

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

Injury No.: 00-068567

Employee: Keith Hellmann
Employer: Ford Motor Company
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: January 13, 2000
Place and County of Accident: St. Louis County

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 19, 2005. The award and decision of Administrative Law Judge Linda J. Wenman, issued October 19, 2005, 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 27th day of April 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Keith Hellmann

Injury No.: 00-068567

Dependents: N/A
Employer: Ford Motor Company
Additional Party: Second Injury Fund
Insurer: Self-insured
Hearing Date: July 15, 2005

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

Checked by: LJW:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: January 13, 2000
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While walking to his car after his shift ended, Claimant was struck by a co-worker's car.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 10% BAW referable to Claimant's lumbar spine.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Keith Hellmann Injury No.: 00-068567

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$792.45
19. Weekly compensation rate: \$528.25 / \$303.01
20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

7 1/7 th weeks of temporary total disability (or temporary partial disability)	\$3,773.21
40 weeks of permanent partial disability from Employer	\$12,120.40

22. Second Injury Fund liability: No

TOTAL: \$15,893.61

23. Future requirements awarded: None

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Keith Hellmann	Injury No.: 00-068567
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Ford Motor Company	Department of Labor and Industrial
Additional Party:	Second Injury Fund	Relations of Missouri Jefferson City, Missouri
Insurer:	Self-insured	Checked by: LJW:tr

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on July 15, 2005. Briefs were received and the case was formally submitted on September 2, 2005. Attorney Evan J. Beatty represented Keith Hellmann (Claimant). Ford Motor Company (Employer) is self-insured, and was represented by Attorney Kenneth Alexander. Assistant Attorney General Jennifer Chestnut represented the Second Injury Fund (SIF). Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

Prior to the start of the hearing the parties identified the following issues for disposition in this case as: medical causation; liability of Employer and SIF for permanent total disability or permanent partial disability; liability for past medical expenses; past temporary total disability; and future medical care.

Claimant offered Exhibits A-T, and Employer offered Exhibits 1-5. All exhibits were admitted without objection. Any objections not expressly ruled on in this award are overruled.

SUMMARY OF EVIDENCE

Only testimony necessary to support this award will be reviewed and summarized.

Review of medical records relating to the injury of 1/13/00

On January 14, 2000, Claimant presented to the emergency room at Christian Hospital complaining of back pain after being hit by a car. Claimant reported to hospital personnel that he was leaving work after his shift ended on January 13, 2000, and while walking to his car he was hit in his low back by a co-worker's car. He didn't remember the details well. He reported he did not fall after being hit, and he landed on his feet ten to fifteen feet away from the car. Claimant denied neck pain, reported his spine felt "tingly", and complained of pain shooting down his legs. Examination did not reveal bruising (ecchymosis), and x-rays of Claimant's pelvis, cervical, and lumbar spine was reported as negative. Claimant was discharged and advised to follow-up with Dr. Khan, his private physician.

Claimant saw Dr. Khan on January 19, 2000, and complained of persistent lower back pain that radiated down his right leg. Examination revealed tenderness and spasm at the L4-5 spine, and at the bilateral para-vertebral muscles. Claimant's forward flexion was limited to 30 degrees, and his lateral flexion was limited to 15 degrees. Straight leg raising was negative. Dr. Khan prescribed medication, exercises, and rest.

On January 31, 2000, Claimant returned to Dr. Khan complaining of severe, worsening low back pain radiating to his right leg, and on occasion into his left leg. Claimant also complained of upper back pain. Claimant informed Dr. Khan he "has a lawyer working on his case and wants a complete evaluation done for this." Examination revealed no bruising; a complaint of pain with palpation of his thoracic spine; normal range of motion to his shoulders and cervical spine; mild tenderness to palpation at L4-5; positive straight leg raising (SLR) on the right; no neurological deficit; normal gait and heel/toe walking; 45 degrees forward flexion of the lumbar spine, and pain with lateral flexion. Dr. Khan noted Claimant was reluctant to bend more than 15 degrees. Dr. Khan referred Claimant to Dr. Graven, an orthopedist, and took Claimant off work until seen by the orthopedist.

