

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

Injury No.: 02-156157

Employee: David Heston
Employer: Rock Hill Mechanical Corporation
Insurer: Travelers Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 13, 2009. The award and decision of Administrative Law Judge Suzette Carlisle issued February 13, 2009, 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 23rd day of July 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: David Heston Injury No.: 02-156157
Dependents: N/A Before the
Employer: Rock Hill Mechanical Corp. **Division of Workers'**
Compensation
Department of Labor and Industrial
Additional Party: Second Injury Fund (Denied) Relations of Missouri
Jefferson City, Missouri
Insurer: Travelers Commercial Casualty
Hearing Date: November 17, 2008 Checked by: SC

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - 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
 - Date of accident or onset of occupational disease: August 15, 2002
 - State location where accident occurred or occupational disease was contracted: St. Louis City, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
 - Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant injured his back when he was pinned between a truck and a dolly.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back -Psychiatric
 - Nature and extent of any permanent disability: Permanent Total Disability-Employer

15. Compensation paid to-date for temporary disability: \$119,288.36
16. Value necessary medical aid paid to date by employer/insurer? \$50,792.66
17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: Sufficient for maximum rates

19. Weekly compensation rate: \$649.32/\$340.12
20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Permanent total disability benefits in the amount of \$649.32 from Employer/Insurer beginning March 1, 2008, for Claimant's lifetime

Employer/Insurer shall receive a credit for overpayment of temporary total disability in the amount of \$371.04 (4/7 weeks) from February 25, 2008 to March 1, 2008

22. Second Injury Fund liability: Denied

Total: **to be determined**

23. Future requirements awarded: As outlined in the award

Said payments to begin 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 Christiansen

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Heston

Injury No.: 02-156157

Dependents: N/A

Before the

Employer: Rock Hill Mechanical Corp.

Additional Party: Second Injury Fund (Denied)

Insurer: Travelers Commercial Casualty

**Division of Workers'
Compensation**

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

Checked by: SC

STATEMENT OF THE CASE

A Temporary Award was issued by Judge Edwin Kohner in the above captioned matter on November 3, 2004. The judge found for David Heston ("Claimant") on medical causation, past medical expenses, future medical care, and Temporary Total Disability ("TTD"). On July 31, 2006, Judge Kohner issued a Second Temporary Award in this matter, and found for Claimant on medical causation, past medical expenses, future medical care and TTD.

On November 17, 2008, a hearing was held for a final award at the Missouri Division of Workers' Compensation ("DWC") St. Louis office at the request of Claimant, pursuant to Section 287.450 RSMo. (2000). Claimant seeks permanent total disability ("PTD") benefits. Attorney Dean Christianson represented Claimant. Attorney Stephen Larson represented Rock Hill Mechanical Corporation, ("Employer") and Travelers Commercial Casualty, ("Insurer"). Attorney Sarah Reichert represented the Second Injury Fund ("SIF"). Attorney Christopher Archer withdrew on behalf of Employer. The record closed after presentation of evidence.

Claimant's Exhibits A-EE, Employer's Exhibits 1-9, and SIF's Exhibits I-II were admitted. Any notations contained in the records were present when admitted.

STIPULATIONS

The parties stipulate that on or about August 15, 2002:

- Claimant was employed by Employer;
- Claimant sustained an accident which arose out of and in the course of employment in St. Louis City;
- Employer and Claimant were operating under the Missouri Workers' Compensation law;
- Insurer fully insured Employer's liability;
- Employer had notice of the injury;
- A Claim for Compensation was timely filed;
- Claimant's average weekly wage was sufficient for a maximum rate of \$649.32 for TTD and PTD and \$340.12 for Permanent Partial Disability ("PPD");
- Employer paid \$119,288.36 in TTD benefits; from June 7, 2004 to December 15, 2004 and February 16, 2005 to February 25, 2008;
- Employer paid \$50,792.66 in medical benefits;
- Claimant achieved maximum medical improvement ("MMI") on February 25, 2008;
- Claimant received a TTD overpayment totaling four days;
- There are two temporary awards from prior hearings, held September 20, 2004 and May 26, 2006;
- The parties request the Court take judicial notice of all testimony in the two prior hearings; and
- All exhibits from the prior hearings are admitted into evidence without objection in this hearing.

ISSUES

The parties presented the following issues for disposition:

- Is Claimant's medical condition medically causally related to a work injury?

Is Employer liable for future medical benefits?

