

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

Injury No.: 02-149623

Employee: John Kinnikin
Employer: Triad Development Company (Settled)
Insurer: Westport Insurance Corporation (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 28, 2009. The award and decision of Administrative Law Judge Grant C. Gorman, issued May 28, 2009, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 4th day of February 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: John Kinnikin

Injury No. 02-149623

Dependents: None

Employer: Triad Development Company

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

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

Insurer: Westport Insurance Corporation

Hearing Date: February 24, 2009

Checked by: GCG/ch

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: November 19, 2002
5. State location where accident occurred or occupational disease was contracted: St. Charles 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 was digging with a shovel and operating heavy equipment when he injured his back.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Body as a whole referable to low back
14. Nature and extent of any permanent disability: 30% BAW
15. Compensation paid to-date for temporary disability: \$34,713.51
16. Value necessary medical aid paid to date by employer/insurer? \$72,236.03

Employee: John Kinnikin

Injury No. 02-149623

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$827.50
- 19. Weekly compensation rate: \$551.67 TTD/\$340.12 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

| | |
|---|-------------|
| 178 weeks of temporary total disability less advance of \$10,203.60 | \$87,993.66 |
| 120 weeks of permanent partial disability from Employer | \$40,814.40 |

- 22. Second Injury Fund liability: Yes

| | |
|--|-------------|
| 26 weeks of permanent partial disability from Second Injury Fund | \$ 8,843.12 |
|--|-------------|

TOTAL: \$137,651.18

- 23. Future requirements awarded: None

Said payments to begin as of the date of this Award and to be payable and be subject to modification and review as provided by law.

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

Jill Bollwerk

Employee: John Kinnikin

Injury No. 02-149623

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John Kinnikin

Injury No: 02-149623

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Triad Development Company

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

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

Insurer: Westport Insurance Corporation

Checked by: GCG/ch

PRELIMINARY STATEMENT

Hearing on the above-referenced case was held before the undersigned Administrative Law Judge on February 24, 2009 at the Division of Workers' Compensation in St. Charles, Missouri. John Kinnikin (Claimant) was present, and represented by Jill Bollwerk. Robert Hendershot represented Triad Development Company (Employer) and Westport Insurance Corporation. (Insurer). Assistant Attorney General Laura Wagener represented the Second Injury Fund. A hardship hearing was previously held before Administrative Law Judge Joseph E. Denigan on April 5, 2006; and a Temporary Award issued on May 12, 2006. The parties submitted post-trial briefs.

The parties made the following stipulations: Claimant sustained an accidental injury arising out of and in the course of employment on November 19, 2002; venue is proper in St. Charles County, Missouri; Employer received proper notice of injury; the Claim was filed in a timely manner; Claimant's average weekly wage is \$827.50 resulting in applicable rates of compensation of \$551.67 for total disability and \$340.12 for permanent partial disability (PPD); Employer paid \$34,713.51 in temporary total disability (TTD) benefits from November 25, 2002 to April 13, 2003 and from September 12, 2006 to March 1, 2007; Employer paid medical expenses totaling \$72,236.03; and employer mad an advance payment of \$10,203.60 to Claimant.

The following issues are presented for determination: employment; medical causation; Employer's liability for future medical care; Employer's liability for past TTD benefits; nature and extent of Claimant's disability; liability of Second Injury Fund; and the necessity of surgery provided pursuant to the Temporary Award.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. Certain exhibits offered into evidence may contain handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were

Employee: John Kinnikin

Injury No. 02-149623

offered by the parties. Further, any such notes, markings and/or highlights had no impact on any ruling in this case.

The parties filed Joint Exhibits I and II—the Transcript from the Hardship Hearing of this case, tried on April 5, 2006, which included Employee’s Exhibits A-H and Employer’s Exhibits 1-5.