Dr. Graven examined Claimant on February 11, 2000. Claimant complained of pain in his neck through mid-back, low back, and down both legs. Claimant reported leg pain on the right to his calf, and pain to his knee on the left. Examination revealed tenderness of the sacroiliac joints and lumbosacral junction; lumbar flexion was limited to Claimant's hands on his thighs; SLR was positive for back pain only; and he displayed no true radicular signs. Dr. Graven ordered physical therapy (PT), and prescribed a Medrol dose pack, anti-inflammatories, and muscle relaxants.

Claimant began PT on February 15, 2000, and by February 21, 2000, Claimant complained of pain "everywhere". The pain identified was in his low back to his right gluteal muscle, sharp pain at T4-T8, and cervical pain of his posterior neck. The therapist called Dr. Graven and notified him of Claimant's complaints.

On February 25, 2000, Dr. Graven examined Claimant. Claimant complained of mid to low back pain, and that his neck felt out of place. EE voiced concern that "something was terribly wrong". Dr. Graven ordered MRI's of Claimant's thoracic and lumbar spine, and placed Claimant's PT on hold. Both MRI's were obtained, and read as "unremarkable" by the radiologist. On March 3, 2000, Dr. Graven provided Claimant a prescription for Ultram, and a work excuse until March 13, 2000. On March 22, 2000, Claimant called Dr. Graven and informed him the Ultram made him sick, and he was unable to work. Dr. Graven prescribed Vicadon.

On May 16, 2000, Claimant consulted Dr. Spezia, who noted Dr. Khan and Dr. Graven had treated Claimant, and Claimant reported he was unhappy with the results. Claimant complained of persistent lumbar spine pain and swelling; decreased strength since his MRI; and that he had experienced a recent lumbar popping. Examination revealed tenderness of Claimant's lumbar spine and coccyx, along with decreased lumbar extension. Dr. Spezia diagnosed a lumbar sacral sprain with somatic dysfunction. Dr. Spezia ordered a new MRI of the lumbar spine, and provided Claimant an off work slip from May 16, 2000 through May 31, 2000. The new MRI was read by the radiologist as "unremarkable". Dr. Spezia referred Claimant to Dr. Ibrahim, an orthopedist.

Dr. Ibrahim examined Claimant on May 23, 2000. Claimant reported he had experienced excruciating low back pain that traveled down the back of his right leg to the ankle, and on occasion to his left leg. Claimant reported his pain had not improved since the accident, and PT had not helped his back pain. Examination revealed tenderness in the paraspinous musculature of Claimant's lumbar spine; a decreased right ankle reflex; and negative bilateral SLR. Dr. Ibrahim obtained lumbar x-rays that demonstrated no evidence of degenerative disc disease, and no evidence of dynamic instability of Claimant's lumbar spine. Dr. Ibrahim reviewed Claimant's May 18, 2000 MRI, and noted it revealed a very mild degenerative L5-S1 disc that may be slightly protruding and touching the thecal sac, but did not demonstrate nerve root compression or spinal stenosis. Dr. Ibrahim also reviewed Claimant's February 25, 2000 cervical MRI, and found it to be normal.

Dr. Ibrahim diagnosed a musculoligamentous injury of Claimant's lumbar spine, and did not find Claimant to be a surgical candidate. Dr. Ibrahim believed Claimant would benefit from conservative treatment, and an aggressive PT

program. Claimant was placed on Reflen, encouraged to complete the PT program, and assured that his type of injury normally resolves with conservative care. Dr. Ibrahim provided Claimant an off work slip from May 23, 2000 through May 30, 2000, and then he was placed on light restricted duty from May 31, 2000 through June 6, 2000. Claimant attended PT regularly until he returned to work, at which time he complained of increased pain and began to miss PT appointments.

On June 13, 2000, neurologist, Dr. Turpin, examined Claimant. Dr. Turpin was asked to evaluate Claimant for a possible lumbar radiculopathy at L5. Claimant underwent an EMG that demonstrated a mild, acute and chronic bilateral L5 radiculopathy. Dr. Turpin then ordered a CT/myelogram of Claimant's lumbar spine. The CT/myelogram was performed on June 20, 2000. The test disclosed a mild broad based L4-5 disc bulge without central canal stenosis; no significant disc disease at L1-4; facet degenerative changes present at L4; and no significant neural foramen narrowing present at any level.