- What is the nature and extent of Employer's liability for PPD, if any?
- What is the nature and extent of Employer's liability for PTD, if any?
- What is the nature and extent of SIF liability for PPD, if any?
- What is the nature and extent of SIF liability for PTD, if any?
- Did Claimant have dependents on the date of accident?

SUMMARY OF DECISION

Claimant met his burden to show his medical condition was medically causally related to a work injury based on the entire record, including expert testimony, Claimant's testimony and demeanor, medical reports, and the applicable law of the State of Missouri.

FINDINGS OF FACT

All evidence was reviewed but only evidence supporting this award is referenced below. This Court adopts and reissues all "Findings of Fact" from the first two hearings. Any objections not expressly ruled on in this award are overruled. Based upon previous "Findings of Fact," competent and substantial evidence presented during three hearings, and reasonable inferences to be derived, I find the following facts:

1. **Claimant** graduated high school in 1972. He attended college for one semester and dropped out due to a motorcycle accident. Claimant married Sylvia Yoder on July 5, 1980.
2. On August 15, 2002, Claimant was forty-eight years old, still married to Sylvia, and had three children; David, Jessica and Lauren Heston. Claimant lived with his wife, Jessica and Lauren; and provided for their support. David attended college and Claimant provided tuition, room, and board.
3. In 1973, Claimant became a journeyman sheet metal worker and obtained assignments through the union hall with various employers.
4. Claimant worked for Employer from 1999 to November 2003. Employer hired Claimant as a journeyman and promoted him to foreman two months later. He was required to lift seventy-five pounds; but frequently lifted up to one-hundred twenty-five pounds. Claimant worked with sheet metal on roof tops and with ductwork inside buildings. He lifted and installed duct work weighing up to several hundred pounds, with assistance, and operated hand and power tools. Work involved bending, stooping, and using his hands. As a foreman, he measured ductwork, ordered material, and performed manual labor as needed.

The August 15, 2002 Work Accident

5. On August 15, 2002, while moving duct work on a dolly with a co-worker, Claimant injured his back when he was pinned between a truck and the dolly.
6. Claimant continued to work until November 2003; but pain increased; and it became difficult to walk up stairs. He used man lifts to climb. In November 2003, Employer needed to lay off workers and remove man lifts. Claimant volunteered to be laid off because he could not climb, and had difficulty lifting, bending, and walking.
7. The union required Claimant remain on the hiring list, but he refused several jobs because he could not climb thirty-two foot ladders due to leg weakness.
8. Before the accident, Dr. Heidi Prather provided medication and injections for an earlier injury that caused left leg radiculopathy. After the 2002 accident, Dr. Prather injected both sides of Claimant's back for the first time. Also, this was the first time Claimant had pain and numbness in both legs. He received numerous injections but declined the recommended surgery.

9. No work restrictions were imposed after the 2002 work accident, and he missed no time from work until he was voluntarily laid off, sixteen months later.
10. Physical complaints include pain and numbness to the left calf, right thigh, and constant back throbbing, stabbing pain, instability, weakness in both legs, increased pain with movement, coughing or sneezing, and decreased range of motion.
11. Claimant can sit for an hour after walking three minutes on the treadmill, and after six minutes he has to lie down for an hour. After walking twenty-two minutes, he is in bed for two days. Claimant can no longer perform housework or mow the lawn because he cannot bend. He lies down every two hours. If he sits too long, it is hard to walk. After 1998, Claimant limited golf to once a month. After the 2002 accident, Claimant limited golf to twenty swings due to pain. Claimant limits driving because he gets lost in unfamiliar areas. He takes breaks after driving thirty minutes. Claimant continues to smoke against advice from physicians.
12. Twice a night he tries to change position without causing pain. Each morning, he makes coffee, watches television, walks the treadmill twice a day, works puzzles, and loads the dishwasher as long as he is not bending.
13. At times, Claimant feels suicidal and sits around doing nothing. He used to be the “breadwinner”, and laughs to avoid crying. He continues to see Dr. Graham twice a year for pain management; and Dr. Stillings four times a year for depression. He would like to continue treatment with Dr. Stillings for both medication and psychiatric therapy.
14. In 2004, Claimant sold drinks at a golf course five hours a day, up to four days a week. The following summer, he quit after he experienced increased pain when he repeatedly bent over a cooler to serve eighty golfers. He has not worked since that time.