The following exhibits were offered by Claimant and received into evidence at the hardship hearing of this case:

- A Certified records of Barnescare
- B Certified records of Nydic Open MRI
- C Certified records of St. Charles Sports & Physical Therapy
- D Certified records of ProRehab, PC
- E Certified records of Creve Coeur Pain Control
- F Certified records of St. Peters Bone and Joint
- G Certified records of The Work Center
- H Original transcript of deposition of Dr. David Kennedy

The following exhibits were offered by Claimant and received into evidence without objection at the final hearing of this case:

- I Certified records of Trinity Rehab
- J Certified records of Dr. Pedro Padilla
- K Certified records of Barnes Jewish Hospital
- L Certified records of St. Joseph West Hospital
- M Records of Aquatic Fitness, Inc.
- N Certified records of St. Louis Orthopedic Institute, Inc.
- O Certified records of Midwest Spine Surgeons/Dr. Coyle
- P Certified records of Primary Care Physicians
- Q Certified records of Missouri Baptist Medical Center

Employee: John Kinnikin

Injury No. 02-149623

- R Certified records of Dr. David Kennedy
- S Original Transcript of Dr. David Volarich
- T Original Transcript of Mr. James England

The following exhibits were offered by Employer and received into evidence at the hardship hearing of this case:

1. Records of St. Joseph Hospital West
2. Records of Dr. Tate
3. Records of Dr. Lange
4. Judge Brown's Order for Independent Medical Examination
5. Deposition of Dr. James Coyle with Exhibits attached.

The following exhibits were offered by Employer and received into evidence without objection at the final hearing:

6. Application for Review of Hardship Award
7. Commission's Order Dismissing Appeal
8. Deposition of Dr. Russell Cantrell

In the Temporary Award, ALJ Denigan accurately summarized the relevant evidence in the findings of fact made in the Award. They are copied here for the sake of convenience. The following summary of evidence and findings of fact are herein adopted and incorporated:

Claimant initially injured his back while working in a trench, and then on a bulldozer, in November, 2002. The employer referred employee for treatment with Barnescare (Exhibit A). He was placed on light duty, but his employer had no work available for him. Dr. Schockley with Barnescare referred employee for physical therapy, but employee continued to have shooting pain in his legs, so she then suggested an MRI (Exhibit B). After receiving the MRI results, Dr. Schockley suggested a referral to a physiatrist, and employee was then referred to Dr. Sandra Tate. (Exhibit 2).

Dr. Tate ordered epidural steroid injections, additional therapy, and ultimately released employee at maximum medical improvement on April 14, 2003.

Employee was unable to return to his former employment, due to his pain and due to the fact that the job was heavy, and the fact that he was released by Dr. Tate with a restriction of no

Employee: John Kinnikin

Injury No. 02-149623

lifting greater than 30 pounds. (Exhibit 2). Employee has received no temporary total disability benefits since that time, nor has he worked since that time.

Because employee was still significantly disabled due to the injury, he decided to get a second opinion from a doctor of his own choosing, Dr. Terrence Piper. (Exhibit F). Dr. Piper recommended a fusion at L5-S1 and employee filed his Request for Hardship Hearing (see court file). Employer subsequently agreed to send employee for an appointment with Dr. David Lange, who is in Dr. Tate's office. Dr. Lange ordered an additional MRI on November 19, 2003 (Exhibit C), but provided no treatment to employee.

Another hardship mediation was scheduled, and Judge Brown ordered an IME with Dr. David Coyle. (Exhibit 4). Dr. Coyle first examined employee on March 3, 2004. He testified that upon his initial examination, he believed that employee's pain was due to "sagittal plane imbalance and the development of degenerative changes in the low back." (Exhibit 5, p. 16, line 20 – p. 17, line 1). He testified that the imbalance was caused by a condition called "Scheurmann's kyphosis," and that this condition pre-existed the work injury, but that the work accident made this minimally symptomatic condition become symptomatic. (Exhibit 5, p. 17, lines 2-13). At that time, he didn't feel employee was a candidate for surgery. He admitted that a fusion at L5-S1 might temporarily relieve employee's symptoms, but that it would not correct his imbalance problems and pathology might be transferred to adjacent levels of the spine. (Exhibit 5, p 18, lines 12 – 22). He prescribed additional therapy for employee. (Exhibit 5, p. 22, lines 17-19).