The next physician to examine Claimant was Dr. Walentynowicz. Dr. Walentynowicz is an orthopedist, and he examined Claimant on August 10, 2000. Dr. Walentynowicz noted Claimant walked without a limp or list. His examination revealed Claimant displayed 75% lumbar extension; full flexion; full lateral bending; negative supine SLR; and negative sitting SLR. Dr. Walentynowicz diagnosed chronic thoracic and lumbar strains due to the January 2000 accident, and indicated Claimant's symptoms should resolve over time.

During August 2000, Claimant underwent a series of trigger point and epidural steroid injections under the direction of Dr. Smith at Christian Hospital with mixed results. Between September 14, 2000 and October 23, 2000, Dr. Spezia placed Claimant in additional PT with an emphasis on work hardening and lumbar strengthening. Claimant met one of nine short-term goals set by the therapist. The therapist noted Claimant had attended eight of twelve visits, and was terminated from the program secondary to the attendance policy.

Dr. Kennedy examined Claimant on January 14, 2001. Dr. Kennedy reviewed Claimant's two MRI's, CT/myelogram, and EMG. Dr. Kennedy agreed with the various radiologists' interpretation of those films. Claimant's examination revealed no restriction of Claimant's lumbar spine with forward bending; slight limitation in extension; and negative SLR for sciatica. Dr. Kennedy concluded Claimant had subjective complaints after the January 2000 accident. Dr. Kennedy found no evidence of neurologic deficit, and noted all studies failed to show nerve root compression. Dr. Kennedy also noted the mild L5 radiculopathy found on EMG, and noted it was not verified by Claimant's radiographic studies. Dr. Kennedy did not find Claimant to be a surgical candidate, found Claimant's symptoms to be out of proportion to his objective studies, and also believed Claimant could be more active than he was. Dr. Kennedy found Claimant to be at maximum medical improvement (MMI), and did not place any restrictions on Claimant's activity.

Claimant remained under the care of Dr. Spezia, and on March 8, 2001 through June 29, 2001, Claimant underwent additional epidural lumbar steroid injections by Dr. Chen. Dr. Spezia next referred Claimant to neurosurgeon, Dr. Sheehan. Dr. Sheehan examined Claimant on August 31, 2001. Following examination Dr. Sheehan diagnosed Claimant with chronic pain, etiology unknown. Dr. Sheehan noted during Claimant's exam his ability to only reach six inches above his knees with forward flexion, and Dr. Sheehan observed "interesting he was in the seated position and I extended both legs out to 90 degrees, he had some low back pain, but not severe. This indicates the range of motion of his back is much greater than he was willing to do with the toe touch instructions." Dr. Sheehan recommended Claimant undergo a discogram, and if the discogram was positive, he would be willing to offer Claimant the option of undergoing a lumbar fusion.

On February 11, 2002, Claimant underwent a post discogram CT of his lumbar spine. The CT demonstrated no abnormal findings at L4-5; a degenerative contrast pattern at L5-S1 with no discrete focal disc protrusion, and no nerve root compression; and patent foramina at S1-2. The radiologist indicated at positive discogram finding at L5.

Claimant's testimony

Claimant is 43 years old, a high school graduate of South County Technical, and received training in offset lithography while in high school. Claimant does not have any additional educational experience. Prior to his last employment, Claimant had employment experience as a metal fabricator, forklift driver, manufacturing orthotics, janitor, press-operator, and as a self-employed landscaper operating his own business.

During these employments Claimant injured his lower back on at least two occasions. A review of Division records demonstrated Claimant's first low back injury occurred in 1991, and resulted in a 6% settlement referable to his lumbar, thoracic, and cervical spine. The second injury occurred in 1994, he was diagnosed with a lumbar strain, and resulted in a 9% settlement referable to his lumbar spine. During treatment for the 1994 injury, Claimant complained of intermittent numbness in his right leg, he underwent a myelogram of his entire spine, MRI, and EMG, which were reported as negative. He received a right sacroiliac injection. During treatment for the 1994 injury, Claimant told health care providers "something is seriously wrong", and it was noted Claimant displayed "inconsistent behavior on exam". From 1994 until his injury in 2000, Claimant testified he had no significant back problems, only occasional back pain. While working for Employer, the first job he was assigned caused back discomfort, and after informing his supervisor he was placed on another job. During this time period, Claimant did not take pain medication.

