

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

Injury No.: 00-018643

Employee: Chris Idol  
Employer: Zimmer Companies, Inc. (Settled)  
Insurer: Travelers Indemnity Company of America (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: February 22, 2000

Place and County of Accident: Jackson County, Missouri

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 April 19, 2007. The award and decision of Administrative Law Judge Mark S. Siedlik, issued April 19, 2007, 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 2<sup>nd</sup> day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD AS TO SECOND INJURY FUND ONLY**

Employee: Chris Idol

Injury No. 00-018643

Dependents: N/A

Employer: Zimmer Companies, Inc.

Insurer: Travelers Indemnity Company of America

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: November 11, 2006

Checked by: MSS/lh

### 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: February 22, 2000.
5. State location where accident occurred or occupational disease was contracted: Jackson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant slipped and fell from a ladder, injuring his neck and back.
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.
14. Nature and extent of any permanent disability: 27.5 percent whole body.
15. Compensation paid to-date for temporary disability: \$4,381.39.
16. Value necessary medical aid paid to date by employer/insurer? \$15,654.18.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: Unknown.
19. Weekly compensation rate: \$358.95/\$303.01.
20. Method wages computation: By agreement

### COMPENSATION PAYABLE

21. Amount of compensation payable:
  - unpaid medical expenses
  - weeks for temporary total disability (temporary partial disability)
  - weeks for permanent partial disability from employer
  - weeks of disfigurement
  - permanent total disability benefits from employer
22. Second Injury Fund liability: \$8,181.27 (27 weeks)

TOTAL: \$8,181.27

23. Future requirements awarded: N/A

Said payments to begin as of the date of the award.

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

Mr. Michael Matteuzzi.

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Chris Idol

Injury No. 00-018643

Dependents: N/A

Employer: Zimmer Companies, Inc.

Insurer: Travelers Indemnity Company of America

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: November 11, 2006

Checked by: MSS/lh

This case comes on for hearing on November 13, 2006, before Administrative Law Judge Siedlik in Kansas City, Missouri. Jurisdiction is appropriate in Kansas City pursuant to §287.110. The Claimant, Chris Idol, appeared in person with his counsel Mike Matteuzzi. The Second Injury Fund appeared through their counsel, Ms. Maurine Shine. The issue to be resolved is the liability of the Second Injury Fund for three separate dates of injury.

The parties stipulated that the Claimant is bringing three separate claims of injury: First date of injury is February 22, 2000; the second of November 9, 2001; and the third on or about April 1, 2003, and at the time of those injuries, the Claimant was covered under the Missouri workers' compensation law. All injuries occurred in Jackson County, Missouri. The Claimant has offered and exhibits were admitted into evidence comprising Claimant's A through K. The Second Injury Fund offered Second Injury Fund Exhibit 1, the deposition of Chris Idol, which initially at trial was not admitted into evidence and after further review is now considered as part of the evidence in this trial.

I show the disputed issues to be resolved in each of these cases as the compensation rate as well as the liability of the Second Injury Fund.

At the time of trial, the Claimant is a 55-year-old male who lives with his wife in Grandview, Missouri. The Claimant was a high school graduate in 1970 with no further education or training beyond high school. After graduating from high school, the Claimant held jobs in maintenance, home repair and auto supply and machine shops. The Claimant was self-employed for approximately 20 years at Idol Maintenance Company performing painting, electrical, carpentry work, lawn and grounds maintenance work, which at times was full-time and at times part-time employment with other employers.

In 1999, the Claimant went to work for Zimmer Property Management Company performing maintenance work, which included electrical, plumbing, heating, cooling, and carpentry work, as well as snow removal. On February 22, 2000, the Claimant was injured when while working up in the ceiling trying to pass telephone wires across the top of a hallway into an adjacent room, the Claimant was standing on top of file cabinets and slipped and fell from where he was standing. The Claimant initially fell backwards hitting his lower back directly on the edge of a file cabinet and then fell forward face first striking his face and head directly on a concrete floor after approximately a 5-foot drop. The Claimant reported the injury but continued working. The Claimant was initially seen at Occupational Medicine Associates on March 2, 2000, where he was diagnosed with a cervical strain and lumbosacral strain and underwent physical therapy, which increased his pain to the point as of March 15, 2000, he could no longer go to work. On March 17, 2000, the Claimant had x-rays taken at Occupational Medicine Associates which revealed an intact fusion with no bony injury which could be identified to his pre-existing cervical fusion. Due to the Claimant's continued pain, the Claimant saw Dr. Prohaska, his personal physician, who ordered an MRI scan on March 20, 2000, which revealed the central disk herniation at C5-C6 with mild stenosis. There was moderate neural foraminal right-sided stenosis at C6-7 from a large osteophyte. Claimant's fusion of his neck from a prior unrelated-to-work injury remained solid. At C7-T1 there was significant central bulging with moderate severity bilateral neural foraminal stenosis at C7-T1. Due to significant pain, Dr. Prohaska hospitalized the Claimant from March 21 through March 25 during which time a morphine pump was administered for pain relief.

The Claimant was subsequently seen by Dr. Clough who ordered a CT myelogram of the cervical and lumbar spine, which revealed a left-sided C5-C6 disk herniation, and a possible disk herniation at C6-7 on the right. There were also central disk bulges in the lumbar region at L2-3, 3-4 and L4-5. Upon release from the hospital, the Claimant was referred to Dr. Zarr, who treated the Claimant with cervical steroid injections administered by Dr. Morgan at St. Joseph's Health Center. The Claimant was prescribed work hardening, which the Claimant attended at HealthSouth starting in May 2000. Due to increased pain, the Claimant began drinking heavily, became depressed and suicidal and was admitted to Menorah Psychiatric where electroconvulsive therapy was administered for his profound depression. Two months later, the Claimant was admitted to Research Psychiatric for suicidal gestures. After the psychiatric hospitalizations, the Claimant returned to Dr. Zarr on July 20, 2000. The Claimant had work hardening and received some relief from the cervical epidural steroid injections. Dr. Zarr released him from care on September 5, 2000. The Claimant returned to work on September 6, 2000, but was sent home and the next day terminated. The Claimant then went to work for Life Care Center of Grandview on September 12, 2000, performing maintenance work. At that point, the Claimant's problems were progressing. The Claimant was having neurological deficits involving his right upper extremity, which caused him difficulty performing his work. An EMG, a nerve conduction velocity study was performed by Dr. Allen, which revealed an inactive C6-7 radiculopathy with progressive dysfunction and a C7-C8 dermatomes. An MRI scan of the brachial plexus was negative for any mass. The MRI scan of the cervical spine revealed disk osteophyte complex in the lateral recess of C7. There were moderate changes at C5-6 as well as C7-T1 with broad based disk osteophyte complexes and borderline stenosis involving the neural foramen at these levels. In April 2001 the Claimant was terminated from Life Care, and took a position with the Greens At Creekside, as a maintenance engineer in the assisted living apartments and nursing home. The Claimant continued to be symptomatic and saw Dr. Hylton on August 9, 2001 and September 6, 2001. After reviewing the Claimant's medical history and information, Dr. Hylton expressed an opinion that there was C8 and some degree of C7 central dysfunction. Dr. Hylton offered the Claimant a decompression of the lateral recess and foraminotomy on the right side at C6-7 and C7-T1. A repeat electrodiagnostic study was performed by Dr. Allen which revealed some regenerative changes in C8 and T1 innervated muscles. There was still denervation persisting at C7. At that point the Claimant's deficits seemed to be stabilizing instead of progressing. When the Claimant saw Dr. Hylton on February 21, 2002, Dr. Hylton felt that the Claimant was best treated nonoperatively at that point and indicated he was at maximum medical improvement. In the mean time, the Claimant was having increasing problems with his low back. There was no new specific injury, but he was relating the low back problems to the February 2, 2000 injury. The employer and insurer refused to authorize treatment to the low back and the Claimant sought treatment on his own which included three lumbar steroid injections. Claimant saw Dr. Zarr on July 9, 2002, and told Dr. Zarr about his lumbar problems and at that point Dr. Zarr assigned 10 percent permanent partial disability to the whole body for the cervical injury and was silent as to any disability to the low back.

