounts previously paid by employer and the Second Injury Fund for the previous injury. Section 287.220 provides for no such credit or offset. "The

legislature's failure to include an offset provision for prior second injury fund payments leads us to the conclusion such an offset was not intended." *Frazier v. Treasurer of Missouri*, 869 S.W.2d 152 (Mo. App. 1993).

The administrative law judge properly applied the law. I would affirm the award and decision of the administrative law judge.

John J. Hickey, Member

AWARD

Employee: David Harris Injury No: 02-102986
Dependents: N/A
Employer: Phillips Metals Before the
Division of Workers' Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Lumberman's Mutual Casualty Co.
Hearing Date: October 19, 2004 Checked by: WLN

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: June 28, 2002 as the last exposure at work prior to filing claim.
5. State location where occupational disease was contracted: St. Louis
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 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 subjected to repetitive neck trauma while operating heavy crane equipment
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: neck,
- 14. Nature and extent of any permanent disability: 30% permanent partial disability of the body as a whole (against employer) combines with preexisting disability to create permanent total disability (against Second Injury Fund).
- 15. Compensation paid to-date for temporary disability: \$21,802.13
- 16. Value necessary medical aid paid to date by employer/insurer? \$43,180.68
- 17. Value necessary medical aid not furnished by employer/insurer? \$893.00
- 18. Employee's average weekly wages: \$614.25
- 19. Weekly compensation rate: \$409.50/\$329.42
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid Medical Expenses	\$893.00
120 weeks of permanent partial disability from Employer	\$39,530.40
Minus: credit for advance payment of PPD by Employer	(\$13,176.80)
 - 22. Second Injury Fund liability: Permanent total disability payments of \$80.08 per week for 120 weeks from October 21, 2003 until February 7, 2006. Thereafter at \$409.50 per week for life. Undetermined
- TOTAL: Undetermined

- 22. Future requirements awarded: see narrative

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: Dean L. Christianson.

FINDINGS OF FACT and RULINGS OF LAW

Employee:	David Harris	Injury No: 02-102986
Dependents:	N/A	
Employer:	Phillips Metals	Before the <u>Division of Workers' Compensation</u>
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Lumberman's Mutual Casualty Co.	
Hearing Date:	October 19, 2004	Checked by: WLN

The date of hearing was October 19, 2004. The Employee, David Harris, was represented by Dean L. Christianson, and the Employer, Phillips Metals, was represented by Christopher Archer. The Second Injury Fund was represented by Rebecca Chestnut. Mr. Christianson sought a fee of 25% of Employee's award. This case was tried simultaneously with Injury numbers 01-166088 and 01-166089.

STIPULATIONS

The parties stipulated to the following:

ISSUES:

1. What is the nature and extent of the Employee's permanent disability?
2. Is the Employer liable for past medical expenses?
3. Is the Employer liable for future medical care?
4. What is the liability of the Second Injury Fund?

RATES OF COMPENSATION:

The Employee's average weekly wage is \$614.25 with a PTD/PPD rate of \$409.50/\$329.42.

EXHIBITS:

The Employee offered the following exhibits:

EMPLOYEE'S EXHIBIT A:	Deposition of Dr. Polinsky of 12/10/02
EMPLOYEE'S EXHIBIT B:	Deposition of Dr. Stillings of 1/22/03
EMPLOYEE'S EXHIBIT C:	Medical records of Dr. Morrow (certified 10/11/02)
EMPLOYEE'S EXHIBIT D:	Medical records of Dr. Washington
EMPLOYEE'S EXHIBIT E:	Medical records of Dr. Randolph
EMPLOYEE'S EXHIBIT F:	Medical records of Dr. Strege
EMPLOYEE'S EXHIBIT G:	Medical records of Missouri Baptist Hospital
EMPLOYEE'S EXHIBIT H:	Medical records of Deaconess Hospital
EMPLOYEE'S EXHIBIT I:	Records from Division of Workers' Compensation
EMPLOYEE'S EXHIBIT J:	Medical bills
EMPLOYEE'S EXHIBIT K:	Deposition of Johnnie Day
EMPLOYEE'S EXHIBIT L:	Deposition of Carlos Brown
EMPLOYEE'S EXHIBIT M:	Deposition of Lieutenant McCray
EMPLOYEE'S EXHIBIT N:	Deposition of Freddie Edwards