Claimant's testimony regarding the January 13, 2000 accident, and subsequent medical treatment correlate with the medical records previously summarized. Following the accident, Claimant did not seek medical assistance from the plant

medical department because he was on new employee probation, and feared losing his job. Claimant later notified Employer's Labor Relations Department of the accident, but was informed it was not a compensable case. Claimant believes he spoke to a plant physician regarding the injury, but testified he was not directed to medical care. Claimant last worked for Employer during May 2000, and he is not entitled to receive long-term disability.

Claimant's current complaints include pain in his low back that radiates down his legs, and affects his gait. His pain is continuous, averages 4-5/10 on a pain scale on a good day, and 9-10/10 on a bad day. When his pain is severe, he will lie down or recline for 1-2 hours up to three times per day. He is able to sit for 30 minutes to 1 hour, stand approximately 1 hour if not in a fixed position, and drive for 30 minutes to 1 hour before stopping. Claimant testified he is unable bend or stoop, and will assist his wife with grocery shopping if at the store for only 30 minutes. He experiences sleep disturbance due to pain, and has noted problems with memory and concentration.

Claimant no longer plays sports or hunts, and has gone fishing approximately six times since the accident. His daily activities include watching TV, resting, and cooking meals if he doesn't have to bend. Claimant's medical expenses were covered by Employer's insurance until the insurance ended, and he now receives Medicare benefits. He currently takes hydro-codeine 2-3 times per day, and he takes medication for his nerves.

Upon cross-examination by Employer, Claimant acknowledged immediately following the injury the driver inquired if he was ok, Claimant yelled at the driver to leave, and refused help of co-workers at the scene. Claimant also acknowledged he was familiar with the procedure used to report a work injury, and that the plant physician never refused to see him.

Claimant remembered being seen by Dr. Graven, Dr. Ibrahim, and Dr. Sheehan, but didn't remember seeing Dr. Walentynowicz or Dr. Kennedy. Claimant agreed Dr. Graven and Dr. Ibrahim released him without restrictions. Claimant denied previous injuries to his mid-back and neck until he was shown his claim indicating the body parts as preexisting conditions. Claimant conceded he has 13 reported prior work injuries leading up to the current accident.

Claimant verified he does all the family driving, because his wife doesn't drive. Claimant has not looked for employment, and receives Social Security Disability. Claimant also verified all the physicians that examined him were thorough and listened to his complaints. Finally, Claimant verified he was convicted in 1985 for selling marijuana, but has no other felony convictions.

Upon cross-examination by SIF, Claimant acknowledged prior to the January 2000 accident, he worked without restrictions. Claimant verified he has never undergone back or left knee surgery. Also, prior to the January 2000 accident, he did not lie down during the day, and did not have problems with walking, standing, or sitting. On average, Claimant testified he sleeps 6-7 hours per night now that he is on medication. Prior to receiving medication, his sleep was splintered, and he required naps during the day.

Medical Deposition Testimony

Dr. Volarich: Dr. Volarich examined Claimant on January 9, 2004. Dr. Volarich testified to the mechanics of Claimant's injury as: "he got knocked down, face down, on the asphalt and injured his neck and back in the process". During examination, Dr. Volarich confirmed the discogram demonstrated disc pathology at L5-S1. During examination Dr. Volarich noted his examination findings were consistent with the findings on the discogram, and prior to the January 2000 injury, Claimant had no history of bilateral radiculopathy. Dr. Volarich diagnosed Claimant's January 2000 injuries as: lumbar syndrome due to mild disc bulge at L4-5; discogenic pain at L5-S1 with mild bilateral radiculopathy; aggravation of cervical syndrome; and post-traumatic headaches. Dr. Volarich identified preexisting conditions as: chronic lumbar syndrome; chronic cervical/thoracic syndrome; left knee patella frontal syndrome with chondromalacia; left groin strain resolved; and depression. Dr. Volarich opined Claimant's January 2000 accident was the cause of Dr. Sheehan's surgical recommendation.