Employee had therapy as directed by Dr. Coyle and returned to see him on May 11, 2004. Dr. Coyle testified that the therapy gave him better flexibility, but that he received no sustained benefit afterwards. (Exhibit 5, p. 23, lines 21-24.) Mr. Kinnikin was still having back pain, radiating into the buttocks, shooting pains and numbness in his legs. (Exhibit 5, p. 24, lines 2-6). At that time, Dr. Coyle felt Mr. Kinnikin was at MMI from a standpoint of conservative treatment, and that he did not recommend surgery. (Exhibit 5, p. 25, lines 14-24).

Mr. Kinnikin testified that when he was released by Dr. Coyle, the pain was still too significant and he didn't feel he could continue living that way, so he wanted yet another opinion on surgery. He saw Dr. David Kennedy on January 18, 2005. Dr. Kennedy examined employee, reviewed his MRI scan of December 24, 2002 and thought that a new MRI was in order. He thought that employee might be a candidate for an operative procedure at L5-S1, (Exhibit H, p. 7, line 22 – p. 8, line 6).

Dr. Coyle was sent Dr. Kennedy's report of his visit with employee on January 18, 2005 and was asked by employer/insurer to comment on the report. After reviewing the report, Dr. Coyle did state that there was some possibility employee would get benefit from an anterior lumbar procedure at L5-S1, but that he would still have problems in the future. (Exhibit 5, p. 32, lines 8-12).

The employer authorized a new MRI scan in June, 2005 as suggested by Dr. Kennedy. After the MRI was performed, the employer sent employee back to see Dr. Coyle. According to Dr. Coyle, the new MRI showed a more obvious foraminal narrowing at L5-S1. (Exhibit 5, p.

Employee: John Kinnikin

Injury No. 02-149623

34, lines 13-22). This was evidence of progressive deterioration at the L5-S1 level. (Exhibit 5, p. 35, lines 1-7). He did state in the report of that particular visit that employee may get some benefit from an anterior lumbar procedure, and that the surgery would address the L5-S1 disc, but not the spinal deformity. (Exhibit 5, p. 38, line 18 – p. 39, line 3). He also stated that if Mr. Kinnikin were to have surgery, he would recommend a fusion as opposed to disc replacement surgery. (Exhibit 5, p. 40, lines 2-4).

Dr. Kennedy also saw employee again on December 21, 2005. (Ex. H, p. 9, lines 15-18). He reviewed the MRI scan of June 10, 2005, and he read the scan as showing an annular tear at L5-S1. (Exhibit H., p. 10, lines 2-5). Dr. Kennedy stated that this finding was more compatible with an acute injury that has scarred rather than degenerative changes. (Exhibit H, p. 15, lines 2-12). He felt that employee was a candidate for an anterior fusion at L5-S1 or, in the alternative, an artificial disc placement at that level. (Exhibit H., p. 10, lines 15-20). He gave the opinion that the need for surgery was caused by the work-related accident, and that employee was not at maximum medical improvement. (Exhibit H, p. 10, line 20 – p. 11, line 2).

Both doctors agree Claimant would receive some benefit from an anterior lumbar fusion at L5-S1. Their difference of opinion is the long-term effect of the fusion. Dr. Coyle stated:

I did state that there was some possibility he would get benefit from an anterior lumbar procedure at L5-S1, but that he did have problems above that, in all likelihood was going to still have some problems in the future.

(Exhibit 5, p. 32, lines 8-12). On the other hand, when Dr. Kennedy was asked to comment on Dr. Coyle's opinion, he stated as follows:

I think that there is, in my mind, as far as I can understand from his report, pain being generated by the L5-S1 disc. He does have other issues in his spine. I don't know that he's going to become symptom free with an anterior fusion, but by the same token, we're talking about a more limited intervention that I don't think would really alter the balance of his spine very much; nor necessarily be adversely impacted by the degree of kyphosis that he has which is relatively mild.

(Exhibit H, p. 16, lines 16-25).

Dr. Kennedy views the surgery as providing Claimant relief of his lumbar spine symptoms and increasing his function. "I'm not sure that hard labor would be feasible for him, even if he were to be operated, but I think there's—he's pretty disabled, functionally speaking, as he is right now, so the goal would be to get him back to what I would consider a more routine lifestyle..." (Exhibit H, p. 18, lines 2-10).