On November 19, 2001, the Claimant had a work injury while trying to move an air conditioner through a door frame, when he struck his left elbow and metal door frame, resulting in a fracture. This fracture was treated in a closed fashion. Due to the ongoing problems with intermittent olecranon bursal swelling and pain with use of the left upper extremity, Dr. Clymer recommended performing an olecranon bursectomy on the left elbow. The Claimant sought such treatment for this work-related injury and the employer and insurer refused to authorize treatment. The Claimant exhibited a large red swollen knot on his left elbow at the hearing. Due to the Claimant's ongoing maintenance activities at the employer, the Claimant frequently had to stoop, crawl and be in awkward postures, which caused increasing back pain and new left leg pain and numbness which progressed up until his last day of employment in April of 2003. Dr. Prohaska ordered an MRI scan of the lumbar spine on April 5, 2003, which revealed multi-level disease with broad-based, slightly

asymmetric to the left at L4-5 that produced moderate severe lateral recessed stenosis on the left greater than the right accompanied by facet hypertrophy. This compressed the L5 nerve root. There was also broad-based disk bulging and facet hypertrophy, which compressed the left L5 nerve root. There was also broad-based disk bulging and facet hypertrophy with lateral stenosis at L2-L3 and L3-L4. When compared to the prior study of September 28, 2001, the significant new finding on the later MRI was some left lateral disk herniation at L5-S1 that was compressing the S1 nerve root. This was new since the September 28, 2001 MRI scan. Dr. Prohaska referred the Claimant to Dr. Simon who noted that he was worse than he was when he was previously evaluated by Dr. Simon in 1998. The Claimant filed a claim for cumulative trauma injury each and every day he has worked until his last day of employment on April 1, 2003. The employer and insurer refused to provide treatment to the Claimant's low back based on this cumulative trauma accident alleged on or about April 1, 2003. The Claimant was terminated on April 1, 2003, after being caught lying down while on the job. The Claimant testified he has been unable to work since April 1, 2003, due to his low back symptoms.

Prior to the Claimant's work-related injuries alleged in these claims, the Claimant had complications following other pre-existing conditions, the first of which was a gunshot wound which occurred in 1969. The Claimant was accidentally shot in the left medial proximal thigh and groin area by a .22 caliber rifle, injuring his left femoral artery and the bullet traveled superiorly into the abdominal area and back. Associated with the potential abdominal injuries, a laparotomy was performed. No significant intraperitoneal injury was identified, but Claimant did develop the complication of adhesions and bowel obstructions. Claimant had neurological injury to the left lower extremity which has resulted in some numbness and weakness of the left lower extremity. The Claimant, however, was able to perform work without any significant restriction despite the numbness and weakness. During treatment for the gunshot wound injury, the Claimant had multiple blood transfusions and as a result developed chronic hepatitis C with portal to portal fibrosis. Although interferon treatment was discussed due to the Claimant's history of depression, it was decided by the medical providers that he was not a candidate for interferon.

In 1994, the Claimant was wrestling with his dog and was head butted by the dog, injuring his neck. Dr. Clough performed an anterior cervical discectomy and fusion at the C6-C7 level in August of 1994. Claimant had a subsequent injury to his cervical spine in September 1995 and a motor vehicle accident in which he was a passenger in a vehicle which was rear ended at 45 miles per hour. MRI scans revealed some changes at C5-C6 with some mild central stenosis and a clinical right C6 radiculopathy, which was treated conservatively by Dr. Clough, four cervical steroid injections were administered after the motor vehicle accident.

### **MEDICAL EVIDENCE**

Dr. P. Brent Koprivica testified on behalf of the Claimant. Dr. Koprivica examined the Claimant, reviewed his medical history and interviewed the Claimant, and at the conclusion of which opined that the Claimant's ongoing work activities at the Greens At Creek Side doing maintenance activities represent activities in terms of force and posture that have resulted in repetitive injury each and every day he worked up until April 1, 2003, with further permanent aggravating injury to his lumbar spine based on objective MRI scan evidence and a new disk herniation to the left at L5-S1 with left S1 nerve root compression. Dr. Koprivica opined that the Claimant should be provided a repeat spinal surgical evaluation to direct ongoing care and treatment in terms of his low back, and until he has this evaluation and has reached a plateau state in terms of any medical treatment suggested by that evaluation, he would consider Mr. Idol to be temporarily and totally disabled until the appropriate evaluation and any additional medical care and treatment suggested has been provided. However, in light of the fact that the Claimant had been refused treatment and sought not to force that issue with his employer but settle his cases, Dr. Koprivica opined that for the further aggravating injury, with the identified new disk herniation, he would apportion 15 percent permanent partial disability to the whole body.

Dr. Koprivica opined that as a direct and proximate result of the work injury on November 9, 2001, the Claimant sustained an avulsion fracture of the left elbow which has been complicated by the development of a chronic olecranon bursitis on the left, which requires an olecranon bursectomy surgery. As the Claimant's workers' compensation case progressed for reasons unknown, the employer/insurer had denied authorized treatment to the left upper extremity so the recommended surgical intervention was not provided, and the Claimant chose to settle his workers' compensation case. Dr. Koprivica felt that the Claimant needed to be provided that surgical intervention and he would not be at a maximum medical improvement in reference to that November 9, 2001 injury and could not reach a point of maximum medical improvement until he had reached a plateau state following recovery from surgery. Taking into consideration that the Employee chose not to pursue the issue of treatment with the employer and insurer but rather settle his case, Dr. Koprivica had no independent opinion on the degree of disability to the Claimant's left upper extremity and deferred to Dr. Zimmerman's opinion regarding a 30 percent permanent partial disability of the left upper extremity at the 210-week level.

As a result of the February 22, 2000 work-related fall, Dr. Koprivica opined that the Claimant sustained a permanent injury to his cervical spine with the development of new radiculopathy, in addition to his sustaining aggravating injury to his lumbar spine, and assessed a 35 percent permanent partial disability to the whole body attributable to the February 22, 2000 work injury.

For the pre-existing disabilities, Dr. Koprivica opined that based on the Claimant's history of chronic hepatitis C with fatigue, Claimant had a 15 percent permanent partial disability to the whole body. For the pre-existent cervical condition, which included a prior anterior cervical discectomy and fusion, Dr. Koprivica opined Claimant had a 25 percent permanent partial disability to the whole body. In addition, when Dr. Koprivica took into consideration the disabilities that predated the last work injury claim date along and through April 1, 2003, with the additional disability attributed to the aggravating injury to the lumbar spine associated with the April 1, 2003 claimed injury date, assuming that the Claimant is not offered additional evaluation and care as suggested, significant enhancement of the combined disabilities arise above the simple arithmetic sum of the separate disabilities and when one considers the effect of this compilation, Dr. Koprivica opined that Claimant is permanently and totally disabled.

### **VOCATIONAL EVIDENCE**

Mr. Michael Dreiling, a vocational expert, also testified on behalf of the Claimant. Mr. Dreiling noted that Claimant at the time of his visit was 52 years of age, graduated from high school and admitted to having difficulties with academic classes. Dr. Dreiling noted a work history of performing physically oriented work and that Claimant currently has significantly limiting medical restrictions. Mr. Dreiling noted that Claimant is receiving social security disability benefits and that the Claimant described significant problems of both an exertional and nonexertional nature. Mr. Dreiling presently noted that Claimant is not currently working.

Mr. Dreiling opined that when taking into account the totality of the Claimant's vocational profile, including the various medical problems and difficulties he has experienced and the impact it has on his day-to-day functioning, it is apparent that he is not a candidate to return to any of his past work in the labor market or any other type of substantial gainful employment. Mr. Dreiling opined that based upon the Claimant's presentation to any prospective employers, no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to hire the Claimant.

### **FINDINGS**

In a Missouri workers' compensation case, the law clearly provides that the employee has a burden of proving all material elements of their claim. Fischer v. Archdiocese of St. Louis-Cardinal Richter Institute, 793 S.W.2d 195 (Mo.App. E.D. 1990). It is the Claimant's burden to prove "not only causation between the accident and the injury, but also that a disability resulted in the extent of such disability." Griggs v. A.B. Chance Company, 503 S.W.2d 697 (Mo.App. W.D. 1973). Further, "proof of permanency of injury requires reasonable certainty." *Id* This proof must be based on competent and substantial evidence and not merely on speculation. Moriarty v. Treasurer of the State of Missouri, 141 S.W.3d 69 (Mo.App. E.D. 2004).