Pre-existing Medical Conditions

15. In August, 1973, Claimant sustained a compound fracture to the left distal tibia and fibula in a motorcycle accident. The bones were fused with a left hip graft. Claimant missed two years from work. He received 15% PPD of the left leg from SIF in February 2001.
16. In 1987, Claimant sustained a fractured right ankle. He wore a cast and missed work for seven weeks. He received 16% PPD of the right ankle in February 2001.
17. In 1995, Claimant fractured his right hand, but it was not casted. At work he experienced cramping and problems with gripping.
18. In 1998, Claimant injured his back lifting at work. Dr. Prather diagnosed discogenic back pain. Complaints included occasional left leg and thigh pain, stabbing, burning and aching pain with bending and walking, and increased pain with coughing or sneezing. No work restrictions were imposed. He started sleeping on the floor for comfort. As a foreman, Claimant used man lifts to avoid climbing ladders and assigned heavy work to other workers. Claimant received 17.5% PPD of the body as a whole in August 2000.
19. Between May 2000 and May 2002, Dr. Prather provided five injections for a herniated disc with left leg radiculopathy at L5-S1.
20. **Jessica Heston** is Claimant’s daughter. She visits her parents on a daily basis. Before the 2002 accident, Claimant worked, mowed the lawn, and played golf. Claimant did not exhibit psychological problems. After the accident, Claimant gradually stopped working, cleaning the house, mowing, or playing golf. He has trouble holding a gallon of milk. He lies on the floor, sits, walks the treadmill, and lies down. Claimant has become despondent, suicidal, and unsociable, which caused Mrs. Heston to hide the guns they own. In an email, Claimant informed Jessica that if anything happened to him, she should know he loved her.

Expert Opinion-Physical Condition

21. **Dr. Gornet** is a board certified orthopedic surgeon. On June 7, 2004, he provided an independent medical examination (“IME”) for Claimant. Dr. Gornet diagnosed discogenic low back pain at L5-S1. A July 2004 MRI showed L5-S1 herniation and mild disc bulges at L4-5 and L3-4. He opined at least the L5-S1 disc may be torn or injured, and possibly other discs.
22. Dr. Gornet compared a September 1998 CT scan to two scans taken in 2003, and opined the August 2002 accident was a substantial factor that caused the disc condition, disability and need for surgery. He found the 1998 scan revealed a small right sided disc protrusion at L5-S1, and mild degenerative changes at L3-4. The 2003 scans revealed central disc herniation at L5-S1, with changes at L3-4. X-rays showed loss of disc height at L5-S1 and L3-4.
23. On January 11, 2005, **Dr. Feinberg** provided an IME for Claimant. He diagnosed lumbar radiculopathy with degenerative disc disease (“DDD”), pain syndrome of the lumbar spine, and compensatory changes in the thoracic, lumbar, and cervical spine. An MRI revealed discogenic disease at L3-4, L4-5 and L5-S1. Dr. Feinberg opined the August 2002 work accident was a substantial factor which caused his condition and the need for treatment because Claimant’s low back pain became bilateral after the 2002 accident.
24. From January 2005 to May 2005, Dr. Feinberg prescribed therapy, medication, and injections. On May 2, 2005, Claimant provided poor effort on the Functional Capacity Evaluation (“FCE”), and admitted he refused to perform any tasks that would increase pain. Dr. Feinberg concluded the 1998 disc injury had not completely healed when the 2002 accident occurred. Treatment was provided for both injuries and could not be separated. Dr. Feinberg did not recommend surgery based on the pain pattern and Claimant’s smoking history.
25. **Dr. John Graham** is a pain specialist. He provided nerve root injections at L4-5, L5-S1 and medication for pain from March 2005 to the present. Psychological testing showed elevated scales for somatization, depression, anxiety, and phobia, which should be considered when evaluating Claimant’s subjective response to treatment. Based on 1998 x-rays and 2005 MRI’s, Dr. Graham opined Claimant’s low back complaints were caused by pre-existing degenerative changes. He restricted Claimant to lifting forty pounds in September 2006.
26. **Dr. Mark Lichtenfeld**, a physician, treated Claimant’s back condition on May 20, 2004 and June 8, 2004, and provided an IME on May 5, 2008. He testified for Claimant. He diagnosed the following conditions related to the August 2002 accident; 1) Exacerbation and acceleration of pre-existing degenerative lumbar changes, 2) Herniated disc at L4-5, 3) Increased herniation at L5-S1, and 4) L4 right radiculopathy. He diagnosed left S1 radiculopathy caused by the primary and pre-existing injuries.
27. Restrictions include no repetitive lifting over twenty pounds and thirty pounds once. Lift only between the waist and shoulder, avoid operating gas, electric or air powered tools, working with arms outstretched or overhead, climbing ladders, stairs, and inclines, prolonged sitting, and standing. Alternate positions at least two times per hour, and avoid walking on uneven, slick, and icy surfaces.
28. Dr. Lichtenfeld opined the 2002 accident was the substantial factor that caused the medical conditions, and rated 25% PPD of the entire body. He opined future medication and conservative treatment were needed, and a CT myelogram and multi-level fusion may be needed, if symptoms persist.
29. **Dr. Kevin D. Rutz** is a board certified orthopedic surgeon. He provided an IME for Employer on August 17, 2004. He diagnosed lumbar DDD, a herniated disc at L5-S1; and opined it pre-dated the 2002 work accident.
30. In November 2004, Dr. Rutz offered repeat diagnostics or the FCE if Claimant did not want surgery. Claimant chose the FCE which showed eight validity criteria failed out of thirteen. On December 14, 2004, Dr. Rutz placed Claimant at MMI. He concluded the 2002 accident was not a substantial factor in causing the low back condition based on a long history of back problems, with the same complaints, and treatment before the accident. He opined genetics, smoking, and poor conditioning may also contribute to the conditions.