EMPLOYEE'S EXHIBIT O:	Pictures
EMPLOYEE'S EXHIBIT P:	Statement demand
EMPLOYEE'S EXHIBIT Q: Lichtenfeld of 7/9/04	Deposition of Dr.
EMPLOYEE'S EXHIBIT R: Stillings of 9/30/04	Deposition of Dr.
EMPLOYEE'S EXHIBIT S: James Israel of 10/6/04	Deposition of
EMPLOYEE'S EXHIBIT T: Dr. Polinsky	Medical records of
EMPLOYEE'S EXHIBIT U: Missouri Baptist Medical Center	Medical records of
EMPLOYEE'S EXHIBIT V: Dr. Morrow (certified 10/4/02)	Medical records of
EMPLOYEE'S EXHIBIT W: Dr. Morrow (certified 9/21/04)	Medical records of
EMPLOYEE'S EXHIBIT X: Dr. Morrow (not certified)	Medical records of
EMPLOYEE'S EXHIBIT Y: Forest Park Hospital	Medical records of
EMPLOYEE'S EXHIBIT Z: Hand & Physical Therapy	Medical records of
EMPLOYEE'S EXHIBIT AA: St. Louis Medical Clinic (certified 11/19/03)	Medical records of
EMPLOYEE'S EXHIBIT BB: St. Louis Medical Clinic (certified 9/15/04)	Medical records of
EMPLOYEE'S EXHIBIT CC:	Medical bills

1. Forest Park Hospital (Deaconess) Date of Service:
8/31/01

Amount: \$2,009.18

2. Towne & Country Cardiovascular; Date of Service 6/21/03
Amount: \$495.00

3. Midwest Imaging-Alton; Date of Service 4/2/03
Amount: \$398.00

Employer/Insurer and Second Injury Fund stipulated to the admission of Exhibits A through CC.

The Employer/Insurer offered the following exhibits:

EMPLOYER'S EXHIBIT 1:	Deposition of Dr. Chabot
EMPLOYER'S EXHIBIT 2: David Harris	E-mail of 8/22/02 from
EMPLOYER'S EXHIBIT 3:	Maintenance logs
EMPLOYER'S EXHIBIT 4:	Unemployment compensation application
EMPLOYER'S EXHIBIT 5:	Service contract on "number four" crane
EMPLOYER'S EXHIBIT 6:	Computer notes on "number four" crane maintenance
EMPLOYER'S EXHIBIT 7:	Videotape
EMPLOYER'S EXHIBIT 8: Polinsky of 9/21/04	Deposition of Dr.
EMPLOYER'S EXHIBIT 9: 9/29/04	Deposition of Dr. Kopp of

EMPLOYER'S EXHIBIT 10: England	Report of James
EMPLOYER'S EXHIBIT 11: Catanzaro of Concentra	Report from Dr.
EMPLOYER'S EXHIBIT 12: of James England	Curriculum Vitae

Claimant and Second Injury Fund stipulated to the admission of Exhibits 1 through 12.

The Second Injury Fund offered no Exhibits.

FINDINGS OF FACT

Based upon the competent and substantial evidence, I find:

1. Claimant David Harris, a 45 year old male, worked for the Employer as a crane operator for employer and employer's predecessor for 21 years, operating various cranes. He has not worked since June 28, 2002.
2. Claimant testified that he has had particular difficulty in operating crane "number four" because it had a high cab extension (twenty feet off the ground) and operated on steel tracks as opposed to rubber wheels or tracks. Claimant identified Exhibit O as pictures depicting crane "number four." The employer/insurer also introduced a video-tape of three of its cranes. The video shows the operator of "number four" crane being vigorously jostled in the cab causing his head to be snapped and bounced about as well as his upper torso being thrown from side to side and back to front.
3. Claimant testified that he operated the "number four" crane as soon as it was brought to the yard, and that for a period of years he was the only operator to run the crane. He would operate the crane continuously throughout an eight hour day, as well as overtime each week. More recently, he operated the crane on a sporadic basis from a few days per month to a few days in a row, but this use would not generally be for an entire working shift. Claimant testified that he had problems with the "number four" crane from the first day he began operating it. He stated that the crane would shake violently from side to side when he moved it (traveling) and caused him to sometimes hit his head on a fan on the side of the cab. He also stated that the crane would shake violently from front to back when he used the boom. He stated that it would "shake his guts out," and cause him to "kiss the windshield." Claimant stated that the shaking was worst when he operated the crane on uneven ground, which constituted most of the ground at employer's premises. He stated that he tried to operate the crane differently, using just his fingertips on the control lever (joy stick) so that he could control its movement and prevent it from "bucking."
4. Claimant testified that the "number four" crane developed structural problems as a result of the shaking. He stated that the frame of the crane had cracked. Also it would shake so much that sometimes a load would fall loose from the large magnet used to lift metal. The employer attempted to fix the structural problems by putting regulators on the hydraulic system, welding sheet metal braces on the cab, welding repairs to the cracks and installing rubber cushions. Claimant testified that pictures numbered four, five, six, seven, eight and number nine in Claimant's Exhibit O depicted the current state of the "number four" crane, and the attempts to repair it.
5. Claimant also testified that two outside agencies came to inspect the "number four" crane because of the problems it was having. He testified that the manufacturer of the crane came from Switzerland to inspect it and recommend changes. He also testified that the Occupational Safety and Health Administration had inspected the crane because

another employee had filed a complaint. However, he stated that nothing had changed with the crane's operation after these inspections.