The Claimant alleges that as a result of and at the conclusion of his period of employment April 1, 2003, he is permanently and totally disabled. However, to show that the disability constitutes a permanent and total disability under the Missouri workers' compensation law, the Claimant must show that given the employee's situation and condition, he or she is not competent to compete in the open labor market. Under the Missouri Compensation Act "total disability" is defined as the inability to return to any employment. Messex v. Sachs Electric Company, 989 S.W.2d 206 (Mo.App.E.D. 1999). The words "inability to return to any employment" mean that "the employee is unable to perform the usual duties of the employment under consideration in a manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals & Sale, 631 S.W.2d 919 (Mo.App.S.D. 1982). Primary determination for permanent total disability is whether the employee is able to compete in the open labor market. Messex v. Sachs Electric Company, 989 S.W.2d 206 (Mo.App.E.D. 1999). There are many factors that may be considered in this assessment, including the Claimant's physical and mental condition, age, education, job experience and skills in order to determine whether a claimant is permanently and totally disabled. Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo.App. 1997). If a claimant is found to be permanently and totally disabled, it becomes a determination for the Finder of Fact to determine whether the claimant is permanently and totally disabled due to the last accident alone or as a result of a combination of the claimant's pre-existing primary injuries, triggering Second Injury Fund liability. The statutory basis for determining Second Injury Fund liability is found at §287.220.1 RSMo., by unambiguous language, the legislature has imposed potential liability

on the Second Injury Fund for claimant who, "at the time of the last injury, had some partial disability. §287.220.1 RSMo. The administrative law judge is to consider the degree of the employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained. This statutory formula for determining Second Injury Fund liability incorporates a medical causation component. The employer's liability must be determined first, and the statute provides that the employer shall be liable only for the disability resulting from the last injury considered alone and of itself. The statute then provides if the compensation for which the employer at the time of the last injury is less than the compensation provided in this chapter for permanent and total disability, then in addition to the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent and total disability from the Second Injury Fund. Applying this language, if it is clear the last injury considered alone and of itself results in permanent and total disability, the employer is responsible for the full permanent and total disability benefits and the Second Injury Fund has no liability. Gasson v. Treasurer of the State of Missouri, 134 S.W.3d 75 (Mo.App.W.D. 2004)

The Claimant has filed three separate claims for injuries which are the subject of this hearing, the first injury on February 22, 2000, where the Claimant had a cervical and lumbar injury and settled his case for 27.5 percent of the whole body, a November 9, 2001 injury to his left elbow which he settled for 15 percent at the 210-week level, and a cumulative repetitive trauma injury through the last day worked April 1, 2003, alleging injury to the lumbar spine and whole body, which the Claimant settled for 12.5 percent of the whole person. During the pendency of these workers' compensation cases, Dr. Hylton had earlier recommended surgical intervention for the February 22, 2000 cervical injury, and after receiving conservative treatment, Claimant's symptoms stabilized and he was released at maximum medical improvement and continued to work. Claimant, however, did develop increasing problems with his low back, which he related to the February 22, 2000 injury but which the employer and insurer refused to authorize treatment to cure and relieve. In the interim, on November 9, 2001, the Claimant fractured his left elbow and due to continuing problems with the elbow Dr. Clymer recommended performing an olecranon bursectomy to the left elbow but the employer and insurer refused to authorize treatment. The Claimant thereafter continued working until April 1, 2003, when he was terminated for being found lying down on the job due to low back pain. The Claimant testified that after working for three hours on April 1, 2003, his back gave out on him, and he went upstairs to lay down, was caught, and as a result was terminated.

Claimant testified that he is not able to work due to his low back pain. The Claimant testified he is unable to participate in any of his former hobbies, carpentry, making distressed furniture, and building model cars because he cannot stand long enough as his legs give out on him. Claimant stated that he has pain in his low back from his tailbone down through his legs and feet, and that his legs twitch all night long. Claimant testified both legs hurt every day and he can only walk 200 feet. Claimant testified he can stand for only 20 minutes, needs a cane to walk as his legs have given out on him, and as a result he has fallen on numerous occasions. Claimant testified he can only sit for 15 minutes due to his back pain and the twitching in his legs. The Claimant testified he is unable to sleep through the night due to back pain.

It is obvious through the chronology of the Claimant's history of treatment, especially related to his lumbar spine, that the Claimant did not get the treatment recommended after the February 22, 2000 injury. Due to the severity of his low back complaints, the Claimant is still in need of treatment for his lumbar spine. Claimant testified he has to lay down several times a day and that the majority of his complaints are due to the nonoperated herniated disk in his low back. The reason the Claimant is unable to work is due to severe pain which is caused by the unoperated lumbar disk in his lower spine. What has removed the Claimant from the workforce in his own testimony is his symptoms from his nonoperated herniated disk at L5-S1, not from a combination of any other injuries. The Claimant from earlier injuries in February of 2000 and November of 2001 to his low back and left elbow are conditions which are to this day unresolved and in the opinion of Dr. Koprivica needing treatment. The Claimant, however, chose not to fight that fight for treatment with his employer and insurer but chose instead to settle his claims for compensation. Finally, a fair reading of the evidence indicates that the Claimant has not reached maximum medical improvement for his low back injury nor his left elbow injury and it is questionable whether the Claimant is in need for additional treatment of the cervical injury from February 22, 2000. I make this statement based on the testimony of the Claimant's expert Dr. Koprivica and his testimony that the Claimant is in need of treatment for the herniated disk in his lumbar spine, as well as surgical intervention for the left elbow. However, since the employer and insurer have disputed the causation and necessity for treatment under those earlier workers' compensation cases and the Claimant has settled those matters, treatment cannot be ordered from the employer and insurer at this time. Likewise, since the Claimant's own offered medical expert is of the opinion the Claimant has not reached maximum medical improvement from any of the three injuries, and specifically to the lower spine, it is premature to find the Claimant permanently and totally disabled absent the necessary treatment. The Claimant has forgone the ability to pursue that treatment through the workers' compensation remedy with the employer and insurer for each of the three injuries at issue here choosing to settle his cases with the employer and insurer. I cannot and do not find that the Second Injury Fund has the responsibility either to treat the Claimant's conditions of ill to bring him to maximum medical improvement at which time a determination of his permanent disability status can be determined or hold the Claimant's current condition to the responsibility of the Second Injury Fund for permanent and total disability if the Claimant has not put himself in a position to appropriately resolve his claims.

After considering all the evidence and testimony presented, I find the Claimant has met his burden of proof to establish the Second Injury Fund liability for the injury dated February 22, 2000. I find the Claimant had pre-existing conditions of a 1994 surgical fusion and 1995 motor vehicle accident involving a cervical injury and chronic hepatitis C. In the opinion of Dr. Koprivica, those pre-existing conditions totaled 160 weeks of pre-existent disability predating the February 22, 2000 injury. The settlement from the February 22, 2000 injury resulted in a settlement of 27.5 percent of the whole body, a total of 110 weeks when combined with the 160 pre-existing weeks total 270 weeks. And the Second Injury Fund liability I find to be 27 weeks of compensation at \$303.01 per week, a total of \$8,181.27. I find Claimant's counsel, Mr. Michael Matteuzzi, entitled to attorney's fees of 25 percent of sums recovered.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Mark S. Siedlik  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 01-159118

Employee: Chris Idol  
Employer: Zimmer Companies, Inc. (Settled)  
Insurer: Travelers Indemnity Company of America (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: November 9, 2001  
Place and County of Accident: Jackson County, Missouri

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 April 19, 2007. The award and decision of Administrative Law Judge Mark S. Siedlik, issued April 19, 2007, 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 2<sup>nd</sup> day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

**AWARD AS TO SECOND INJURY FUND ONLY**

Employee: Chris Idol

Injury No. 01-159118

Dependents: N/A

Employer: Zimmer Companies, Inc.

Insurer: Travelers Indemnity Company of America

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: November 11, 2006

Checked by: MSS/lh

**FINDINGS OF FACT AND RULINGS OF LAW**

2. 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: November 9, 2001.
5. State location where accident occurred or occupational disease was contracted: Jackson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant struck his left elbow, causing injury.

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: left back.
14. Nature and extent of any permanent disability: 15 percent left elbow.
15. Compensation paid to-date for temporary disability: -0-.
16. Value necessary medical aid paid to date by employer/insurer? \$465.00.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: Unknown.
19. Weekly compensation rate: \$317.46/\$317.46.
20. Method wages computation: By agreement

#### **COMPENSATION PAYABLE**

21. Amount of compensation payable:
  - unpaid medical expenses
  - weeks for temporary total disability (temporary partial disability)
  - weeks for permanent partial disability from employer
  - weeks of disfigurement
  - permanent total disability benefits from employer
22. Second Injury Fund liability: \$9,571.41 (30.15 weeks)

TOTAL: \$9,571.42

23. Future requirements awarded: N/A

Said payments to begin as of the date of the award.

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

Mr. Michael Matteuzzi.

### **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Chris Idol

Injury No. 01-159118

Dependents: N/A

Employer: Zimmer Companies, Inc.

Insurer: Travelers Indemnity Company of America

Additional Party: Missouri State Treasurer as Custodian of Second Injury Fund

Hearing Date: November 11, 2006

Checked by: MSS/lh

This case comes on for hearing on November 13, 2006, before Administrative Law Judge Siedlik in Kansas City, Missouri. Jurisdiction is appropriate in Kansas City pursuant to §287.110. The Claimant, Chris Idol, appeared in person with his counsel Mike Matteuzzi. The Second Injury Fund appeared through their counsel, Ms. Maurine Shine. The issue to be resolved is the liability of the Second Injury Fund for three separate dates of injury.

The parties stipulated that the Claimant is bringing three separate claims of injury: First date of injury is February 22, 2000; the second of November 9, 2001; and the third on or about April 1, 2003, and at the time of those injuries, the Claimant was covered under the Missouri workers' compensation law. All injuries occurred in Jackson County, Missouri. The Claimant has offered and exhibits were admitted into evidence comprising Claimant's A through K. The Second Injury Fund offered Second Injury Fund Exhibit 1, the deposition of Chris Idol, which initially at trial was not admitted into evidence and after further review is now considered as part of the evidence in this trial.