31. Dr. Rutz provided medication, left L5 nerve root blocks, and therapy from March 2005 to May 20, 2005. A second FCE noted “a large amount of self limiting behavior,” and seven failed validity criteria out of thirteen. Dr. Rutz increased lifting to forty pounds and rated 5% PPD of the low back for the work accident.

32. In July 2008, Dr. Rutz provided another IME and opined DDD was the prevailing factor that caused Claimant’s condition. Further, Claimant did not give full effort on FCEs, and magnified symptoms, which made it difficult to determine symptoms and disability.

33. **Dr. James Coyle** is a board certified orthopedic surgeon. He testified for Employer. In November 2005, and diagnosed multi level DDD of the lumbar spine; discogenic back pain and bilateral lower extremity radiculopathy. He opined the progressive condition started before August 2002. He did not recommend surgery.

34. **Dr. James Doll** is board certified in physical medicine and rehabilitation. He testified for Employer. Dr. Doll examined Claimant on November 30, 2005 and December 12, 2005. He diagnosed low back pain, lumbar spondylosis, central disc protrusions at L4-5 and L5-S1, and spondylosis. He opined most of the degenerative changes were present before the 2002 accident; although Claimant was able to work regular duty. He noted MRI’s after the 2002 accident revealed a slight increase in disc protrusions at multiple levels when compared to the 2000 MRI.

35. Dr. Doll recommended a home exercise program, but no surgery. On December 12, 2005, Dr. Doll found Claimant had achieved MMI from the 2002 accident, rated 3% PPD of the entire body, restricted lifting to forty pounds, and recommended he avoid repetitive bending, twisting, and squatting.

Expert Opinion- Psychological Condition

36. In late 2005, Claimant sought psychological treatment from **Dr. Mohinder Partap**. Dr. Partap diagnosed major depression, prescribed medication for depression, and loss of energy and interest. MMPI-2 results showed a 50 GAF.

37. **Dr. Wayne Stillings**, a board certified psychiatrist, provided an IME for Claimant on December 7, 2005 and October 18, 2006. Dr. Stillings diagnosed: 1) Major depression caused by the 2002 accident, 2) Pain disorder- fifty percent caused by the 1998 back injury and fifty percent caused by the 2002 work accident, 3) Pre-existing reading and writing disorders, 4) Pre-existing “maladaptive personality traits.” He also diagnosed a personality disorder related to a pre-existing psychiatric disability.

38. In December 2005, MMPI-2 results showed a 52 GAF, which indicated moderate symptoms. Dr. Stillings recommended medication for mood and pain. He restricted work to low stress and repetitive work that did not require creativity or cognitive skills. On October 18, 2006, a second MMPI-2 revealed a GAF between 55 and 58. Dr. Stillings prescribed medication and supportive psychotherapy.

39. Dr. Stillings concluded Claimant was unable to return to work based on depression, pain disorder, and a combination of pre-existing psychiatric conditions.