6. Claimant testified that he developed a stiff neck four months after he began operating the "number four" crane. His neck would occasionally "lock up." He stated that he did not report these problems because he "felt" he had "slept wrong" and that his condition was "not job related." He testified that some of his co-workers were aware of his neck problems, but not his supervisors. Claimant did not seek medical treatment because he did not think his problem came from operating the crane. However after he obtained an MRI in August 24, 2002, he reported a neck problem to his employer.
7. On June 28, 2002 the claimant went on vacation. He stated that he took a vacation at that time for a period of one week. He did not travel anywhere during his vacation. He stated that on July 7, 2002 he was at home and holding a plate of barbequed steaks, weighing a total of approximately three to four pounds, when he turned his head and developed a muscle spasm in his left shoulder area. He stated that he lay down for a while and the spasm went away. However, he then had problems with moving two of the fingers on his left hand. He went to his family doctor who referred him to another doctor who in turn referred him to another doctor who performed an MRI. He underwent an MRI in August of 2002. Dr. Strege discussed his work as a crane operator. The previous doctors had been looking at his left arm as being the source of his problems, and when Dr. Strege told him his problems stemmed from his neck, he made the connection with the neck problems he had at work. He therefore raised the issue of his work as crane operator with Dr. Strege and Dr. Strege found his work as a cause of his neck problem. Claimant was also evaluated by Dr. Polinsky and Dr. Chabot.
8. Claimant testified that he also had neck complaints when operating other cranes for Employer. He said that he spent a great deal of time in stacking materials up to fifty feet high, and that having to keep his neck tilted constantly skyward produced neck pain and stiffness. He also had to operate other cranes that crushed and stacked heavy materials, and that this caused the cranes to rock and shake.
9. At the initial hearing, Claimant testified that he was aware the physicians have indicated he is a surgical candidate. He stated he wanted to undergo surgery because he is in extreme pain. He identified several medical bills contained within Employee's Exhibit P as being bills for the medical treatment he has received. His complaints at that time included neck and left arm pain which was better with massage and hot water. He stated that his problems were worse with lying down and sleeping. He had pain and tingling in his left forearm and tingling in the fingers of his left hand. He could not completely extend the fourth and fifth fingers of his left hand.
10. Mr. Myron Loggins testified on behalf of the employer and insurer. Mr. Loggins is the superintendent at Phillips Metals. He identified Employer's Exhibit 3 as being the daily maintenance logs which are completed by the crane operators after their shifts. He stated that these logs are not completed by workers who only operate a crane for a portion of a work day. He initially indicated that the logs show all of the cranes which Claimant had operated going back to August of 1995. However, he later stated that he only had some of the logs and was not able to find others. Further, he indicated that portions of Employer's Exhibit 3 contained logs from workers' other than the Claimant. Mr. Loggins also testified, initially, that Claimant had last operated the number four crane on February 16, 2000 and that prior to that he had not operated the crane since some time in 1996. However, he later stated that the Claimant had operated it in 1999. Mr. Loggins also testified that he did not operate these cranes and that he was not generally aware of the maintenance that was performed on them. All in all, Mr. Loggins' testimony corresponded with what claimant stated.
11. Also Mr. Larry Hall testified on behalf of the employer and insurer. Mr. Hall is also a crane operator at Phillips Metals, a position he has held for four years. Mr. Hall did not

believe that Claimant had been operating the number four crane recently. Mr. Hall stated that Claimant had complained to him of pain in his back, though he could not remember what portion of his back. Mr. Hall stated that he did not personally want to get back on crane number four because of the shaking that it produced. He stated that he had personally developed back pain in the past when operating it. He also stated that he had stacked materials in the past with a crane, and had developed neck pain as a result.