Dr. Volarich rated the January 13, 2000 injuries at: 25% BAW PPD referable to the lumbar spine, disc bulge at L4-5, and discogenic pain L5-S1 with associated bilateral radiculopathy; and 7.5% BAW PPD referable to the cervical spine for cervical syndrome and post-traumatic headaches. Dr. Volarich rated Claimant's preexisting injuries at: 12.5% BAW PPD referable to the cervical spine; 15% BAW PPD referable to the lumbar spine; and 25% PPD referable to Claimant's left knee. Dr. Volarich declined to evaluate and rate Claimant's depression. Dr. Volarich opined Claimant should undergo a vocational examination due to his young age, and he would defer to a vocational expert to determine Claimant's employability.

Upon cross-examination by Employer, Dr. Volarich confirmed he does not specialize in spinal surgery, and evaluated Claimant on one occasion. Dr. Volarich acknowledged Claimant's medical record demonstrated a long standing history of back and neck complaints. Dr. Volarich verified CT, MRI, and myelograms are objective tests, and all performed on Claimant were normal. Dr. Volarich also verified that of the multiple physicians who examined Claimant, only Dr. Sheehan suggested surgery.

Dr. Volarich confirmed Claimant had normal neurological clinical examination. Dr. Volarich acknowledged he was unaware Dr. Sheehan had testified Claimant's radicular findings on EMG and his leg complaints were unrelated to his L5

discogenic pain. Dr. Volarich testified having this information may have impacted his opinion regarding Claimant's leg pain, but until more information is provided he will stand by his report. Dr. Volarich agreed discogram is a subjective test in terms of relying on a patient to tell when pain is reproduced. Dr. Volarich does not believe Claimant is a surgical candidate, and believes Claimant is at MMI from the January 2000 accident.

Upon cross-examination by SIF, Dr. Volarich acknowledged most of Claimant's preexisting injuries required limited treatment, no permanent restrictions were placed, and Claimant did not require any work accommodations.

Dr. Sheehan: Dr. Sheehan's evaluation and treatment was summarized previously, and will not be repeated here. Dr. Sheehan testified discograms are widely accepted as a diagnostic procedure in the neurosurgery community. He verified Claimant had reproduction of mid-line low back pain at the L5-S1 disc space. Dr. Sheehan opined assuming Claimant had no significant prior low back pain history, and the accident occurred as stated, it is reasonable to assume the accident caused Claimant's pain.

Upon cross-examination by Employer, it was confirmed that Dr. Sheehan had not been provided records from Dr. Graven, Dr. Walentynowicz, Dr. Kennedy, Dr. Ibrahim, or other physicians (except radiologists) who evaluated Claimant during the course of his treatment. Claimant had reported to Dr. Sheehan he had received epidural injections and medications, and indicated past low back muscle strains, but Claimant did not elaborate on the extent of his prior symptoms. Dr. Sheehan was not aware Claimant had undergone a 1990 myelogram that showed a disc bulge at L5-S1, and believed the disc bulge present on Claimant's current MRI predated the January 2000 accident.

Dr. Sheehan verified when he reviewed Claimant's MRI, CT, and myelograms there was no evidence of a herniated disc, nerve root impingement or surgical lesion present on the films. Dr. Sheehan also confirmed his clinical examination of Claimant failed to demonstrate lumbar radiculopathy, and the discogram finding does not relate to Claimant's complaints of bilateral leg pain.

When asked to explain his office note comment regarding a negative SLR and Claimant's inability to forward bend, Dr. Sheehan explained a forward bend is similar to a SLR and Claimant displayed a significant discrepancy between the two tests. Dr. Sheehan testified that the discrepancy many times indicates a sub-maximal effort given by a patient. Dr. Sheehan verified Claimant's range of motion testing was not significant for lumbar nerve root irritation.

While Dr. Sheehan finds the discogram to be a reliable diagnostic test, he agreed the test is a subjective test, and independent of the discogram there is no indication Claimant would need surgery. Finally, Dr. Sheehan acknowledged now that he is aware of Claimant prior back history, the January 2000 accident appears to be an exacerbation of a previous injury, and if Claimant had chronic low back pain prior to the January 2000 accident, he would reconsider his prior opinion linking Claimant's need for surgery to the January 2000 accident.