Dr. Coyle admitted the purpose of the lumbar fusion would be for pain relief, for whatever period of time. (Exhibit 5, p. 50, lines 10-25).

Throughout the depositions of both Drs. Kennedy and Coyle, Employer questioned whether the need for surgery was due to the work he performed or due to pre-existing

Employee: John Kinnikin

Injury No. 02-149623

degenerative conditions. As stated above, Dr. Kennedy said that the need for surgery was due to the work-related accident. Dr. Coyle's opinion was that Claimant had a minimally symptomatic degenerative condition that became symptomatic after the work event. (Exhibit 5, p. 17, lines 7-14). Because the aggravation of a pre-existing non-disabling condition caused by a work-related accident is compensable, there really is no issue with respect to whether the treatment needed is due to the compensable injury. See **Kelley v. Banta & Stude Constr. Co.**, 1 S.W.3d 43, 48 (Mo.App. E.D.1999).¹

After ALJ Denigan ordered treatment, Employer scheduled an appointment for Claimant to see Dr. Kennedy. Dr. Kennedy and Dr. Robson performed an "L5-S1 laminectomy, facetectomy, foraminotomy bilateral, pedicle screw fixation and fusion L5-S1" on September 12, 2006. (Ex. R, Operative note dated 9/12/08). Claimant reported to Dr. Kennedy that the leg pain improved, and Dr. Kennedy then ordered therapy. (Exhibit R, office note of 12/7/06). A functional capacity evaluation was performed on February 2, 2007, after which Dr. Kennedy released Claimant with permanent restrictions, which included no lifting over 30 pounds. (Exhibit R, office note of 2/28/07).

Claimant testified about his current condition. He stated that his symptoms improved after the surgery. He is no longer in constant pain. He further testified he feels he is not able to work, given the fact that he cannot handle any sustained activity without developing pain that requires him to lie down for an extended period of time.

Claimant testified he recovered from any incident of back pain prior to the November 19, 2002 event. He stated on a few occasions he would "pull a muscle or something" in shoveling but symptoms were gone within a day or so. He further testified he slipped climbing through the window of a dump truck in the early 1990's and strained his back. Claimant stated he went to a chiropractor for two visits and "the pain was gone." Claimant also testified in 1999 he was a passenger in a vehicle that was hit from behind. He indicated he went to the emergency room but had no further treatment, and that he "just had sore muscles in my neck for a couple of days and I was okay."

Claimant sustained an injury to his left knee in 1969, which required surgical intervention. He testified the left knee would pop and swell, and it would ache and stiffen when the weather changed. Claimant stated that he was able to perform his work duties and did not miss work nor require ongoing treatment for the knee. During cross-examination Claimant stated that, although he did not miss time from work due to his knee, he had to change the way he did his work because of the knee. Claimant also showed the court his left knee, which revealed a deformity.

Claimant testified that he worked for Triad Development for approximately 10 years as a heavy equipment operator. He received a paycheck from Triad, and he received a W-2 from them each pay period.

¹ End of the summary and findings of fact from the Temporary Award

Employee: John Kinnikin

Injury No. 02-149623

Dr. Russell Cantrell testified on behalf of Employer. Dr. Cantrell examined Claimant on August 7, 2007. It was Dr. Cantrell's opinion that Claimant had a disability of 20% of the body as a whole, with 7% of that amount being due to the exacerbation of pre-existing degenerative disc disease. (Ex.8, p. 30). He stated that the injury exacerbated the condition to the point where Claimant needed surgery. (Ex. 8, p. 30).