40. On January 9, 2008, Dr. Stillings opined Claimant attained psychiatric MMI related to the 2002 accident and recommended ongoing medication. He modified his opinion on April 7, 2008, and recommended psychotherapy every two months; in addition to medication, in order for Claimant to remain at MMI. Dr. Stillings concluded psychotherapy was needed because Claimant had a “significant risk for suicide” based on a three month deterioration when Claimant did not see Dr. Stillings. Dr. Stillings believes treatment can relieve, not cure Claimant’s depression. The goal is to maintain his current status while avoiding a suicidal state.

41. On July 14, 2008, Dr. Stillings rated 20% permanent partial psychiatric disability (“PPPD”) for major depressive disorder caused by the work accident, 10% PPPD for a pain disorder related to the work accident, 10% PPD for pre-existing “impoverished learning” skills (reading and writing), and 10% PPPD for pre-existing personality disorder. He opined Claimant to be permanently unable to work from a psychiatric point of view, but deferred to a vocational expert regarding Claimant’s ability to work. He continues to treat Claimant four times a year.

42. **Dr. Stacey Smith**, a board certified psychiatrist, provided an IME for Employer on March 16, 2006. She identified depressive symptoms and diagnosed a pain disorder related to psychological and medical conditions. Dr. Smith attributed eighty-five percent of Claimant's need for psychiatric medication to the 1998 injury and personality concerns from adolescence. She attributed fifteen percent to aggravation of the pre-existing injury caused by the August 2002 accident. Dr. Smith opined Claimant exaggerated the impact of the 2002 work accident. She believed medication might improve Claimant's mood and decrease his physical symptoms. She found no learning disability based on post-high school test scores and college attendance.

43. Dr. Smith recommended Dr. Stillings provide medication and psychiatric counseling. She believed Claimant could perform sedentary work but it was unlikely; based on his "personality factors, secondary gain, pain disorder, and lack of motivation."

Expert Opinion- Vocational

44. **Mr. Timothy Lalk**, a vocational rehabilitation counselor, interviewed Claimant on January 3, 2006 and April 11, 2008; and testified at the second hearing for Claimant. Testing revealed post high school reading proficiency.

45. Claimant reported he lies down for thirty-five minutes each morning and afternoon due to low back pain and inability to sleep. Claimant associates medications with nausea, dizziness, confusion, decreased reaction time, and alertness.

46. Based on Mr. Lalk's experience and Dr. Stillings' opinion, Claimant could secure but not maintain employment due to psychiatric instability and the need to lie down.

47. By exhibiting pain and depression, Mr. Lalk concluded potential employers may not hire Claimant, thinking something is wrong with him. Even if hired, Mr. Lalk opined Claimant would have difficulty retaining employment based on psychiatric instability and inability to work without lying down. Also, side effects from medication can impair learning new information and procedures.

48. Mr. Lalk found the psychiatric condition prevented Claimant from accepting work restrictions the way most workers would. He believed Claimant's intolerance for pain at work had become obsession.

49. Mr. Lalk based his opinion on restrictions set by Drs. Rutz, Lichtenfeld and Graham, and Claimant's perceived inability to work. Also, Mr. Lalk relied on Dr. Stillings' finding that Claimant did not believe he could work at the level set by physicians.

50. Mr. Lalk described Claimant's "cycle" of depression as; pain, depression, pain, and obsession. Depression is caused by inability to work as a sheet metal worker due to chronic pain. His symptoms were magnified when he attempted to perform unskilled work, which increased depression causing symptoms appear worse. In other words, the psychiatric condition caused an obsession with pain, followed by more depression and feelings of uselessness.

51. Mr. Lalk believed Claimant was unable to compete in the open labor market because of the primary and pre-existing low back condition with a psychiatric component, even if no other pre-existing conditions were present.

ADDITIONAL FINDINGS of FACT and RULINGS OF LAW

This Court adopts and incorporates as if fully set forth herein all previous "Rulings of Law" to the extent they do not conflict with the rulings contained herein. Based upon the prior and above "Findings of Fact," credible testimony, competent and substantial evidence presented at three hearings, and the applicable law of the State of Missouri, this Court finds the following:

The issues of medical causation and future medical care have been twice decided in Claimant's favor in

temporary proceedings. To modify a temporary award, the ALJ in the final award must find there was “additional significant evidence” not before the ALJ at the temporary award. *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552, 558 (Mo.App. 2006) (*citations omitted*). As discussed below, Employer has not met his burden of proof to modify the prior findings.