12. The initial deposition testimony of Michael N. Polinsky, M.D. was admitted on behalf of the employee. Dr. Polinsky, a board certified neurosurgeon, testified that he evaluated Claimant on one occasion. He also personally reviewed the MRI films taken on August 24, 2002. Thereafter he arrived at a diagnosis of a radiculopathy compromising the nerve roots in Claimant's neck at two levels, both C7 and C8 levels. He stated that Claimant needed additional testing, and perhaps surgery, as a result of the same. Dr. Polinsky testified that Claimant's work for Phillips Metals as a crane operator was a substantial factor in causing the condition in his neck and the need for medical treatment. He stated that the sort of work which Claimant did for Employer was enough mechanical stress to cause the development of degenerative changes and disc problems in the neck that would lead to this kind of radiculopathy. Further he testified that claimant's MRI showed that his neck has "substantial degenerative changes" that are "not caused by turning one's head to the left while carrying barbeque meat," and "that's the type of condition which develops over longer periods of time, along with mechanical stress, which I think his job in some part caused."
13. Also admitted into evidence was a copy of the medical records from Claimant's personal physician, Dr. Morrow. Dr. Morrow saw Claimant on July 8, 2002, at which time he complained of left shoulder pain and twitching in the left chest with a decreased ability to extend the fingers of his left hand. The doctor apparently ordered a CT scan of Claimant's head, which was reported on July 19, 2002 as being negative. Subsequent records from Dr. Morrow indicate that the doctor had referred him to Dr. Washington and Dr. Randolph. Dr. Morrow indicated in his note of August 27, 2002 a diagnosis of a C8 radiculopathy.
14. Also admitted into evidence was the medical record of Dr. Eric Washington. Dr. Washington first Claimant on July 29, 2002. At that time Claimant complained of a spasm in his left shoulder while barbecuing on July 7, 2002. He said that there was "no injury or trauma."
15. Medical records of Dr. Randolph show that he evaluated Claimant on the one occasion of August 13, 2002, thereafter ordering an EMG and nerve conduction study. This showed evidence of a possible C8 radiculopathy. An MRI scan diagnosed a left ulnar nerve neuropathy, together with cervical degenerative disc disease with stenosis.
16. The medical report of David W. Strege, M.D., was admitted into evidence on behalf of Claimant. Dr. Strege saw Claimant on September 25, 2002. His history notes that Claimant experienced spasms in his left shoulder area while carrying a plate of barbeque on July 7, 2002. It also indicates that Claimant has been employed as a crane operator for 22 years and he has been unable to perform his duties because of his symptoms. Dr. Strege, an orthopedic surgeon, evaluated Claimant and advised that while there is possibility of an injury to the ulnar nerve in the elbow, it would appear that most of the problems are related to Claimant's cervical spine. He therefore recommended that Claimant be evaluated by a spine surgeon.
17. Also admitted into evidence were numerous medical bills and a medical bill summary. These showed that Claimant's medical treatment to the date of the initial hearing totaled \$2,980.31.
18. The deposition testimony of Mr. Johnnie Day was admitted into evidence on behalf of Claimant. Mr. Day testified that he is currently retired, and has been since September

of 1999. Prior to that he worked for Phillips Metals (and McKinley Iron) for a period of 37 years. Mr. Day testified that the “number four” crane was a difficult crane to operate because it would “shake the guts out of you.” He stated that at times the crane would shake so hard that it would shake the load off of the magnet. He stated that it shook and bounced when it was operated and while it was being driven. He also indicated that the heavier the load on the crane, the more that it would shake. Mr. Day indicated that he eventually advised the employer that he was refusing to operate the crane any longer because of its problems. Mr. Day also testified that Claimant “used to say his neck was bothering him all the time.” He said that Claimant had complained of stiffness and a “crook” in his neck. He stated that he and other workers would tease Claimant about his stiff neck.

19. The Claimant also offered the deposition of Mr. Carlos Brown. Mr. Brown testified that he is currently employed with Phillips Service Corporation, where he has worked for the last 13 years. He stated that he has operated the “number four” crane in the past. He stated that the crane operators had “all” written up the crane as being in bad shape, meaning that it was not stable. He stated that the crane would shake badly when it was being operated, mainly in a front to back motion. Mr. Brown testified that Claimant would sometimes come to work and “couldn’t turn around.” He stated that he and other workers would tease him because of his neck stiffness. He stated that Claimant appeared “as if he had a neck brace on.” Mr. Brown stated that Claimant “always said he had a stiff neck,” and that he was in pain.
20. The Claimant also offered the deposition of Mr. Lieutenant McCray. Mr. McCray testified that he previously worked for Phillips Metals, though he retired in July of 2000. Prior to that he had worked for Phillips (and McKinley Iron) for a period of 46 years. His job was a crane operator. Mr. McCray testified that he worked on a different shift from Claimant so he did not always see him. However, he had also worked the “number four” crane in the past and that it was like riding a “bucking horse.” He stated that there were a number of attempts to try to stop the crane from shaking, but that none of them had worked. He also stated that he filed a grievance with the employer and also a complaint with OSHA about the problems with crane “number four.” Mr. McCray testified that he remembered Claimant complaining about the shaking from the “number four” crane. He could not remember Claimant ever personally complaining that he was hurting, though he said that everyone had complained of the machine and its difficult ride and roughness.
21. The Claimant also offered the deposition of Mr. Freddie Edwards. Mr. Edwards testified that he currently works at Phillips Services, where he has worked for the last 26 years. He states that he has operated the “number four” crane on occasion and that he has problems with it bucking and jumping. He states that if something is being picked up then it starts jerking and shaking both up and down and forwards and backwards. He stated that on occasion he had hit his head on the windshield from the shaking. He testified that some of the other workers were trying to get the employer to weld the machine to attempt to improve its condition. Mr. Edwards could not remember Claimant ever complaining of having physical problems. However, Mr. Edwards testified that every time he drove the “number four” crane he would be stiff and hurting in his back. He also said it would give him complaints across his shoulders and in his neck.
22. The employer insurer offered the deposition of Michael Chabot, D.O. Dr. Chabot, an orthopedic surgeon, testified on behalf of the employer and insurer. He stated that he had evaluated Claimant on one occasion, and thereafter concluded that Claimant suffers from a cervical radiculopathy and neck pain. Dr. Chabot testified that Claimant’s work as a crane operator was not a significant contributing factor to the development of his condition. Rather, he felt that the incident of July 7, 2002, when Claimant was barbecuing in his backyard was the significant contributing factor. Dr. Chabot also testified that Claimant gave him a history of developing “crooks” and aches in his neck about ten years earlier. He stated that while he reviewed some of the medical records,

he did not have all of them. Further, he was not able to review the actual films from the MRI scan. He did conclude, however, that Claimant was in need of surgery to correct the condition in his cervical spine. When Dr. Chabot was asked as to his understanding of the shaking and bouncing that Claimant underwent in operating his cranes, he indicated that Claimant had simply told him that his work duties required the operation of a crane which could result in shaking and jerking. He stated that he was not familiar with the specifics of the shaking and bouncing that Claimant was subjected to.