I show the disputed issues to be resolved in each of these cases as the compensation rate as well as the liability of the Second Injury Fund.

At the time of trial, the Claimant is a 55-year-old male who lives with his wife in Grandview, Missouri. The Claimant was a high school graduate in 1970 with no further education or training beyond high school. After graduating from high school, the Claimant held jobs in maintenance, home repair and auto supply and machine shops. The Claimant was self-employed for approximately 20 years at Idol Maintenance Company performing painting, electrical, carpentry work, lawn and grounds maintenance work, which at times was full-time and at times part-time employment with other employers.

In 1999, the Claimant went to work for Zimmer Property Management Company performing maintenance work, which included electrical, plumbing, heating, cooling, and carpentry work, as well as snow removal. On February 22, 2000, the Claimant was injured when while working up in the ceiling trying to pass telephone wires across the top of a hallway into an adjacent room, the Claimant was standing on top of file cabinets and slipped and fell from where he was standing. The Claimant initially fell backwards hitting his lower back directly on the edge of a file cabinet and then fell forward face first striking his face and head directly on a concrete floor after approximately a 5-foot drop. The Claimant reported the injury but continued working. The Claimant was initially seen at Occupational Medicine Associates on March 2, 2000, where he was diagnosed with a cervical strain and lumbosacral strain and underwent physical therapy, which increased his pain to the point as of March 15, 2000, he could no longer go to work. On March 17, 2000, the Claimant had x-rays taken at Occupational Medicine Associates which revealed an intact fusion with no bony injury which could be identified to his pre-existing cervical fusion. Due to the Claimant's continued pain, the Claimant saw Dr. Prohaska, his personal physician, who ordered an MRI scan on March 20, 2000, which revealed the central disk herniation at C5-C6 with mild stenosis. There was moderate neural foraminal right-sided stenosis at C6-7 from a large osteophyte. Claimant's fusion of his neck from a prior unrelated-to-work injury remained solid. At C7-T1 there was significant central bulging with moderate severity bilateral neural foraminal stenosis at C7-T1. Due to significant pain, Dr. Prohaska hospitalized the Claimant from March 21 through March 25 during which time a morphine pump was administered for pain relief.

The Claimant was subsequently seen by Dr. Clough who ordered a CT myelogram of the cervical and lumbar spine, which revealed a left-sided C5-C6 disk herniation, and a possible disk herniation at C6-7 on the right. There were also central disk bulges in the lumbar region at L2-3, 3-4 and L4-5. Upon release from the hospital, the Claimant was referred to Dr. Zarr, who treated the Claimant with cervical steroid injections administered by Dr. Morgan at St. Joseph's Health Center. The Claimant was prescribed work hardening, which the Claimant attended at HealthSouth starting in May 2000. Due to increased pain, the Claimant began drinking heavily, became depressed and suicidal and was admitted to Menorah Psychiatric where electroconvulsive therapy was administered for his profound depression. Two months later, the Claimant was admitted to Research Psychiatric for suicidal gestures. After the psychiatric hospitalizations, the Claimant returned to Dr. Zarr on July 20, 2000. The Claimant had work hardening and received some relief from the cervical epidural steroid injections. Dr. Zarr released him from care on September 5, 2000. The Claimant returned to work on September 6, 2000, but was sent home and the next day terminated. The Claimant then went to work for Life Care Center of Grandview on September 12, 2000, performing maintenance work. At that point, the Claimant's problems were progressing. The Claimant

was having neurological deficits involving his right upper extremity, which caused him difficulty performing his work. An EMG, a nerve conduction velocity study was performed by Dr. Allen, which revealed an inactive C6-7 radiculopathy with progressive dysfunction and a C7-C8 dermatomes. An MRI scan of the brachial plexus was negative for any mass. The MRI scan of the cervical spine revealed disk osteophyte complex in the lateral recess of C7. There were moderate changes at C5-6 as well as C7-T1 with broad based disk osteophyte complexes and borderline stenosis involving the neural foramen at these levels. In April 2001 the Claimant was terminated from Life Care, and took a position with the Greens At Creekside, as a maintenance engineer in the assisted living apartments and nursing home. The Claimant continued to be symptomatic and saw Dr. Hylton on August 9, 2001 and September 6, 2001. After reviewing the Claimant's medical history and information, Dr. Hylton expressed an opinion that there was C8 and some degree of C7 central dysfunction. Dr. Hylton offered the Claimant a decompression of the lateral recess and foraminotomy on the right side at C6-7 and C7-T1. A repeat electrodiagnostic study was performed by Dr. Allen which revealed some regenerative changes in C8 and T1 innervated muscles. There was still denervation persisting at C7. At that point the Claimant's deficits seemed to be stabilizing instead of progressing. When the Claimant saw Dr. Hylton on February 21, 2002, Dr. Hylton felt that the Claimant was best treated nonoperatively at that point and indicated he was at maximum medical improvement. In the mean time, the Claimant was having increasing problems with his low back. There was no new specific injury, but he was relating the low back problems to the February 2, 2000 injury. The employer and insurer refused to authorize treatment to the low back and the Claimant sought treatment on his own which included three lumbar steroid injections. Claimant saw Dr. Zarr on July 9, 2002, and told Dr. Zarr about his lumbar problems and at that point Dr. Zarr assigned 10 percent permanent partial disability to the whole body for the cervical injury and was silent as to any disability to the low back.

On November 19, 2001, the Claimant had a work injury while trying to move an air conditioner through a door frame, when he struck his left elbow and metal door frame, resulting in a fracture. This fracture was treated in a closed fashion. Due to the ongoing problems with intermittent olecranon bursal swelling and pain with use of the left upper extremity, Dr. Clymer recommended performing an olecranon bursectomy on the left elbow. The Claimant sought such treatment for this work-related injury and the employer and insurer refused to authorize treatment. The Claimant exhibited a large red swollen knot on his left elbow at the hearing. Due to the Claimant's ongoing maintenance activities at the employer, the Claimant frequently had to stoop, crawl and be in awkward postures, which caused increasing back pain and new left leg pain and numbness which progressed up until his last day of employment in April of 2003. Dr. Prohaska ordered an MRI scan of the lumbar spine on April 5, 2003, which revealed multi-level disease with broad-based, slightly asymmetric to the left at L4-5 that produced moderate severe lateral recessed stenosis on the left greater than the right accompanied by facet hypertrophy. This compressed the L5 nerve root. There was also broad-based disk bulging and facet hypertrophy, which compressed the left L5 nerve root. There was also broad-based disk bulging and facet hypertrophy with lateral stenosis at L2-L3 and L3-L4. When compared to the prior study of September 28, 2001, the significant new finding on the later MRI was some left lateral disk herniation at L5-S1 that was compressing the S1 nerve root. This was new since the September 28, 2001 MRI scan. Dr. Prohaska referred the Claimant to Dr. Simon who noted that he was worse than he was when he was previously evaluated by Dr. Simon in 1998. The Claimant filed a claim for cumulative trauma injury each and every day he has worked until his last day of employment on April 1, 2003. The employer and insurer refused to provide treatment to the Claimant's low back based on this cumulative trauma accident alleged on or about April 1, 2003. The Claimant was terminated on April 1, 2003, after being caught lying down while on the job. The Claimant testified he has been unable to work since April 1, 2003, due to his low back symptoms.

Prior to the Claimant's work-related injuries alleged in these claims, the Claimant had complications following other pre-existing conditions, the first of which was a gunshot wound which occurred in 1969. The Claimant was accidentally shot in the left medial proximal thigh and groin area by a .22 caliber rifle, injuring his left femoral artery and the bullet traveled superiorly into the abdominal area and back. Associated with the potential abdominal injuries, a laparotomy was performed. No significant intraperitoneal injury was identified, but Claimant did develop the complication of adhesions and bowel obstructions. Claimant had neurological injury to the left lower extremity which has resulted in some numbness and weakness of the left lower extremity. The Claimant, however, was able to perform work without any significant restriction despite the numbness and weakness. During treatment for the gunshot wound injury, the Claimant had multiple blood transfusions and as a result developed chronic hepatitis C with portal to portal fibrosis. Although interferon treatment was discussed due to the Claimant's history of depression, it was decided by the medical providers that he was not a candidate for interferon.

In 1994, the Claimant was wrestling with his dog and was head butted by the dog, injuring his neck. Dr. Clough performed an anterior cervical discectomy and fusion at the C6-C7 level in August of 1994. Claimant had a subsequent injury to his cervical spine in September 1995 and a motor vehicle accident in which he was a passenger in a vehicle which was rear ended at 45 miles per hour. MRI scans revealed some changes at C5-C6 with some mild central stenosis and a clinical right C6 radiculopathy, which was treated conservatively by Dr. Clough, four cervical steroid injections were administered after the motor vehicle accident.