1. The August 15, 2002 injury is medically causally related Claimant’s work accident.

Claimant bears the burden of proving that an accident occurred and it resulted in injury. *Thorsen v. Sachs Electric Co.*, 52 S.W.3d 611, 621 (Mo.App. 2001) (*overruled by Hampton v. Big Boy Steel Erection*, 21 S.W.3d 220 (Mo. banc 2003)). For an injury to be compensable, evidence must establish a causal connection between the accident and injury. *Silman v. William Montgomery & Associates*, 891 S.W.2d 173, 175 (Mo. App. 1995). Medical causation not within the common knowledge or experience must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. *McGrath v. Satellite Sprinkler Systems*, 877S.W. 2d 704, 708 (Mo. App. 1994).

It is undisputed Claimant had a back injury in 1998 and received medication and five injections up to three months before the 2002 accident. All physicians agree Claimant had degenerative changes to the low back before the 2002 accident.

I find credible Drs. Gornet, Feinberg, and Lichtenfeld’s opinion that the 2002 accident was a substantial factor that caused disc injury and the need for treatment. Dr. Lichtenfeld noted the 2002 accident exacerbated and accelerated the pre-existing degenerative changes of the lumbar spine. Dr. Doll noted slight increased disc protrusions between MRIs taken in 2000 and 2002, after the accident. A 2003 MRI revealed a tiny annular tear with protrusion, indenting the thecal sac with more protrusion than the 2000 MRI.

Claimant’s testimony was generally credible. After the 1998 injury, Claimant continued to have stabbing, burning pain with bending and walking. He assigned heavy work to other employees, and used a lift to climb. He played golf less; but could walk an eighteen hole golf course twice a month. He hunted pheasants. He experienced left sided leg pain and numbness to the thigh.

After the 2002 accident, his symptoms extended to the calf on the left. Right leg pain and numbness increased. For the first time, he received right sided injections. Claimant no longer played a complete round of golf. He had pain with walking more than three minutes. He can longer mow the lawn or clean house.

I do not find credible the opinions of Drs. Rutz, Graham, and Coyle that the 2002 accident was not a substantial factor in causing Claimant’s injury. Despite denying causation, Dr. Rutz rated 5% PPD of the low back for the 2002 accident. When evaluating Claimant’s pain complaints, Dr. Graham suggested evaluators consider Claimant’s high scores for somatization, depression, anxiety and phobia. Also, Drs. Doll and Lichtenfeld noted changes in the MRIs taken before and after the accident.

Drs. Stillings and Smith agree the 2002 accident contributed to Claimant’s psychological condition. I find credible Dr. Stillings opinion that the 2002 accident caused Claimant’s major depression and fifty-percent of the pain disorder.

Based on the credible testimony of Drs. Gornet, Feinberg, Lichtenfeld, Doll, Stillings, and Claimant, medical records and reports, I find Claimant met his burden to show a causal connection between the 2002 accident and his low back and psychological injuries.

2. Employer is liable for future medical benefits.

Claimant asserts future medical care is needed for physical and psychological injuries sustained from the 2002 work accident. Employer continues to provide treatment for pain and depression.

Section 287.140.1 RSMo (2000) requires the Employer provide “such medical, surgical, chiropractic, and

hospital treatment , including nursing, custodial, ambulance and medicines as may reasonably be required after the injury or disability, to cure and relieve [the employee] from the effects of the injury.” Future medical care must flow from the accident before the employer is held responsible. *Modlin v. Sun Mark, Inc.* 699 S.W. 2d 5, 7 (Mo.App. 1985).

After the first hearing, Claimant declined the recommended low back surgery. Dr. Lichtenfeld found medication and conservative treatment were needed to cure and relieve the effects of the 2002 work accident. Dr. Feinberg concluded low back treatment helped the 1998 and 2002 injuries; and cannot be separated. Dr. Graham monitors medication twice a year to manage pain. Dr. Stillings sees Claimant four times a year for depression and anxiety; and prescribes medication and therapy. Dr. Stillings recommended psychotherapy every two months in addition to medication to maintain Claimant’s mental status and prevent a suicidal state. Dr. Stillings predicted Claimant’s depression cannot be cured but it can be partially relieved. Claimant would like to continue the treatment with Dr. Stillings for medication and psychotherapy.