23. Finally, employer and insurer submitted a video tape of several cranes being run on their premises. The first two cranes were seen to operate with a minimal amount of shaking. The third crane was seen to shake a great deal. Claimant identified concerning the three cranes as being the "number 5", "number seven", and number four" cranes respectively. He testified also that the cranes in the video tape were not being operated in a manner in which they are usually operated. Normally they are operated much more quickly and with much heavier materials. Further, the operators were not moving their heads in any manner. Claimant testified that the crushing of the materials was not being performed on the video tape. He also specifically pointed out that additionally welding appeared to have been done to the "number four" crane.
24. At the second trial of this case, Claimant testified that he attended high school first in St. Louis, and then transferred to a high school in Dallas, Texas. He did not do well in St. Louis, and when he was in Texas he felt he was simply being taught the same things he had already learned in St. Louis. As a result he got good grades in Texas. However, when he went to college he again did not do very well. He was doing some other things while in college, such as playing in bands at night, though he said he attended his classes and studied. Still, his grades were not good, and he was placed on academic probation. He therefore decided that he would stop school and go to work. He knows the basics of operating a computer, though the only thing he does is go on the Internet. He does not know how to type.
25. Claimant's first job was in auto bodywork, which he did for a couple of years. He also worked in St. Louis for a short time in the housekeeping department of a local hospital before going to work for the employer, where he worked for 22 years. Claimant is not currently working, and has not worked since June 2002 when he worked at Phillips Metals. However, he did work in the Phillips' office for about three weeks in 2003. Claimant did attempt to return to work for Phillips in a light duty capacity in 2003. He worked in the office, prior to the development of the more severe venous problems. However, he found that he was not able to do office work such as filing and going through MSD sheets because of having to hold his neck in a bent position. He also had problems because of trying to use his left hand at the time.
26. Claimant testified that after the hearing in February 2003 he came under the care of Dr. Polinsky with regard to his neck. Dr. Polinsky performed surgery in April 2003, which helped the symptoms in his left hand in that it was previously "clubbed," but now can be opened somewhat. He said that he has been discharged by Dr. Polinsky but still takes medications that he received from Dr. Morrow. He last saw Dr. Polinsky in September 2004, and the Doctor wanted to prescribe medication but the insurance company would not approve it.
27. Medical records from Missouri Baptist Medical Center show that Claimant underwent a myelogram and CT scan on April 2, 2003. (Claimant's Exhibit U). These studies showed defects at several levels of Claimant's cervical spine. Claimant was then admitted to the hospital on April 23, 2003, during which time he underwent the following surgical procedures: left C6-T1 posterior cervical foraminotomy and microdiscectomy; left C6-7 posterior cervical foraminotomy and microdiscectomy; microscopic dissection.