Dr. Cantrell: Dr. Cantrell examined Claimant on behalf of Employer on December 28, 2004. Dr. Cantrell reviewed Claimant's preexisting and post-accident treatment records, along with CT, MRI, myelogram and discogram films. Upon examination, Dr. Cantrell noted Claimant moved easily from a sitting to standing position. There was no evidence of back spasms, but Claimant did complain of low back muscle tenderness, greater on the left than the right side. Claimant demonstrated mildly limited range of motion in extension and flexion. SLR was noted to be negative bilaterally, and other than Claimant's EMG, nothing on Claimant's physical examination was consistent with radiculopathy. Claimant complained of pain with passive hip flexion at 20 degrees, which Dr. Cantrell found to be inconsistent with Claimant being to extend his knees while in a sitting position, as it produced a hip flexion equal to 90 degrees without Claimant complaining of low back pain. Dr. Cantrell found Claimant to have normal strength and reflexes.

After reviewing Claimant's diagnostic films, Dr. Cantrell opined Claimant's CT scan showed a degenerative disc at Claimant's lowest lumbar functioning level. Dr. Cantrell opined Claimant's discogram showed evidence of disc degeneration at the lowest level, but showed no evidence of dye leakage. Dr. Cantrell also noted Claimant's symptoms were not necessarily aggravated by sneezing or coughing which indicated he did not definitively have discogenic back pain. Dr. Cantrell concluded as a result of the January 2000 accident, Claimant sustained a lumbar contusion and an associated sprain/strain injury. Dr. Cantrell found Claimant to be at MMI, required no restrictions, and he had no further treatment recommendations. Dr. Cantrell opined Claimant's January 2000 accident was not a substantial factor in Claimant's current condition. Dr. Cantrell rated Claimant's injury at 5% BAW PPD due to January 2000 accident, and 5% BAW PPD referable to the lumbar spine that was preexisting.

Upon cross-examination by Claimant, Dr. Cantrell agreed with Dr. Sheehan that Claimant had a congenital transitional vertebra off L5, but he disagrees that the discogram proves L5 disc is the source of Claimant's pain. Further, Dr. Cantrell opined Claimant's congenital variant could be the cause of the chronic radiculopathy noted on Claimant's EMG study. Dr. Cantrell acknowledged Claimant had no long-term relief by medication or injections. Finally, Dr. Cantrell verified trauma can aggravate a degenerative disc, and it is possible the January 2000 injury did aggravate Claimant's disc.

Vocational Deposition Testimony

Ms. Delores Gonzalez: Ms. Gonzalez is a vocational rehabilitation counselor who utilizes a sequential vocational

evaluation. Ms. Gonzalez interviewed Claimant to obtain vocational and medical histories, and reviewed Claimant's medical records. Based on the interview and review conducted, Ms. Gonzalez determined academics would limit Claimant in work activities. Ms. Gonzalez testified she did not know what Claimant's intelligence level was, but intelligence is not what limits Claimant, rather, Claimant is limited by his physical condition. Ms. Gonzalez found Claimant had done both skilled and unskilled work, and light to heavy work. Ms. Gonzalez testified if an individual's skills are not transferable because of functional limitations, it doesn't matter what skills a worker possesses.

Based on Claimant's interview, medical record review, and the physical restrictions placed by Dr. Volarich, Ms. Gonzalez concluded Claimant is not capable of any work for which there is a reasonably stable job market, and Claimant is unemployable at this time. Ms. Gonzalez opined based on Dr. Volarich's restrictions and the medical evidence, Claimant is unable to do sedentary work. Further, she felt Claimant's complaints were compatible with the medical records. Ms. Gonzalez testified she did not conduct a market survey, because the medical said Claimant couldn't work. Finally, Ms. Gonzalez found Claimant to be unemployable due to a combination of his current and preexisting conditions.

Upon cross-examination by Employer and SIF, Ms. Gonzalez testified Claimant complained of severe pain, and she specifically utilized the medical reports of Dr. Volarich and Dr. Chen. Ms. Gonzalez acknowledged she did not review the reports of Dr. Kennedy or Dr. Cantrell, nor was she aware that Dr. Chen had not placed any limitation on Claimant's activities. Ms. Gonzalez also did not attempt to independently verify the history Claimant provided to her, stating, "he seemed like he was telling the truth". Ms. Gonzalez acknowledged she formed her opinion based on what Dr. Volarich gave as Claimant's residual functional capacity, even though Dr. Volarich deferred to a vocational expert, because "he always does that just in case." Ms. Gonzalez verified she does not know how Claimant performed in school, and conducted no intelligence testing. Finally, Ms. Gonzalez acknowledged Claimant had no permanent restrictions prior to the last injury.