I find Claimant met his burden to show his need for future medical care flows from his work accident. I find credible the opinions of Dr. Lichtenfeld and Stillings that treatment is reasonable and necessary to cure and relieve the effects of Claimant’s injury. Employer shall provide ongoing medical care for Claimant’s work related low back and psychiatric conditions.

3-6. Employer is liable for permanent total disability.

Claimant asserts he is entitled to PTD benefits. Employer and SIF each contend the other is liable for PTD benefits.

Permanent and total disability requires a claimant to be “unable to return to any employment, not just unable to return to the employment he was engaged in when he was injured.” *Muller v. Treasurer of Missouri*, 87 S.W.3d 36 (Mo. App. 2002). The test is the claimant's ability to compete in the open labor market. *Id.* The “crucial question is whether or not an employer can reasonably be expected to hire the claimant in his present physical condition and can reasonably expect him to perform the work successfully.” *Id.*

Missouri courts have held that “inability to return to any employment” means that the employee is unable to perform the usual duties of the employment ... in the manner that such duties are customarily performed by the average person engaged in such employment. *Vogel v. Hall Implement Co.*, 551 S.W.2d 922, 926 (Mo.App.1977).

The inquiry begins with the Employer’s liability. If a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, SIF has no liability and the employer is responsible for the entire amount. *Hughey v. Chrysler Corp.* 34 S.W.3d 845, 847 (Mo. App. 2000).

I find credible Mr. Lalk’s opinion that Claimant is unable to compete in the open labor market. Medical restrictions prevented Claimant from working as a journeyman, foreman or superintendent. Drs. Rutz, Lichtenfeld, Doll and Graham restricted Claimant to lifting no more than forty pounds. Mr. Lalk concluded Claimant was unable to work as a journeyman with those restrictions. Additionally, Dr. Doll recommended Claimant avoid repetitive bending, twisting, and squatting, which eliminated working as a foreman because they bend, twist and squat to measure ductwork.

Mr. Lalk concluded Claimant may be able to work as a superintendent. However, he did not think Claimant would be able to compete in the open labor market for superintendent positions. In thirty years, Claimant worked once as a superintendent for his brother’s friend. The rest of the time, he worked out of the union hall as a journeyman and was promoted to foreman. Therefore, it was not likely he would be hired as a superintendent. Additionally, superintendents climbed and walked on uneven terrain, which violated Dr. Lichtenfeld’s restrictions.

I find credible Dr. Lichtenfeld’s opinion that Claimant is PTD because of conditions related to the August 2002 accident; including exacerbation and acceleration of pre-existing degenerative changes, L4-5 herniation, increased herniation at L5-S1, right L4 radiculopathy, and increased left herniation at S1.

I find Dr. Lichtenfeld's opinion is not credible that PTD is caused by the primary and pre-existing conditions. Mr. Lalk's opinion is credible that Claimant could work in a different field if he only had the above restrictions. But, Dr. Stillings restricted work to "low stress jobs which do not tax Claimant's mood or require a lot of emotional or cognitive energy, and require a low level of concentration."

I find credible Mr. Lalk's opinion that Claimant has not accepted career changes the way most people would, due to his psychiatric condition. The psychiatric disorder exacerbates pain, causing Claimant to feel useless. Mr. Lalk found the restrictions from the 2002 accident and psychological injury caused Claimant to be unable to compete in the open labor market, without considering pre-existing injuries. Mr. Lalk explained:

Question: And I think your opinion that he could not compete in the open labor market was due to a combination of all physical and psychiatric conditions?

Answer: Yes. In my opinion, yes, those two combine.

Question: And when we're talking about physical conditions, we're talking about everything that you've identified here, all injuries, all conditions, and all restrictions?

Answer: I've taken all of them into account, *but it's primarily the symptoms that he's experiencing in his low back and legs and the psychiatric condition that were preventing him from working. The other conditions that he talked about could limit him to certain types of work, could limit his physical capabilities, but even with all of those other conditions, I think I could find him some type of sedentary or near sedentary type of work that he could do with all of the other restrictions that he has. It's primarily the low back that keeps him from working. If those other conditions did not exist, it would still be the low back and the psychiatric that would keep him from working.* (Emphasis added)

I find credible Dr. Stillings' opinion that Claimant could not sustain employment because of major depression and pain disorder, both caused by the 2002 accident. I find not credible Dr. Stillings' opinion that Claimant had a pre-existing psychiatric condition and pain disorder. Prior to the 2002 accident, Claimant was not diagnosed with a psychiatric condition, received no treatment and missed no work for a psychological condition. But even if a prior psychiatric condition existed; Dr. Stillings attributed all of the major depression to the August 2002 accident.