28. Medical records from Hand & Physical Therapy of Ferguson – Florissant show that Claimant received physical therapy following his surgery for complaints involving his neck, left shoulder/upper back, and left arm. (Claimant’s Exhibit Z). He complained of a “fluttering” and “clawing” in his left hand. Claimant was provided with physical therapy over a period of weeks in an attempt to improve the symptoms in his left arm.
29. Claimant described his ongoing complaints as constant neck pain, mainly in the left side, going up into the area near his ear and down into the left shoulder blade area. It also radiates into the shoulder and left upper arm. He complains of muscle wasting in the back of his left arm, as well as into the left hand. He says that his pain interrupts his sleep, and that it is much worse when attempting to hold his head in a bent position. He also has trouble with movement of his head, mainly to the left, such as when he is driving. He said that his neck constantly pops with all movements, and he demonstrated this at trial. Claimant attempts to relieve his symptoms by soaking in hot water. He found that he has to keep his head supported even when he is rolling over in bed. He complains of a “charley horse” feeling in the left hand, which is extremely painful. He has lost strength in the hand and motion in the small and ring fingers. He complained that this prevents him from lifting things, and that he has dropped things.
30. Claimant identified a number of medical bills marked as Exhibit CC. He said that one bill was for a doppler study ordered by Dr. Ireland; another bill was for a myelogram ordered by Dr. Polinsky; and the third bill was his Deaconess Hospital admission in 2001 by Dr. Morrow.
31. Claimant described his daily activities as simply trying to do as much as he can. He tries to do some work around the home, and has tried to cut his lawn. To do so he has found that he has to stop and take frequent breaks, and he can only mow his lawn over a period of two days. He tries to do other chores around the home, such as vacuuming, though this is also prevented by his complaints. He took one trip out of town since his injury, though this was before his venous problems took a turn for the worse. He took his trip because Dr. Polinsky had told him to try to be as active as he could. Claimant has ongoing problems with driving. He has difficulty with moving his head from side-to-side. He cannot drive over rough roads because of the shaking and jarring on his neck and arm. He also cannot hold the steering wheel with his left hand because of the symptoms that he has there. Claimant also complained of restrictions in his daily activities because of the problems with his left hand and arm. He says that he drops things with his left hand such as his iron, glasses, etc. He says that he has tried to be more active and do more things, but then he “pays for it” with more symptoms in his neck and left arm.
32. The Court also takes judicial notice of the complaints and symptoms which Claimant has from his other two workers compensation cases.
33. Also testifying at trial was Mr. James England, a vocational expert who evaluated this matter at the request of the employer/insurer. Mr. England did not meet personally with Claimant, but read his depositions and medical records. He concluded that there would be jobs of a light nature which Claimant could perform. Mr. England said that he was operating with the understanding that the only psychiatric restriction on Claimant was that he not work in cranes. He said that he had not been provided with the deposition of Dr. Stillings, who had testified that Claimant’s psychiatric conditions would be a significant barrier to any attempt to return to work. He said that he was aware that Dr. Polinsky had cautioned about use of the left hand, though he did not know why he had not included this in the “functional restrictions” portion of his report. He was also aware that Dr. Kopp had placed restrictions on Claimant’s walking of stairs although he again did not know why he had not put this in the “functional restrictions” portion of his report. He said that he was not aware that the doctors had talked about Claimant having problems with concentration, and that this could possibly affect his ability to be retrained. He said that he was not aware of Claimant’s skill level in working with a

computer, other than that he could go on the internet. He did not know if Claimant had used office machines in the past.

34. Mr. England also testified that Claimant has no “transferable skills,” which he defined as a particular knowledge, skill or ability that could be used in a different job. He agreed that Claimant would be restricted to unskilled entry-level jobs, and that if Claimant were to try any type of work beyond an entry level position, he would have to be completely retrained. He said that the majority of unskilled entry level jobs involve either physically repetitive work or “service oriented” work, which he described as work which involves dealing with the public, such as exchanging money or information. Mr. England said that when a person is looked at by an employer as a job candidate there are certain things that will reflect negatively on their ability to compete with other workers. One negative is a lack of experience. Another possible negative is if a person has left a job that pays more money to take a lower paying job for no apparent reason. Another possible negative factor is if a person is not able to be on their feet and is limited to sit down work, and he said that this would greatly reduce what is left as far as service oriented and unskilled entry level jobs. He said if a person tells a perspective employer that they can only sit for short periods of time that could limit their employability, at least in certain jobs. He said that Claimant would be less employable if he advised potential employers that he had to take extended breaks to prop his feet up. It would also be a negative if he has limitations in the use of one of his hands due to pain and spasms. It would also be limiting in his employability if he had crying spells, anxiety, depression, panic attacks and poor concentration. Finally, Mr. England testified that he was not aware of any attempts by Claimant to return to light duty work in an office setting, nor how he fared with those jobs.
35. Dr. Mark Lichtenfeld testified that Claimant sustained injury due to the shaking he endured while operating the number four crane, including: exacerbation of degenerative disease in the cervical spine; neuroforaminal stenosis bilaterally at C6; stenosis of left and right C7 neuroforamen, as well as the left neuroforamen at C7-T1; status-post left C6-7 and C7-T1 posterior cervical foraminotomy and microdiscectomy; status-post partial medial facetectomy and lateral laminectomy; and chronic left C7 and C8 radiculopathy. (Depo p. 38-39). He stated that Claimant has permanent partial disability of 45% of the body. (Depo p. 40). He also stated that this disability combines with the pre-existing disabilities such that Claimant is permanently and totally disabled. (Depo p. 45). He said that Claimant should have the following restrictions: avoid bending, stooping and twisting; avoid all types of overhead work; avoid remaining in one position for any length of time; sit and stand as needed; avoid lifting more than forty to fifty pounds on a one-time basis, and twenty to twenty-five pounds on a repetitive basis, with lifting only between waist and shoulder; avoid operation of any power tools; avoid operation of heavy equipment or machinery; avoid operating motor vehicles with poor shock absorbers that cause vibration; avoid driving over secondary and tertiary roads, or roads in poor repair; avoid operating a crane. (Depo p. 42-43). Dr. Lichtenfeld also stated that Claimant should receive additional medical care in the form of: treatment with anti-inflammatory medications, pain medications, and muscle relaxers. (Depo p. 44-45).
36. Dr. Polinsky testified in his second deposition that Claimant had continued symptoms following his neck surgery because the nerve in his neck had been pinched. (Depo p. 23-24). He said that at times there is no complete recovery, depending on the severity of the injury. (Depo p. 24). He said that the period of time that Claimant’s nerve was pinched was a “long time.” (Depo p. 25). When Dr. Polinsky last saw Claimant he found continued weakness and atrophy in the left arm. (Depo p. 16). Dr. Polinsky stated that Claimant had sustained disability of 20% of the body as a whole, due to his neck injury. (Depo p. 20). He recommended that Claimant not lift nor carry more than fifty pounds, and avoid repeated bending, lifting, twisting and stooping. (Depo p. 20).