Dr. David Volarich testified on behalf of the Claimant. Dr. Volarich opined that the work-related accident resulted in permanent partial disability of 40% of the body as a whole at the level of the lumbosacral spine due to the aggravation of degenerative disc disease. (Ex. S, p. 26) He also rated significant pre-existing disabilities of 15% of the body as a whole due to the underlying disc disease from L3-S1; a 20% disability of the body as a whole rated at the thoracic spine for a pre-existing presence of Schuermann's Kyphosis; a 50% permanent partial rating of the left knee, due to "medial compartment arthrotomy and subsequent development of severe posttraumatic degenerative arthritis in the medial compartment with varus deformity of the knee." He also found a 5% rating of the body as a whole due to prostate difficulties, and mentioned that some disability might exist from depression, but he would defer to a psychiatrist. (Ex. S, p. 27- 28). It was Dr. Volarich's opinion that based upon his medical evaluation alone, that Claimant is permanently and totally disabled as a result of the work-related injury of November 19, 2002 in combination with his preexisting medical conditions. (Ex. S, p. 29) It was further his opinion that Claimant was permanently and totally disabled prior to the progression of his knee symptoms between November, 2002 and the date of his exam. (Ex. S, p. 30).

James England testified on behalf of Claimant (Exhibit T). Mr. England is a rehabilitation counselor. Mr. England interviewed Claimant, administered vocational testing, and reviewed medical records and the opinions of medical experts in order to formulate his opinions. Mr. England opined that Claimant would be permanently and totally disabled if the restrictions recommended by Dr. Volarich are considered in conjunction with Claimant's educational background and work history. Mr. England indicated he relied on Claimant reporting that he has dyslexia and his understanding that Claimant was fired from a previous job with Toyota as a result of dyslexia. Mr. England further testified Claimant would not be permanently and totally disabled taking into consideration the restrictions recommended by Dr. Kennedy and Dr. Cantrell.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the competent and substantial evidence presented in this case, including the testimony of Claimant, deposition testimony of expert witnesses, transcripts and records received into evidence, and my personal observations, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. **Grime v. Altec Indus.**, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also **Davies v. Carter Carburetor**, 429 S.W.2d 738, 749 (Mo.1968); **McCoy v. Simpson**, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence

Employee: John Kinnikin

Injury No. 02-149623

of those elements by "reasonable probability." **Sanderson v. Porta-Fab Corp.**, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing **Cook v. Sunnen Prods. Corp.**, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)). However, the employee must prove the nature and extent of any disability by a reasonable degree of certainty. **Downing v. Willamette Industries, Inc.**, 895 S.W.2d 650, 655 (Mo. App. 1995); **Griggs v. A. B. Chance Company**, 503 S.W.2d 697, 703 (Mo. App. 1974).

Employment

Employer did not make the employment relationship pursuant to Chapter 287 RSMo. an issue at the hardship hearing. The testimony presented at the final hearing on the issue of employment was favorable to Claimant in that it was indicative of an employer-employee relationship. No evidence to the contrary was presented. Claimant, at the time of his injury was an employee of Employer.

Medical Causation

The issue of medical causation was addressed in the Temporary Award issued by ALJ Joseph Denigan. In ultimately ordering additional surgical treatment by Dr. Kennedy, ALJ Denigan found:

Throughout the depositions of both Drs. Kennedy and Coyle, Employer questioned whether the need for surgery was due to the work he performed or due to pre-existing degenerative conditions. As stated above, Dr. Kennedy said that the need for surgery was due to the work-related accident. Dr. Coyle's opinion was that Claimant had a minimally symptomatic degenerative condition that became symptomatic after the work event. (Exhibit 5, p. 17, lines 7-14). Because the aggravation of a pre-existing non-disabling condition caused by a work-related accident is compensable, there really is no issue with respect to whether the treatment needed is due to the compensable injury. See **Kelley v. Banta & Stude Constr. Co.**, 1 S.W.3d 43, 48 (Mo.App. E.D.1999).

Based on the evidence presented at the hardship hearing, it was determined that there was a medical causal relationship between the work accident of November 19, 2002 and the injury to, and need for treatment of Claimant.