## MEDICAL EVIDENCE

Dr. P. Brent Koprivica testified on behalf of the Claimant. Dr. Koprivica examined the Claimant, reviewed his medical history and interviewed the Claimant, and at the conclusion of which opined that the Claimant's ongoing work activities at the Greens At Creek Side doing maintenance activities represent activities in terms of force and posture that have resulted in repetitive injury each and every day he worked up until April 1, 2003, with further permanent aggravating injury to his lumbar spine based on objective MRI scan evidence and a new disk herniation to the left at L5-S1 with left S1 nerve root compression. Dr. Koprivica opined that the Claimant should be provided a repeat spinal surgical evaluation to direct ongoing care and treatment in terms of his low back, and until he has this evaluation and has reached a plateau state in terms of any medical treatment suggested by that evaluation, he would consider Mr. Idol to be temporarily and totally disabled until the appropriate evaluation and any additional medical care and treatment suggested has been provided. However, in light of the fact that the Claimant had been refused treatment and sought not to force that issue with his employer but settle his cases, Dr. Koprivica opined that for the further aggravating injury, with the identified new disk herniation, he would apportion 15 percent permanent partial disability to the whole body.

Dr. Koprivica opined that as a direct and proximate result of the work injury on November 9, 2001, the Claimant sustained an avulsion fracture of the left elbow which has been complicated by the development of a chronic olecranon bursitis on the left, which requires an olecranon bursectomy surgery. As the Claimant's workers' compensation case progressed for reasons unknown, the employer/insurer had denied authorized treatment to the left upper extremity so the recommended surgical intervention was not provided, and the Claimant chose to settle his workers' compensation case. Dr. Koprivica felt that the Claimant needed to be provided that surgical intervention and he would not be at a maximum medical improvement in reference to that November 9, 2001 injury and could not reach a point of maximum medical improvement until he had reached a plateau state following recovery from surgery. Taking into consideration that the Employee chose not to pursue the issue of treatment with the employer and insurer but rather settle his case, Dr. Koprivica had no independent opinion on the degree of disability to the Claimant's left upper extremity and deferred to Dr. Zimmerman's opinion regarding a 30 percent permanent partial disability of the left upper extremity at the 210-week level.

As a result of the February 22, 2000 work-related fall, Dr. Koprivica opined that the Claimant sustained a permanent injury to his cervical spine with the development of new radiculopathy, in addition to his sustaining aggravating injury to his lumbar spine, and assessed a 35 percent permanent partial disability to the whole body attributable to the February 22, 2000 work injury.

For the pre-existing disabilities, Dr. Koprivica opined that based on the Claimant's history of chronic hepatitis C with fatigue, Claimant had a 15 percent permanent partial disability to the whole body. For the pre-existent cervical condition, which included a prior anterior cervical discectomy and fusion, Dr. Koprivica opined Claimant had a 25 percent permanent partial disability to the whole body. In addition, when Dr. Koprivica took into consideration the disabilities that predated the last work injury claim date along and through April 1, 2003, with the additional disability attributed to the aggravating injury to the lumbar spine associated with the April 1, 2003 claimed injury date, assuming that the Claimant is not offered additional evaluation and care as suggested, significant enhancement of the combined disabilities arise above the simple arithmetic sum of the separate disabilities and when one considers the effect of this compilation, Dr. Koprivica opined that Claimant is permanently and totally disabled.

## VOCATIONAL EVIDENCE

Mr. Michael Dreiling, a vocational expert, also testified on behalf of the Claimant. Mr. Dreiling noted that Claimant at the time of his visit was 52 years of age, graduated from high school and admitted to having difficulties with academic classes. Dr. Dreiling noted a work history of performing physically oriented work and that Claimant currently has significantly limiting medical restrictions. Mr. Dreiling noted that Claimant is receiving social security disability benefits and that the Claimant described significant problems of both an exertional and nonexertional nature. Mr. Dreiling presently noted that Claimant is not currently working.

Mr. Dreiling opined that when taking into account the totality of the Claimant's vocational profile, including the various medical problems and difficulties he has experienced and the impact it has on his day-to-day functioning, it is apparent that he is not a candidate to return to any of his past work in the labor market or any other type of substantial gainful employment. Mr. Dreiling opined that based upon the Claimant's presentation to any prospective employers, no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way

would reasonable be expected to hire the Claimant.

## FINDINGS

In a Missouri workers' compensation case, the law clearly provides that the employee has a burden of proving all material elements of their claim. Fischer v. Archdiocese of St. Louis-Cardinal Richter Institute, 793 S.W.2d 195 (Mo.App. E.D. 1990). It is the Claimant's burden to prove "not only causation between the accident and the injury, but also that a disability resulted in the extent of such disability." Griggs v. A.B. Chance Company, 503 S.W.2d 697 (Mo.App. W.D. 1973). Further, "proof of permanency of injury requires reasonable certainty." *Id* This proof must be based on competent and substantial evidence and not merely on speculation. Moriarty v. Treasurer of the State of Missouri, 141 S.W.3d 69 (Mo.App. E.D. 2004).

The Claimant alleges that as a result of and at the conclusion of his period of employment April 1, 2003, he is permanently and totally disabled. However, to show that the disability constitutes a permanent and total disability under the Missouri workers' compensation law, the Claimant must show that given the employee's situation and condition, he or she is not competent to compete in the open labor market. Under the Missouri Compensation Act "total disability" is defined as the inability to return to any employment. Messex v. Sachs Electric Company, 989 S.W.2d 206 (Mo.App.E.D. 1999). The words "inability to return to any employment" mean that "the employee is unable to perform the usual duties of the employment under consideration in a manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals & Sale, 631 S.W.2d 919 (Mo.App.S.D. 1982). Primary determination for permanent total disability is whether the employee is able to compete in the open labor market. Messex v. Sachs Electric Company, 989 S.W.2d 206 (Mo.App.E.D. 1999). There are many factors that may be considered in this assessment, including the Claimant's physical and mental condition, age, education, job experience and skills in order to determine whether a claimant is permanently and totally disabled. Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo.App. 1997). If a claimant is found to be permanently and totally disabled, it becomes a determination for the Finder of Fact to determine whether the claimant is permanently and totally disabled due to the last accident alone or as a result of a combination of the claimant's pre-existing primary injuries, triggering Second Injury Fund liability. The statutory basis for determining Second Injury Fund liability is found at §287.220.1 RSMo., by unambiguous language, the legislature has imposed potential liability on the Second Injury Fund for claimant who, "at the time of the last injury, had some partial disability. §287.220.1 RSMo. The administrative law judge is to consider the degree of the employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained. This statutory formula for determining Second Injury Fund liability incorporates a medical causation component. The employer's liability must be determined first, and the statute provides that the employer shall be liable only for the disability resulting from the last injury considered alone and of itself. The statute then provides if the compensation for which the employer at the time of the last injury is less than the compensation provided in this chapter for permanent and total disability, then in addition to the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent and total disability from the Second Injury Fund. Applying this language, if it is clear the last injury considered alone and of itself results in permanent and total disability, the employer is responsible for the full permanent and total disability benefits and the Second Injury Fund has no liability. Gasson v. Treasurer of the State of Missouri, 134 S.W.3d 75 (Mo.App.W.D. 2004)

The Claimant has filed three separate claims for injuries which are the subject of this hearing, the first injury on February 22, 2000, where the Claimant had a cervical and lumbar injury and settled his case for 27.5 percent of the whole body, a November 9, 2001 injury to his left elbow which he settled for 15 percent at the 210-week level, and a cumulative repetitive trauma injury through the last day worked April 1, 2003, alleging injury to the lumbar spine and whole body, which the Claimant settled for 12.5 percent of the whole person. During the pendency of these workers' compensation cases, Dr. Hylton had earlier recommended surgical intervention for the February 22, 2000 cervical injury, and after receiving conservative treatment, Claimant's symptoms stabilized and he was released at maximum medical improvement and continued to work. Claimant, however, did develop increasing problems with his low back, which he related to the February 22, 2000 injury but which the employer and insurer refused to authorize treatment to cure and relieve. In the interim, on November 9, 2001, the Claimant fractured his left elbow and due to continuing problems with the elbow Dr. Clymer recommended performing an olecranon bursectomy to the left elbow but the employer and insurer refused to authorize treatment. The Claimant thereafter continued working until April 1, 2003, when he was terminated for being found lying down on the job due to low back pain. The Claimant testified that after working for three hours on April 1, 2003, his back gave out on him, and he went upstairs to lay down, was caught, and as a result was terminated.

Claimant testified that he his not able to work due to his low back pain. The Claimant testified he is unable to participate in any of his former hobbies, carpentry, making distressed furniture, and building model cars because he cannot stand long enough as his legs give out on him. Claimant stated that he has pain in his low back from his tailbone down

through his legs and feet, and that his legs twitch all night long. Claimant testified both legs hurt every day and he can only walk 200 feet. Claimant testified he can stand for only 20 minutes, needs a cane to walk as his legs have given out on him, and as a result he has fallen on numerous occasions. Claimant testified he can only sit for 15 minutes due to his back pain and the twitching in his legs. The Claimant testified he is unable to sleep through the night due to back pain.