37. Dr. Stillings testified that Claimant suffers from diagnoses of post-traumatic stress disorder, chronic, and also a mood disorder due to a general medical condition. (Depo p. 8). He attributed these to Claimant's other two workers' compensation cases. (Depo p. 8). Dr. Stillings testified that while it is conceivable that Claimant could return to work from a psychiatric standpoint, he cannot operate a crane, and his psychiatric state will be a significant barrier to his attempts to return to work. (Depo p. 12). In his report of August 18, 2003 he stated that Claimant's medical conditions "impair concentration and ability to attend to tasks."

38. Testifying by way of deposition was Mr. James Israel, a certified and licensed vocational rehabilitation counselor. (Claimant's Exhibit S). Mr. Israel stated that he met with and evaluated Claimant on April 1, 2004. He also reviewed all of Claimant's medical records, and performed testing of Claimant's skills regarding fine finger dexterity, fine manipulative skills, bi-manual coordination, eye-hand coordination, and sequencing. Claimant's scores put him in a category of "those who were not successful at returning to work." He testified that after having evaluated Claimant, it was his opinion that Claimant is unable to compete for work in the open labor market. (Depo p. 8-9). He said that the combination of Claimant's physical and mental disabilities rule out either adapting to an alternative job or retraining to a new job, even if it was light duty and unskilled in nature. (Depo p. 11-12, 20).

RULINGS OF LAW

Based upon the competent and substantial evidence as stated above, I find the following:

Permanent Disability

Claimant described his ongoing complaints as constant neck pain, mainly in the left side, going up into the area near his ear and down into the left shoulder blade area. It also radiates into the shoulder and left upper arm. He complains of muscle wasting in the back of his left arm, as well as into the left hand. He says that his pain interrupts his sleep, and that it is much worse when attempting to hold his head in a bent position. He also has trouble with movement of his head, mainly to the left, such as when he is driving. He said that his neck constantly pops with all movements, and he demonstrated this at trial. Claimant attempts to relieve his symptoms by soaking in hot water. He found that he has to keep his head supported even when he is rolling over in bed. He complains of a "charley horse" feeling in the left hand, which is extremely painful. He has lost strength in the hand and motion in the small and ring fingers. He complained that this prevents him from lifting things, and that he has dropped things.

Dr. Polinsky stated that Claimant had sustained disability of 20% of the body as a whole, due to his neck injury. Dr. Lichtenfeld stated that Claimant has permanent partial disability of 45% of the body due to this accident. I find, based upon the testimony of Claimant and the expert witnesses, that Claimant has sustained a permanent disability of 30% of the body as a whole due to his injury of June 28, 2004. Employer and Insurer are therefore found to be liable to Claimant for this disability. Insofar as Dr. Lichtenfeld testified that Claimant's permanent total disability comes from the combination of his three workers' compensation injuries, (Depo p. 45), and insofar as Mr. Israel testified to the same, (Depo p. 11-12, 20), it is found that Employer and Insurer are not liable for permanent total disability benefits.

Liability of the Second Injury Fund

With regard to the Second Injury Fund, the Court takes judicial notice of the disabilities that were awarded Claimant from his other two workers compensation cases that were tried along with this case. This includes: 15% of the body referable to psychiatric illness caused by the injury of May 17, 2001, as well as 40% of the body referable to deep venous thrombosis, and 20% of the body referable to a mood disorder, both of which were caused by the injury of August 31, 2001. Acknowledging the disability of 30% from the current injury, the Court also notes that disability from these three injuries totals 105% of the body as a whole. As stated above, Dr. Lichtenfeld testified that Claimant is permanently and totally disabled due to the combination of his three work injuries. (Depo p. 45). Mr. Israel testified that it was his opinion that Claimant is unable to compete for work in the open labor market due to the combination of his injuries. (Depo p. 8-9, 11-12, 20). Mr. England testified that there were jobs of a light duty nature for which Claimant could still compete. Dr. Kopp testified that he did not believe Claimant was permanently and totally disabled. (Depo p. 24).

Claimant described his daily activities as simply trying to do as much as he can. He tries to do some work around the home, and has tried to cut his lawn, but has found that this can only be done over a period of two days and with frequent breaks. He tries to do other chores such as vacuuming, though these are also largely prevented by his complaints. He has trouble with driving because of the shaking and jarring of his neck and arm; and he cannot hold the steering wheel with his left hand. He has difficulty with moving his head from side-to-side. He drops things with his left hand. When he has tried to be more active he has found that he then “pays for it” with more symptoms in his neck and left arm.