While the rulings in a temporary award are not binding on an ALJ in a final award, there must be "additional significant evidence" presented that was not before the ALJ at the temporary award to modify the temporary award. **Dilallo v. City of Maryland Heights**, 996 S.W.2d 675, 676 (Mo.App. E.D.1999); **Jennings v. Station Casino St. Charles**, 196 S.W.3d 552 (Mo.App. E.D. 2006). In this case, the only additional evidence regarding medical causation presented by Employer was the report and testimony of Dr. Russell Cantrell. (Exhibit 8). While Dr. Cantrell did testify that the operation of heavy equipment was not a substantial factor in the cause of Claimant's current or ongoing complaints (Exhibit 8, p.25), he did specifically assign seven percent PPD as a result of the work injury. (Exhibit 8, p.27). He further opined Claimant had a

Employee: John Kinnikin

Injury No. 02-149623

degenerative disc disease process that was exacerbated by the work injury of November 19, 2002. (Exhibit 8, p.24).

Dr. Cantrell's testimony on this issue is confusing at best, perhaps even contradictory. Given this fact, Dr. Cantrell's testimony is neither credible nor persuasive as it pertains to the issue of medical causation. Dr. Kennedy, the treating physician, and a surgeon in this field of specialty, is more credible regarding causation. As such, Employer has not presented additional significant evidence regarding medical causation, and the findings on medical causation in the Temporary Award are adopted and incorporated herein. Claimant has met his burden of proof on the issue of medical causation.

Necessity of Surgery Provided Pursuant to Temporary Award

The surgery performed by Dr. Kennedy was ordered pursuant to the Temporary Award issued by ALJ Denigan. Employer presented no additional significant evidence at the final hearing to dispute the necessity of the surgery. On the contrary, during cross examination, Dr. Cantrell was asked, "But would you agree, though, that the injury exacerbated to the level where he did need the surgery?" To which Dr. Cantrell responded "Yes". (Exhibit 8, p.30). In addition, Claimant reported to both Dr. Cantrell and Dr. Volarich, and testified at hearing, that he has less severe pain in his back since the surgery. The findings of the Temporary Award are adopted and incorporated herein. The surgery performed by Dr. Kennedy was necessary to cure and relieve the effects of the November 19, 2002 injury.

Future Medical Care

A claimant bears the burden of proving entitlement to an award of future medical care. The claimant must establish a "reasonable probability" that he or she will need future medical care. **Chatmon v. St. Charles County Ambulance Dist.**, 55 S.W.3d 451, (Mo.App. E.D. 2001) citing **Boyles v. USA Rebar Placement, Inc.**, 26 S.W.3d 418, 424 (Mo.App.2000). The consensus of the expert medical testimony is that Claimant has reached MMI. The only evidence presented regarding future medical care is Dr. Volarich's recommendation that Claimant use Glucosamine, which he testified "appears" to be a useful compound to maintain articular surface cartilage. Dr. Volarich's report and testimony do not specify if this is recommended for Claimant's primary back injury, the pre-existing knee injury, or both. Claimant has failed to meet his burden of proving it is reasonably probable that he will need future medical care as a result of the November 19, 2002 work injury.

TTD Benefits

Claimant received TTD benefits from November 25, 2002 to April 13, 2003, which represents the period of time Employer provided conservative treatment. He again received TTD benefits from September 12, 2006 to March 1, 2007, which represents the period of time he was provided treatment ordered by ALJ Denigan. Dr. Kennedy, the treating physician, found Claimant to be at MMI on February 28, 2007.

Employee: John Kinnikin

Injury No. 02-149623

At the time Claimant was released from conservative treatment on April 14, 2003, Dr. Tate imposed permanent restrictions, which included only performing work in the medium demand range and no lifting over 30 pounds. Claimant's work for Employer was in the heavy demand range and required lifting over 30 pounds. The restrictions placed on him by Dr. Tate precluded him from returning to the job he had at the time of injury. However, Claimant did not agree with the determination of Dr. Tate and Employer. He expeditiously sought medical opinions to the contrary, and attempted to pursue his remedies in the workers' compensation system.