It is obvious through the chronology of the Claimant's history of treatment, especially related to his lumbar spine, that the Claimant did not get the treatment recommended after the February 22, 2000 injury. Due to the severity of his low back complaints, the Claimant is still in need of treatment for his lumbar spine. Claimant testified he has to lay down several times a day and that the majority of his complaints are due to the nonoperated herniated disk in his low back. The reason the Claimant is unable to work is due to severe pain which is caused by the unoperated lumbar disk in his lower spine. What has removed the Claimant from the workforce in his own testimony is his symptoms from his nonoperated herniated disk at L5-S1, not from a combination of any other injuries. The Claimant from earlier injuries in February of 2000 and November of 2001 to his low back and left elbow are conditions which are to this day unresolved and in the opinion of Dr. Koprivica needing treatment. The Claimant, however, chose not to fight that fight for treatment with his employer and insurer but chose instead to settle his claims for compensation. Finally, a fair reading of the evidence indicates that the Claimant has not reached maximum medical improvement for his low back injury nor his left elbow injury and it is questionable whether the Claimant is in need for additional treatment of the cervical injury from February 22, 2000. I make this statement based on the testimony of the Claimant's expert Dr. Koprivica and his testimony that the Claimant is in need of treatment for the herniated disk in his lumbar spine, as well as surgical intervention for the left elbow. However, since the employer and insurer have disputed the causation and necessity for treatment under those earlier workers' compensation cases and the Claimant has settled those matters, treatment cannot be ordered from the employer and insurer at this time. Likewise, since the Claimant's own offered medical expert is of the opinion the Claimant has not reached maximum medical improvement from any of the three injuries, and specifically to the lower spine, it is premature to find the Claimant permanently and totally disabled absent the necessary treatment. The Claimant has forgone the ability to pursue that treatment through the workers' compensation remedy with the employer and insurer for each of the three injuries at issue here choosing to settle his cases with the employer and insurer. I cannot and do not find that the Second Injury Fund has the responsibility either to treat the Claimant's conditions of ill to bring him to maximum medical improvement at which time a determination of his permanent disability status can be determined or hold the Claimant's current condition to the responsibility of the Second Injury Fund for permanent and total disability if the Claimant has not put himself in a position to appropriately resolve his claims.

After considering all the evidence and testimony presented and taking into account the testimony of Claimant's medical expert and vocational expert, I find the Claimant has met his burden of proof to establish Second Injury Fund liability for the date of accident of 11/9/2001 and the pre-existent conditions which predated that injury. I find the Claimant had from the testimony of Dr. Koprivica involving pre-existing conditions involving a 1994 surgical fusion, 1995 cervical injury in a motor vehicle accident, and chronic hepatitis C a pre-existent disability of 160 weeks, combined with the February 22, 2000 work-related injury settled at 110 weeks of disability for a pre-existent disability of 270 weeks to take into consideration on the November 9, 2001 injury. That injury settled for 15 percent of the left elbow, a total of 31.5 weeks of disability and when combined with the 270 pre-existent weeks, a Second Injury Fund liability of 30.15 weeks results for a total compensation due from the Second Injury Fund of \$9,571.42.

I find Claimant's counsel, Mr. Michael Matteuzzi, entitled to attorney's fees of 25 percent of sums recovered in this matter.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Mark S. Siedlik  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 03-139316

Employee: Chris Idol  
Employer: Zimmer Companies, Inc. (Settled)  
Insurer: Travelers Indemnity Company of America (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: On or about April 1, 2003  
Place and County of Accident: Jackson County, Missouri

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 April 19, 2007. The award and decision of Administrative Law Judge Mark S. Siedlik, issued April 19, 2007, 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 2<sup>nd</sup> day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING  
\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:  
  
\_\_\_\_\_  
Secretary

## **AWARD AS TO SECOND INJURY FUND ONLY**

Employee: Chris Idol

Injury No. 03-139316

Dependents: N/A

Employer: Zimmer Companies, Inc.

Insurer: Travelers Indemnity Company of America

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: November 11, 2006

Checked by: MSS/lh

### **FINDINGS OF FACT AND RULINGS OF LAW**

3. 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: On or about April 1, 2003.
5. State location where accident occurred or occupational disease was contracted: Jackson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant alleges an accident or series of accidents causing injury to his low back.
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.
14. Nature and extent of any permanent disability: 12.5 percent of body.
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? \$105.00.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: Unknown.
19. Weekly compensation rate: \$373.33/\$340.12.
20. Method wages computation: By agreement

### **COMPENSATION PAYABLE**

21. Amount of compensation payable:  
unpaid medical expenses  
weeks for temporary total disability (temporary partial disability)

weeks for permanent partial disability from employer  
weeks of disfigurement  
permanent total disability benefits from employer

22. Second Injury Fund liability: None

TOTAL: -0-

23. Future requirements awarded: N/A

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Chris Idol

Injury No. 03-139316

Dependents: N/A

Employer: Zimmer Companies, Inc.

Insurer: Travelers Indemnity Company of America

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: November 11, 2006

Checked by: MSS/lh

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## Second Injury Fund.

At the time of trial, the Claimant is a 55-year-old male who lives with his wife in Grandview, Missouri. The Claimant was a high school graduate in 1970 with no further education or training beyond high school. After graduating from high school, the Claimant held jobs in maintenance, home repair and auto supply and machine shops. The Claimant was self-employed for approximately 20 years at Idol Maintenance Company performing painting, electrical, carpentry work, lawn and grounds maintenance work, which at times was full-time and at times part-time employment with other employers.

In 1999, the Claimant went to work for Zimmer Property Management Company performing maintenance work, which included electrical, plumbing, heating, cooling, and carpentry work, as well as snow removal. On February 22, 2000, the Claimant was injured when while working up in the ceiling trying to pass telephone wires across the top of a hallway into an adjacent room, the Claimant was standing on top of file cabinets and slipped and fell from where he was standing. The Claimant initially fell backwards hitting his lower back directly on the edge of a file cabinet and then fell forward face first striking his face and head directly on a concrete floor after approximately a 5-foot drop. The Claimant reported the injury but continued working. The Claimant was initially seen at Occupational Medicine Associates on March 2, 2000, where he was diagnosed with a cervical strain and lumbosacral strain and underwent physical therapy, which increased his pain to the point as of March 15, 2000, he could no longer go to work. On March 17, 2000, the Claimant had x-rays taken at Occupational Medicine Associates which revealed an intact fusion with no bony injury which could be identified to his pre-existing cervical fusion. Due to the Claimant's continued pain, the Claimant saw Dr. Prohaska, his personal physician, who ordered an MRI scan on March 20, 2000, which revealed the central disk herniation at C5-C6 with mild stenosis. There was moderate neural foraminal right-sided stenosis at C6-7 from a large osteophyte. Claimant's fusion of his neck from a prior unrelated-to-work injury remained solid. At C7-T1 there was significant central bulging with moderate severity bilateral neural foraminal stenosis at C7-T1. Due to significant pain, Dr. Prohaska hospitalized the Claimant from March 21 through March 25 during which time a morphine pump was administered for pain relief.

The Claimant was subsequently seen by Dr. Clough who ordered a CT myelogram of the cervical and lumbar spine, which revealed a left-sided C5-C6 disk herniation, and a possible disk herniation at C6-7 on the right. There were also central disk bulges in the lumbar region at L2-3, 3-4 and L4-5. Upon release from the hospital, the Claimant was referred to Dr. Zarr, who treated the Claimant with cervical steroid injections administered by Dr. Morgan at St. Joseph's Health Center. The Claimant was prescribed work hardening, which the Claimant attended at HealthSouth starting in May 2000. Due to increased pain, the Claimant began drinking heavily, became depressed and suicidal and was admitted to Menorah Psychiatric where electroconvulsive therapy was administered for his profound depression. Two months later, the Claimant was admitted to Research Psychiatric for suicidal gestures. After the psychiatric hospitalizations, the Claimant returned to Dr. Zarr on July 20, 2000. The Claimant had work hardening and received some relief from the cervical epidural steroid injections. Dr. Zarr released him from care on September 5, 2000. The Claimant returned to work on September 6, 2000, but was sent home and the next day terminated. The Claimant then went to work for Life Care Center of Grandview on September 12, 2000, performing maintenance work. At that point, the Claimant's problems were progressing. The Claimant was having neurological deficits involving his right upper extremity, which caused him difficulty performing his work. An EMG, a nerve conduction velocity study was performed by Dr. Allen, which revealed an inactive C6-7 radiculopathy with progressive dysfunction and a C7-C8 dermatomes. An MRI scan of the brachial plexus was negative for any mass. The MRI scan of the cervical spine revealed disk osteophyte complex in the lateral recess of C7. There were moderate changes at C5-6 as well as C7-T1 with broad based disk osteophyte complexes and borderline stenosis involving the neural foramen at these levels. In April 2001 the Claimant was terminated from Life Care, and took a position with the Greens At Creekside, as a maintenance engineer in the assisted living apartments and nursing home. The Claimant continued to be symptomatic and saw Dr. Hylton on August 9, 2001 and September 6, 2001. After reviewing the Claimant's medical history and information, Dr. Hylton expressed an opinion that there was C8 and some degree of C7 central dysfunction. Dr. Hylton offered the Claimant a decompression of the lateral recess and foraminotomy on the right side at C6-7 and C7-T1. A repeat electrodiagnostic study was performed by Dr. Allen which revealed some regenerative changes in C8 and T1 innervated muscles. There was still denervation persisting at C7. At that point the Claimant's deficits seemed to be stabilizing instead of progressing. When the Claimant saw Dr. Hylton on February 21, 2002, Dr. Hylton felt that the Claimant was best treated nonoperatively at that point and indicated he was at maximum medical improvement. In the mean time, the Claimant was having increasing problems with his low back. There was no new specific injury, but he was relating the low back problems to the February 2, 2000 injury. The employer and insurer refused to authorize treatment to the low back and the Claimant sought treatment on his own which included three lumbar steroid injections. Claimant saw Dr. Zarr on July 9, 2002, and told Dr. Zarr about his lumbar problems and at that point Dr. Zarr assigned 10 percent permanent partial disability to the whole body for the cervical injury and was silent as to any disability to the low back.