Claimant also has sleep problems on a daily basis, which then affects him during the day. He has to take medications to help him sleep. He also has daily anxiety which manifests itself in the form of crying spells and nervousness. He gets panic attacks during which he gets very nervous and shaky, with a tight feeling in his chest. He is depressed, moody and on edge. He complains of claustrophobia. His concentration is poor and he is reclusive and withdrawn.

Claimant still has frequent and daily problems with his stomach and abdominal area. These areas feel hot and are painful. He has pain in his right leg when he stoops and crouches. He pain in his upper thighs and groin area, more so in his left leg. He has atrophy in the left thigh, along with limping, pain with sitting, and constant pain in the left calf. He cannot run, and he limps on the left leg. He complains of swelling, fatigue and heaviness in his legs. He said that he frequently has to relieve his symptoms by sitting in a hot tub of water, or by reclining with his legs elevated for at least one-half hour. He has problems with walking up stairs in that he quickly fatigues and then has to immediately elevate his legs. If he walks for more than thirty minutes he will then “pay for it” with these symptoms.

Two vocational experts testified in this matter; one indicated Claimant was employable, the other said he was not. James England, the expert who said Claimant was employable, is less credible in his opinion because he was not operating with a full understanding of Claimant’s disabilities. Not only did Mr. England not meet with Claimant, he also did not have certain information that is important to this matter, such as the conclusions of Dr. Stillings. Mr. England stated that he was assuming that the only psychiatric restriction placed on Claimant by Dr. Stillings was the restriction against operating cranes. He was unaware that Dr. Stillings had testified that Claimant’s psychiatric conditions were a significant barrier to any attempt to return to work. He was also not aware that the doctors had talked about Claimant having

problems with concentration. And he was unaware that Claimant had tried to return to work for Employer in an office setting, but was unable to do so due to his symptoms.

Having considered the evidence in this matter, it is found that Claimant is permanently and totally disabled due to a combination of physical and psychiatric disabilities from his three injuries. His neck injury alone prevents him from performing heavy and repetitive work, as he has stiffness and pain that limit his endurance. His left arm is atrophied, and his left hand has limitations that prevent many fine motor skills. His psychiatric problems eliminate most other jobs, due to hindrances to concentration and the inability to "attend to tasks." He is nervous and depressed. He does not sleep well and is tired. He has at best a 20% to 25% blood flow through the largest vein in his body, and this causes further psychiatric problems as well as fatigue and pain in his legs. He has found that he has to recline several times a day to relieve his symptoms. He can't walk far. He can't stand for long periods. When all of these disabilities are considered, it can be seen that Claimant will be unable to compete for work in the open labor market. Claimant has no transferable skills, and the only work he has done in the past has been physical. All of his problems prevent him from competing for lighter work in the labor market, and insofar as this situation is related to a combination of injuries, it is found that the Second Injury Fund is responsible for payment of permanent total disability benefits.

The parties stipulated the Claimant reached maximum medical improvement for this injury on October 31, 2003. It is from that date the Permanent partial disability and permanent total disability (as apportioned) begin to accrue. Thus the Second Injury Fund is liable for Permanent total disability payments of \$80.08 per week for 120 weeks from October 21, 2003 until February 7, 2006. Thereafter the Second Injury Fund is liable for \$409.50 per week for life.

Past Medical Care

Claimant alleges that Employer and Insurer are liable for past medical expenses from Midwest Imaging in the amount of \$398.00 and Towne & Country Cardiovascular; Date of Service 6/21/03 Amount: \$495.00. (Claimant's Exhibit CC).

Claimant has submitted the medical bills and medical records pertaining to the treatment he received. As such Employer and Insurer are found to be liable for payment of the \$983.00 in outstanding medical bills.

Future Medical Care

At trial the Claimant testified he has constant neck pain radiating into his left shoulder and arm. His pain interrupts his sleep. He complains of a "charley horse" feeling in the left hand, which is extremely painful. He stated that he has received pain medications from his family physician, and that he asked Dr. Polinsky for medication at the last examination. Apparently Dr. Polinsky would not provide medication at that time because the examination was simply an "independent medical examination," and not a treatment evaluation.

Dr. Lichtenfeld stated that Claimant should receive additional medical care in the form of anti-inflammatory medications, pain medications, and muscle relaxers. (Depo p. 44-45). Dr. Polinsky did not give an opinion regarding future medical care.

Based on the testimony of the physicians in this matter, I find that Claimant has established a need for further medical care to cure and relieve the effects of his neck injuries, mainly pain medications as needed. As such, it is ordered that the Employer and Insurer are responsible for providing further medical care as may be necessary to cure and relieve the Claimant's ongoing neck pain and related pain caused by the cervical injury of June 28, 2002.

Date: _____

Made by:

William L. Newcomb
Administrative Law Judge
Division of Worker's Compensation

A true copy: Attest:

Gary Estenson
Director
Division of Workers' Compensation

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- [1] \$409.50 - \$329.42 (employer payment)
 - [2] \$409.50 - \$ 0.00 (employer payment)
 - [3] \$409.50 - \$329.42 (employer payment)
 - [4] \$409.50 - \$ 0.00 (employer payment)