Claimant ultimately prevailed in 2006 when ALJ Denigan found that he was in fact not at MMI from the November 19, 2002 injury, and ordered the additional treatment provided by Dr. Kennedy. That finding is adopted by and incorporated in this Final Award. Subsequent to the additional treatment and Claimant reaching MMI, the medical experts providing opinions in this case have made recommendations regarding work restrictions substantially similar to those of Dr. Tate. Claimant testified that the additional medical treatment ordered in the Temporary Award did improve the condition of his back. TTD benefits are intended to cover the employee's healing period from a work-related accident until she can find employment or her condition has reached a level of maximum medical improvement. **Boyles v. USA Rebar Placement, Inc.**, 26 S.W.3d 418, 424 (Mo. App. W.D. 2000). Once further medical progress is no longer expected, a temporary award is no longer warranted. **Id.**

Consistent with the findings that Claimant was not at MMI, that Employer was obligated to provide additional medical treatment, and that the restrictions placed on Claimant during this period of denial of benefits and treatment prohibited him from returning to work for Employer, Claimant has met his burden of proof on the issue of past TTD and Employer is ordered to pay \$98,197.26, representing 178 weeks from April 14, 2003 until September 11, 2006. Employer is to receive a credit for \$10,203.60 which the parties stipulated was paid as an advance. Total payment for TTD is then \$87,993.66.

Nature and Extent of Disability

The quantum of proof for the nature and extent of disability is reasonable certainty. The employee must prove the nature and extent of any disability by a reasonable degree of certainty. **Downing v. Willamette Industries, Inc.**, 895 S.W.2d 650, 655 (Mo. App. 1995); **Griggs v. A. B. Chance Company**, 503 S.W.2d 697, 703 (Mo. App. 1973).

In the testimony introduced at the hardship hearing, Dr. Kennedy opined that prior to surgery, Claimant had a 20% PPD to his low back. He attributed this to the work injury, and did not apportion any part of the disability to a pre-existing degenerative condition. Dr. Kennedy also testified he did not know if his opinion regarding PPD would change if the surgery were performed. At that time, Dr. Coyle opined Claimant had a 25% PPD to his low back, indicating that half was due to the work injury and half to a pre-existing degenerative condition.

The final rating of Dr. Cantrell was that Claimant suffered from a 20% PPD of the low back. He apportioned that disability as 7% attributable to the work injury and 13% attributable to the pre-existing degenerative condition. In his final rating, Dr. Volarich opined Claimant had a

Employee: John Kinnikin

Injury No. 02-149623

40% PPD of the low back due to the work injury and a 15% PPD to the low back due to the pre-existing degenerative disease.

In addition to the rating provided for the low back, Dr. Volarich gave additional opinions on disability associated with pre-existing conditions. Dr. Volarich opined Claimant had a pre-existing PPD of 20% to the thoracic spine due to Scheuermann's kyphosis causing lost motion and recurrent back pain. He further opined that Claimant had a pre-existing disability to the left knee of 50%, which accounted for the lost motion, pain weakness and atrophy. He indicated that Claimant also had a 5% PPD to the body as a whole referable to the pelvis due to urinary dysfunction. Dr. Volarich also indicated there may be PPD associated with depression, but deferred to a psychiatric assessment and did not provide a rating. Dr. Volarich ultimately gave the opinion Claimant is permanently and totally disabled due to the combination of his pre-existing disability and the work injury.

There is a distinction between a pre-existing condition and a pre-existing disability. This principle is demonstrated in **Messex v. Sachs Electric Company**, 989 S.W.2d 206, (Mo.App. E.D. 1999). In **Messex**, the claimant's asymptomatic degenerative back condition became symptomatic as a result of his employment. Due to the fact that the claimant had not had any prior problems, complaints, limitations, symptoms, or indications, the Court found the record devoid of substantial and competent evidence of a pre-existing disability. Ultimately, the entire disability was found to be attributable to the work-related injury.

In this case, as of the date of injury, Claimant's degenerative back condition was asymptomatic. The only prior complaint regarding his back was a strain that happened a decade earlier and by Claimant's own testimony completely resolved after two visits to a chiropractor. There was also testimony regarding an automobile accident, which Claimant testified affected his neck, not his back, and resolved in two days. The competent and substantial evidence presented in this case indicate Claimant's pre-existing degenerative condition was asymptomatic and did not constitute a disability prior to the work injury.