Similarly, even if a pain disorder existed before 2002, Dr. Stillings attributed fifty percent of the condition to the August 2002 accident. I find Claimant is unable to compete in the open labor market due to the 2002 accident. I find Employer liable for the entire amount. I find SIF has no liability.

The obligation to pay permanent disability compensation commences under Section 287.160.1 RSMo (2000) on the date claimant's permanent disability begins. *Kramer v. Labor & Indus. Rel. Com'n*, 799 S.W.2d 142, 145 (Mo. App. 1990). Based on the parties' stipulation, I find Claimant achieved MMI on February 25, 2008.

I find Employer's liability for PTD should have commenced February 25, 2008. However, the parties stipulate Employer is entitled to a four day credit for TTD payments made after Claimant was no longer temporarily totally disabled. I find Employer is liable to pay Claimant the sum of \$649.32 per week, retroactive to March 1, 2008 for the remainder of Claimant's lifetime. *Laterno v. Carnahan*, 640 S.W.2d 470, 471 (Mo. App. 1982).

7. The issue of dependency is not ripe.

Claimant asserts that he is entitled to permanent total disability benefits, and upon his death, his spouse Sylvia and children David, Lauren, and Jessica Heston, may qualify as "dependents" who will claim a right to continued benefits, under *Schoemehl v. Treasurer of State of Missouri*, 217 S.W. 3d 900 (Mo banc 2007) (*Overtured due to Legislative action in 2008*). Employer contends Claimant's spouse Sylvia and daughter Lauren were dependents on the date of hearing.

Section 287.240.4 defines "dependent" as a relative by blood or marriage of a deceased employee, who is

actually dependent for support, in whole or part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee, and any death benefit shall be payable to them to the exclusion of other total dependents: a) A wife upon a husband with whom she lives or who is legally liable for her support,...b) A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years or over that age if physically or mentally incapacitated from wage earning...

Claimant married Sylvia Yoder on July 5, 1980, in St. Louis County, and was still married to her on August 15, 2002, and at the time of each hearing. Claimant and Sylvia Yoder had three children born of their marriage, David, Lauren, and Jessica Heston. At the time of the hearing for final award, David was 27 years old, Jessica was 23 years old, and Lauren was 17, years old. Jessica attends school but no longer lives with her parents. On August 15, 2002, David was not under eighteen, and did not suffer from physical or mental incapacity that inhibited his earning capacity. Jessica and Lauren were under age 18.

I find David is not Claimant's dependent. I find it is premature to declare a dependent under Section 287.240.4, as Claimant is alive. In order to apply the statutory definition of "dependent," there must be a "deceased employee." However, the evidence does establish Sylvia Yoder, Jessica and Lauren Heston as relatives by blood or marriage that were actually dependent for support, in whole or part, upon Claimant's wages at the time of his injury. These findings of fact shall be binding on the parties in the future.

CONCLUSION

Claimant sustained an injury that is medically and causally related to the August 15, 2002 accident. Claimant is permanently and totally disabled. Employer is liable for PTD benefits and future medical care. The Second Injury Fund is denied. The issue of dependency is not ripe. The award is subject to a lien in favor of Claimant's attorney for legal services rendered.

Date: _____

Made by: _____

Suzette Carlisle

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Nasreen Engle

General Counsel

Division of Workers' Compensation

References to the Employer also include the Insurer.

Claimant's objection to Employer's Exhibit 3, contained in Exhibit 9, is overruled.

The August 15, 2002 accident is referred to throughout this award as “the 2002 accident.”

Based on a comparison of the pre-existing and primary films Dr. Lichtenfeld found increased herniation at S1 on the left.

FCE results show Claimant able to lift fifteen pounds floor to waist, twenty-five pounds waist to shoulder, and twenty-five pounds shoulder to overhead, and able to carry fifteen pounds. However, Dr. Rutz concluded Claimant could carry more if he had not limited his lifting during the test. Vocational expert Timothy Lalk explained GAF stands for Global Assessment of Functioning. Mr. Lalk testified he interpreted Claimant’s GAF score of 50 to indicate Dr. Partap did not believe Claimant could function on a job.

Several cases herein were overruled by the *Hampton* case on unrelated grounds. No further reference will be made to *Hampton*.