Mr. James England: Mr. England is a vocational rehabilitation counselor, and reviewed medical records, reports and two depositions taken of Claimant. Mr. England reviewed the work restrictions placed by Dr. Volarich, and the lack of restrictions placed by Dr. Cantrell. Mr. England further determined Claimant to be a younger worker. Based on the reports generated by Dr. Cantrell, Dr. Walentynowicz, and Dr. Kennedy, Mr. England concluded Claimant was able to be employable in the open labor market without restrictions. If the restrictions of Dr. Volarich were followed, Claimant would be employable in the open labor market in sedentary to light employment. Mr. England indicated vocational rehabilitation would also be an option for Claimant. Mr. England opined he saw nothing that leads him to believe Claimant is permanently and totally disabled, and unable to be employed in the open labor market.

Upon cross-examination by Claimant, Mr. England believes it is beneficial to personally interview and observe an individual when rendering an opinion, but he could not do so in this case due to the current status of the law, unless the Claimant voluntarily agrees to be interviewed. Mr. England agreed that the length of time an individual is away from employment could hinder their ability to return. Mr. England was provided a lengthy hypothetical (see Exhibit 2, pg. 25), and Mr. England testified that if assuming everything contained in the hypothetical were true, the person in the hypothetical would be unemployable. Mr. England also agreed that lack of sleep could hinder an individual's ability to perform work.

FINDINGS OF FACT & RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues relating to medical causation

Medical causation issues normally require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds).

The medical experts in this case, both in deposition testimony and in medical records, are numerous. Their opinions have previously been summarized, and will not be repeated here. All the medical experts agree on at least one point, the accident of January 13, 2000 did cause a degree of symptoms in Claimant's low back. The true question presented revolves around the degree of injury that was caused. With the exception of the discogram, the overwhelming evidence in this case points to Claimant sustaining nothing more than a back sprain/strain. Dr. Volarich and Dr. Sheehan agreed that a discogram, while reliable, does rely on accurate reporting of a patient during the procedure, despite the safeguards built into the testing. Claimant's ability to provide reliable information was certainly placed in question at hearing when he could not recall being treated by Dr. Kennedy or Dr. Walentynowicz, and by the discrepancies he displayed during physical examination with several physicians. Dr. Sheehan further conceded he had not been fully informed of the extent of Claimant's preexisting back history, and Claimant's back history may have impacted his opinion regarding the relation of the discogram to Claimant's January 2000 injury. I find the opinion of Dr. Cantrell to be persuasive, and find Claimant has established medical causation relating his January 13, 2000 accident to a diagnosis of only a low back contusion with an associated low back sprain/strain.

Liability of the Employer or Second Injury Fund for Permanent Total Disability

Claimant seeks permanent total disability benefits from either Employer or Second Injury Fund. Section 287.020.7 RSMo., defines “total disability” as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled in part). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant’s condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled in part). An employer must be reasonably expected to hire the claimant, given the claimant’s current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled in part). The Second Injury Fund is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone. §287.220.1 RSMo. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995).

The vocational experts disagree on whether Claimant is employable in the open labor market. Ms. Gonzalez forms her opinion by believing everything Claimant told her (because he appeared truthful), and without attempting to independently test Claimant’s veracity. Moreover, Ms. Gonzalez found it appropriate to only consider the restrictions placed by Dr. Volarich and Dr. Chen, to the exclusion of all other physicians. As it turns out, Dr. Chen neither placed nor commented upon the need for any restrictions, and Dr. Volarich, by far, placed the most restrictive restrictions regarding Claimant’s activities. Mr. England considered the restrictions placed by all the physicians, and determined even with application of the most restrictive restrictions, looking at his age, education, employment background, and potential for vocational retraining, Claimant was still employable in the open labor market. I find the opinion of Mr. England to be persuasive, and find Claimant is not permanently and totally disabled as against Employer or SIF.