On November 19, 2001, the Claimant had a work injury while trying to move an air conditioner through a door frame, when he struck his left elbow and metal door frame, resulting in a fracture. This fracture was treated in a closed

fashion. Due to the ongoing problems with intermittent olecranon bursal swelling and pain with use of the left upper extremity, Dr. Clymer recommended performing an olecranon bursectomy on the left elbow. The Claimant sought such treatment for this work-related injury and the employer and insurer refused to authorize treatment. The Claimant exhibited a large red swollen knot on his left elbow at the hearing. Due to the Claimant's ongoing maintenance activities at the employer, the Claimant frequently had to stoop, crawl and be in awkward postures, which caused increasing back pain and new left leg pain and numbness which progressed up until his last day of employment in April of 2003. Dr. Prohaska ordered an MRI scan of the lumbar spine on April 5, 2003, which revealed multi-level disease with broad-based, slightly asymmetric to the left at L4-5 that produced moderate severe lateral recessed stenosis on the left greater than the right accompanied by facet hypertrophy. This compressed the L5 nerve root. There was also broad-based disk bulging and facet hypertrophy, which compressed the left L5 nerve root. There was also broad-based disk bulging and facet hypertrophy with lateral stenosis at L2-L3 and L3-L4. When compared to the prior study of September 28, 2001, the significant new finding on the later MRI was some left lateral disk herniation at L5-S1 that was compressing the S1 nerve root. This was new since the September 28, 2001 MRI scan. Dr. Prohaska referred the Claimant to Dr. Simon who noted that he was worse than he was when he was previously evaluated by Dr. Simon in 1998. The Claimant filed a claim for cumulative trauma injury each and every day he has worked until his last day of employment on April 1, 2003. The employer and insurer refused to provide treatment to the Claimant's low back based on this cumulative trauma accident alleged on or about April 1, 2003. The Claimant was terminated on April 1, 2003, after being caught lying down while on the job. The Claimant testified he has been unable to work since April 1, 2003, due to his low back symptoms.

Prior to the Claimant's work-related injuries alleged in these claims, the Claimant had complications following other pre-existing conditions, the first of which was a gunshot wound which occurred in 1969. The Claimant was accidentally shot in the left medial proximal thigh and groin area by a .22 caliber rifle, injuring his left femoral artery and the bullet traveled superiorly into the abdominal area and back. Associated with the potential abdominal injuries, a laparotomy was performed. No significant intraperitoneal injury was identified, but Claimant did develop the complication of adhesions and bowel obstructions. Claimant had neurological injury to the left lower extremity which has resulted in some numbness and weakness of the left lower extremity. The Claimant, however, was able to perform work without any significant restriction despite the numbness and weakness. During treatment for the gunshot wound injury, the Claimant had multiple blood transfusions and as a result developed chronic hepatitis C with portal to portal fibrosis. Although interferon treatment was discussed due to the Claimant's history of depression, it was decided by the medical providers that he was not a candidate for interferon.

In 1994, the Claimant was wrestling with his dog and was head butted by the dog, injuring his neck. Dr. Clough performed an anterior cervical discectomy and fusion at the C6-C7 level in August of 1994. Claimant had a subsequent injury to his cervical spine in September 1995 and a motor vehicle accident in which he was a passenger in a vehicle which was rear ended at 45 miles per hour. MRI scans revealed some changes at C5-C6 with some mild central stenosis and a clinical right C6 radiculopathy, which was treated conservatively by Dr. Clough, four cervical steroid injections were administered after the motor vehicle accident.

### **MEDICAL EVIDENCE**

Dr. P. Brent Koprivica testified on behalf of the Claimant. Dr. Koprivica examined the Claimant, reviewed his medical history and interviewed the Claimant, and at the conclusion of which opined that the Claimant's ongoing work activities at the Greens At Creek Side doing maintenance activities represent activities in terms of force and posture that have resulted in repetitive injury each and every day he worked up until April 1, 2003, with further permanent aggravating injury to his lumbar spine based on objective MRI scan evidence and a new disk herniation to the left at L5-S1 with left S1 nerve root compression. Dr. Koprivica opined that the Claimant should be provided a repeat spinal surgical evaluation to direct ongoing care and treatment in terms of his low back, and until he has this evaluation and has reached a plateau state in terms of any medical treatment suggested by that evaluation, he would consider Mr. Idol to be temporarily and totally disabled until the appropriate evaluation and any additional medical care and treatment suggested has been provided. However, in light of the fact that the Claimant had been refused treatment and sought not to force that issue with his employer but settle his cases, Dr. Koprivica opined that for the further aggravating injury, with the identified new disk herniation, he would apportion 15 percent permanent partial disability to the whole body.

Dr. Koprivica opined that as a direct and proximate result of the work injury on November 9, 2001, the Claimant sustained an avulsion fracture of the left elbow which has been complicated by the development of a chronic olecranon bursitis on the left, which requires an olecranon bursectomy surgery. As the Claimant's workers' compensation case progressed for reasons unknown, the employer/insurer had denied authorized treatment to the left upper extremity so the recommended surgical intervention was not provided, and the Claimant chose to settle his workers' compensation case. Dr.

Koprivica felt that the Claimant needed to be provided that surgical intervention and he would not be at a maximum medical improvement in reference to that November 9, 2001 injury and could not reach a point of maximum medical improvement until he had reached a plateau state following recovery from surgery. Taking into consideration that the Employee chose not to pursue the issue of treatment with the employer and insurer but rather settle his case, Dr. Koprivica had no independent opinion on the degree of disability to the Claimant's left upper extremity and deferred to Dr. Zimmerman's opinion regarding a 30 percent permanent partial disability of the left upper extremity at the 210-week level.

As a result of the February 22, 2000 work-related fall, Dr. Koprivica opined that the Claimant sustained a permanent injury to his cervical spine with the development of new radiculopathy, in addition to his sustaining aggravating injury to his lumbar spine, and assessed a 35 percent permanent partial disability to the whole body attributable to the February 22, 2000 work injury.

For the pre-existing disabilities, Dr. Koprivica opined that based on the Claimant's history of chronic hepatitis C with fatigue, Claimant had a 15 percent permanent partial disability to the whole body. For the pre-existent cervical condition, which included a prior anterior cervical discectomy and fusion, Dr. Koprivica opined Claimant had a 25 percent permanent partial disability to the whole body. In addition, when Dr. Koprivica took into consideration the disabilities that predated the last work injury claim date along and through April 1, 2003, with the additional disability attributed to the aggravating injury to the lumbar spine associated with the April 1, 2003 claimed injury date, assuming that the Claimant is not offered additional evaluation and care as suggested, significant enhancement of the combined disabilities arise above the simple arithmetic sum of the separate disabilities and when one considers the effect of this compilation, Dr. Koprivica opined that Claimant is permanently and totally disabled.

### **VOCATIONAL EVIDENCE**

Mr. Michael Dreiling, a vocational expert, also testified on behalf of the Claimant. Mr. Dreiling noted that Claimant at the time of his visit was 52 years of age, graduated from high school and admitted to having difficulties with academic classes. Dr. Dreiling noted a work history of performing physically oriented work and that Claimant currently has significantly limiting medical restrictions. Mr. Dreiling noted that Claimant is receiving social security disability benefits and that the Claimant described significant problems of both an exertional and nonexertional nature. Mr. Dreiling presently noted that Claimant is not currently working.