Claimant did have a pre-existing disability in his left knee. Based on the medical evidence presented and the testimony of Claimant regarding his limitations, including the fact that at the time of the work injury to his back Claimant was able engage in heavy work, Claimant's pre-existing PPD of the left knee is found to be 30%.

The degenerative condition in Claimant's thoracic spine is not found to be a pre-existing disability. The only expert opinion regarding disability of the thoracic spine was that of Dr. Volarich. In his opinion, Dr. Volarich specifically designated his pre-existing PPD rating of the thoracic spine to pain and loss of motion. As previously indicated, the pain and loss of motion in Claimant's back did not exist before the work injury, as such, it cannot be a pre-existing disability. There is no expert medical evidence in the record regarding disability to the thoracic spine from the primary injury. Claimant's testimony alone that he has some pain in his mid back is not competent and substantial evidence on which to base a PPD assessment.

Claimant testified that his urinary tract dysfunction is largely under control with the use of medication, no PPD is assessed for this condition.

Employee: John Kinnikin

Injury No. 02-149623

There is no competent and substantial evidence in the record regarding depression, as such, there is no PPD assessed for this condition.

In the report and testimony of Mr. England and the testimony of Claimant, there is some discussion of dyslexia. There are no medical, educational, or vocational records in evidence that provide a diagnosis of dyslexia, or that quantify the effect of dyslexia on Claimant.

Regarding the condition of, and limitations imposed by the injury to Claimant's back, the opinions of Dr. Kennedy are the most credible. Dr. Kennedy is a neurosurgeon, and he actually performed the surgery, giving him the opportunity to personally view the Claimant's injuries. Dr. Kennedy examines and provides treatment for work injuries, and regularly provides disability evaluations. In this case, Dr. Kennedy also had the opportunity to review the functional capacity evaluation (FCE) prior to imposing the work restrictions. By contrast, while Dr. Cantrell and Dr. Volarich both frequently engage in disability examinations and ratings, they are not neurosurgeons and examined Claimant solely for the purpose of conducting independent medical exams (IME).

Based on the competent and substantial evidence presented, including the testimony of Claimant, and the medical evidence and testimony, Claimant has sustained a permanent partial disability of 30% of the body as a whole referable to the low back as a direct result of the November 19, 2002 work injury. There is no pre-existing PPD assessed to the low back as the degenerative condition was asymptomatic at the time of the injury, and therefore was not disabling. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. **Banner Iron Works v. Mordis**, 663 S.W.2d 770, 773 (Mo.App. 1983). Employer's liability for the work injury is therefore \$40,814.40

Claimant has failed to meet his burden of proof on the issue of permanent total disability. Mr. England testified that taking into account the restrictions of Dr. Kennedy, Dr. Cantrell and the FCE, Claimant would be employable. Dr. Kennedy's opinions regarding future restrictions were found to be the most credible. It should also be noted that Mr. England apparently attributed the previous loss of employment to Claimant's dyslexia, which Claimant testified at hearing was due to a dispute over a Christmas bonus. Claimant has failed to prove that it is reasonably certain he is permanently and totally disabled.

SIF Liability

Claimant has met his burden of proof regarding SIF liability for permanent partial disability. Based on the medical evidence presented and the testimony of Claimant, the pre-existing left knee injury and the work injury combine to create a greater disability. Based on the evidence presented, the synergistic effect, or loading factor is 15%. Thirty percent PPD of the left knee is 53.3 weeks. Thirty percent of the body is 120 weeks. The sum of the two is 173.3 weeks, multiplied by 15%, equals 26 weeks. Twenty-six weeks multiplied by the PPD rate of \$340.12 is \$8,843.12. The Second Injury Fund is only responsible for the condition of the knee at the time of the injury, and not for any post-injury worsening of the knee condition. Second Injury Fund liability is therefore \$8,843.12.

Employee: John Kinnikin

Injury No. 02-149623

Attorney Jill Bollwerk is entitled to a lien in the amount of 25% of all sums recovered as and for attorney fees for necessary legal services provided.

Date: May 28, 2009

Made by: /s/ GRANT C. GORMAN
Grant C. Gorman
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ NAOMI PEARSON
Naomi Pearson
Division of Workers' Compensation