Issues relating to permanent partial disability owed by Employer and SIF

A permanent partial award is intended to cover claimant’s permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 646 (Mo.App. 1991). Employer is not responsible for PTD benefits, but is responsible for the permanent effects of the January 13, 2000 injury. The ratings provided by Dr. Volarich and Dr. Cantrell has previously been summarized. Claimant sustained a low back contusion with an associated sprain/strain. Dr. Sheehan believes Claimant’s disc bulge predates the January 2000 injury, and finds Claimant’s bilateral radicular symptoms to be unrelated to his discogram finding. Claimant has previous low back settlements of at least 11% BAW (9% 1994, 6% 1991 for cervical, thoracic & lumbar). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). I find Claimant’s overall low back disability to be 21% BAW, with 11% preexisting this injury, and Employer liable for 10% BAW for the January 13, 2000 injury.

Once a determination is made that a claimant is not permanently and totally disabled, the inquiry then turns to what degree, if any, is an individual permanently partially disabled for purposes of SIF liability. *Leutzinger v. Treasurer of the State of Missouri*, 895 S.W. 591 (Mo.App. 1995). Section 287.220.1 RSMo., provides that SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and pre-existing conditions must produce additional disability greater than the last injury standing alone. As Claimant’s primary injury against Employer does not reach the minimum threshold of 12.5%, the issue of SIF liability becomes moot. SIF has no liability for PPD benefits.

Issues of Employer’s liability for past medical expenses

Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the workers’ injury. Section 287.140.1 RSMo., provides an employee’s right to direct their own medical treatment, but at their own expense. Without an employer’s waiver to direct care, an employee proceeds at his own peril.

Claimant seeks medical expenses in the amount of \$5,356.80 for treatment incurred after he lost medical insurance in 2001. The evidence presented clearly indicates Claimant initially elected to direct his own medical care. Contrary to Claimant’s assertion that Employer didn’t offer him care, his own testimony is that he did not seek care from Employer, because he was afraid of losing his job. This does not constitute a waiver of care by Employer. By the time Claimant lost his medical insurance, numerous doctors from whom he had sought treatment had placed him at MMI and released him from care. I do not find Employer liable for Claimant’s past medical expenses.

Issues relating to temporary total disability underpayment

Temporary total disability (TTD) benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled in part).

Employer has not paid TTD to date. The medical records support the following findings: Dr. Khan took Claimant off work from January 19, 2000 until February 11, 2000; Dr. Graven took Claimant off work from March 3, 2000 until March 13, 2000; Dr. Spezia took Claimant off work from May 16, 2000 until May 31, 2000; and Dr. Ibrahim took Claimant off work from May 23, 2000 until May 30, 2000. Thereafter, Claimant was returned to light duty. The evidence does not indicate Employer challenged Claimant's off work status, by obtaining its own opinion that Claimant was capable of working. Claimant testified he worked for Employer until sometime in May 2000, and has not since attempted to find work. I find Employer is liable for 7 1/7th weeks of temporary total disability or \$3,773.21, representing the period of time authorized by the above physicians.

Issues relating to future medical care

Claimant seeks future medical benefits relating to this injury. Claimant is not required to present evidence concerning the specific future medical treatment that will be necessary in order to receive an award of future medical care. *Landers v. Chrysler Corp.*, 963 S.W2d 275 (Mo.App. 1997) (overruled on other grounds). Future medical benefits may be awarded if a claimant shows by reasonable probability that there will be a need for additional medical care due to the work-related injury. *Id.* When future medical benefits are awarded, the medical care must flow from the accident in order to hold an employer liable. *Id.*

Claimant suffered a lumbar contusion and sprain/strain due to accident of January 13, 2000. Claimant has complaints regarding numerous body parts, many unrelated to this case. As I did not find the evidence produced by the discogram to be reliable, it therefore follows I cannot find Employer liable for the possible surgical care outlined by Dr. Sheehan. The only remaining possible future medical care suggestions were recommended by Dr. Volarich. Dr. Volarich saw Claimant on one occasion, and was not a treating physician. Numerous treating physicians found Claimant to be at MMI, without a need for future medical care. I find the opinions of Dr. Cantrell, and the numerous other physicians associated with Claimant's care, to be persuasive, and do not find Employer liable for future medical benefits.

CONCLUSION

In summary, Claimant sustained an injury on January 13, 2000 that arose out of and in the course of his employment with Employer. Employer is liable for PPD and TTD benefits as outlined in this award. SIF has no liability. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