Mr. Dreiling opined that when taking into account the totality of the Claimant's vocational profile, including the various medical problems and difficulties he has experienced and the impact it has on his day-to-day functioning, it is apparent that he is not a candidate to return to any of his past work in the labor market or any other type of substantial gainful employment. Mr. Dreiling opined that based upon the Claimant's presentation to any prospective employers, no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to hire the Claimant.

### **FINDINGS**

In a Missouri workers' compensation case, the law clearly provides that the employee has a burden of proving all material elements of their claim. Fischer v. Archdiocese of St. Louis-Cardinal Richter Institute, 793 S.W.2d 195 (Mo.App. E.D. 1990). It is the Claimant's burden to prove "not only causation between the accident and the injury, but also that a disability resulted in the extent of such disability." Griggs v. A.B. Chance Company, 503 S.W.2d 697 (Mo.App. W.D. 1973). Further, "proof of permanency of injury requires reasonable certainty." *Id* This proof must be based on competent and substantial evidence and not merely on speculation. Moriarty v. Treasurer of the State of Missouri, 141 S.W.3d 69 (Mo.App. E.D. 2004).

The Claimant alleges that as a result of and at the conclusion of his period of employment April 1, 2003, he is permanently and totally disabled. However, to show that the disability constitutes a permanent and total disability under the Missouri workers' compensation law, the Claimant must show that given the employee's situation and condition, he or she is not competent to compete in the open labor market. Under the Missouri Compensation Act "total disability" is defined as the inability to return to any employment. Messex v. Sachs Electric Company, 989 S.W.2d 206 (Mo.App.E.D. 1999). The words "inability to return to any employment" mean that "the employee is unable to perform the usual duties of the employment under consideration in a manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals & Sale, 631 S.W.2d 919 (Mo.App.S.D. 1982). Primary determination for permanent total disability is whether the employee is able to compete in the open labor market. Messex v. Sachs Electric

Company, 989 S.W.2d 206 (Mo.App.E.D. 1999). There are many factors that may be considered in this assessment, including the Claimant's physical and mental condition, age, education, job experience and skills in order to determine whether a claimant is permanently and totally disabled. Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo.App. 1997). If a claimant is found to be permanently and totally disabled, it becomes a determination for the Finder of Fact to determine whether the claimant is permanently and totally disabled due to the last accident alone or as a result of a combination of the claimant's pre-existing primary injuries, triggering Second Injury Fund liability. The statutory basis for determining Second Injury Fund liability is found at §287.220.1 RSMo., by unambiguous language, the legislature has imposed potential liability on the Second Injury Fund for claimant who, "at the time of the last injury, had some partial disability. §287.220.1 RSMo. The administrative law judge is to consider the degree of the employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained. This statutory formula for determining Second Injury Fund liability incorporates a medical causation component. The employer's liability must be determined first, and the statute provides that the employer shall be liable only for the disability resulting from the last injury considered alone and of itself. The statute then provides if the compensation for which the employer at the time of the last injury is less than the compensation provided in this chapter for permanent and total disability, then in addition to the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent and total disability from the Second Injury Fund. Applying this language, if it is clear the last injury considered alone and of itself results in permanent and total disability, the employer is responsible for the full permanent and total disability benefits and the Second Injury Fund has no liability. Gasson v. Treasurer of the State of Missouri, 134 S.W.3d 75 (Mo.App.W.D. 2004)

The Claimant has filed three separate claims for injuries which are the subject of this hearing, the first injury on February 22, 2000, where the Claimant had a cervical and lumbar injury and settled his case for 27.5 percent of the whole body, a November 9, 2001 injury to his left elbow which he settled for 15 percent at the 210-week level, and a cumulative repetitive trauma injury through the last day worked April 1, 2003, alleging injury to the lumbar spine and whole body, which the Claimant settled for 12.5 percent of the whole person. During the pendency of these workers' compensation cases, Dr. Hylton had earlier recommended surgical intervention for the February 22, 2000 cervical injury, and after receiving conservative treatment, Claimant's symptoms stabilized and he was released at maximum medical improvement and continued to work. Claimant, however, did develop increasing problems with his low back, which he related to the February 22, 2000 injury but which the employer and insurer refused to authorize treatment to cure and relieve. In the interim, on November 9, 2001, the Claimant fractured his left elbow and due to continuing problems with the elbow Dr. Clymer recommended performing an olecranon bursectomy to the left elbow but the employer and insurer refused to authorize treatment. The Claimant thereafter continued working until April 1, 2003, when he was terminated for being found lying down on the job due to low back pain. The Claimant testified that after working for three hours on April 1, 2003, his back gave out on him, and he went upstairs to lay down, was caught, and as a result was terminated.

Claimant testified that he is not able to work due to his low back pain. The Claimant testified he is unable to participate in any of his former hobbies, carpentry, making distressed furniture, and building model cars because he cannot stand long enough as his legs give out on him. Claimant stated that he has pain in his low back from his tailbone down through his legs and feet, and that his legs twitch all night long. Claimant testified both legs hurt every day and he can only walk 200 feet. Claimant testified he can stand for only 20 minutes, needs a cane to walk as his legs have given out on him, and as a result he has fallen on numerous occasions. Claimant testified he can only sit for 15 minutes due to his back pain and the twitching in his legs. The Claimant testified he is unable to sleep through the night due to back pain.

It is obvious through the chronology of the Claimant's history of treatment, especially related to his lumbar spine, that the Claimant did not get the treatment recommended after the February 22, 2000 injury. Due to the severity of his low back complaints, the Claimant is still in need of treatment for his lumbar spine. Claimant testified he has to lay down several times a day and that the majority of his complaints are due to the nonoperated herniated disk in his low back. The reason the Claimant is unable to work is due to severe pain which is caused by the unoperated lumbar disk in his lower spine. What has removed the Claimant from the workforce in his own testimony is his symptoms from his nonoperated herniated disk at L5-S1, not from a combination of any other injuries. The Claimant from earlier injuries in February of 2000 and November of 2001 to his low back and left elbow are conditions which are to this day unresolved and in the opinion of Dr. Koprivica needing treatment. The Claimant, however, chose not to fight that fight for treatment with his employer and insurer but chose instead to settle his claims for compensation. Finally, a fair reading of the evidence indicates that the Claimant has not reached maximum medical improvement for his low back injury nor his left elbow injury and it is questionable whether the Claimant is in need for additional treatment of the cervical injury from February 22, 2000. I make this statement based on the testimony of the Claimant's expert Dr. Koprivica and his testimony that the Claimant is in need of treatment for the herniated disk in his lumbar spine, as well as surgical intervention for the left elbow. However, since the employer and insurer have disputed the causation and necessity for treatment under those earlier workers' compensation cases and the Claimant has settled those matters, treatment cannot be ordered from the employer and insurer at this time. Likewise, since the Claimant's own offered medical expert is of the opinion the Claimant has not reached maximum medical improvement

from any of the three injuries, and specifically to the lower spine, it is premature to find the Claimant permanently and totally disabled absent the necessary treatment. The Claimant has forgone the ability to pursue that treatment through the workers' compensation remedy with the employer and insurer for each of the three injuries at issue here choosing to settle his cases with the employer and insurer. I cannot and do not find that the Second Injury Fund has the responsibility either to treat the Claimant's conditions of ill to bring him to maximum medical improvement at which time a determination of his permanent disability status can be determined or hold the Claimant's current condition to the responsibility of the Second Injury Fund for permanent and total disability if the Claimant has not put himself in a position to appropriately resolve his claims.

After considering all the evidence and testimony presented, including the testimony of Dr. Koprivica and vocational expert, Mr. Dreiling, I find the Claimant has not met his burden of proof in establishing that he is permanently and totally disabled as a result of cumulative trauma injuries resulting in the claim filed on or about April 1, 2003.

I find in the evidence and testimony presented and the Claimant's own testimony the reason the Claimant is currently unable to compete in the open labor market is because of his low back problems. I find that through out the history of the three claims taken up today and the pre-existent conditions, the Claimant had always returned to full duty with minimal restrictions to rather robust and physical heavy labor to which he was engaged continuously up and until April 1, 2003. Claimant had a history of a cervical fusion dating back to 1994, a second cervical injury 1995 as a result of a motor vehicle accident, chronic hepatitis C which involved easy fatigue to the Claimant, coupled with the three work accidents in 2000, 2001 and 2003. The work accidents in 2000 and 2001 involving the cervical and lumbar spine together with the left elbow all of which in the opinion of Dr. Koprivica have not been fully treated to the point of maximum medical improvement and are in need of further treatment, which has been precluded by the Claimant settling his cases with the employer and insurer leave the Second Injury Fund in a position of arguing, I believe appropriately, that the last claimed date of injury on or about April 1, 2003 is premature to determine permanent total disability against the Second Injury Fund in as much as by the Claimant's own evidence the work-related accidents and injuries have not been fully treated and resolved.

I find, therefore, the Second Injury Fund has no liability for the claimed accident date of April 1, 2003, and hold no compensation is due.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Mark S. Siedlik  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*