

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

Injury No.: 99-063133

Employee: Paul J. Kist  
Employer: Mississippi Lime Company (Settled)  
Insurer: Federal Insurance Company (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 § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 12, 2012. The award and decision of Administrative Law Judge Gary L. Robbins, issued December 12, 2012, 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 12<sup>th</sup> day of December 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

---

John J. Larsen, Jr., Chairman

---

James G. Avery, Jr., Member

---

Curtis E. Chick, Jr., Member

Attest:

---

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Paul J. Kist Injury No. 99-063133 and 00-178495  
Dependents: N/A  
Employer: Mississippi Lime Company  
Additional Party: Second Injury Fund  
Insurer: Federal Insurance Company  
Appearances: Mark E. Moreland, attorney for employee.  
Gregg N. Johnson, attorney for Second Injury Fund.  
Hearing Date: August 13, 2012 Checked by: GLR/rm

**SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? Yes, in Injury Number 99-063133.
2. Was the injury or occupational disease compensable under Chapter 287? Yes, in both cases.
3. Was there an accident or incident of occupational disease under the Law? Yes, in both cases.
4. Date of accident or onset of occupational disease? March 18, 1999 in Injury Number 99-063133 and July 8, 2000 in Injury Number 00-178495.
5. State location where accident occurred or occupational disease contracted: Ste. Genevieve County in both cases.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes, in both cases.
7. Did employer receive proper notice? Yes, in both cases.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes, in both cases.

9. Was claim for compensation filed within time required by law? Yes, in both cases.
10. Was employer insured by above insurer? Yes, in both cases.
11. Describe work employee was doing and how accident happened or occupational disease contracted: In Injury Number 99-063133 the employee injured his back when he was thrown around in a crawler machine. In Injury Number 00-178495 the employee injured his neck due to shaking and vibration of a piece of equipment he was operating.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: In Injury Number 99-063133 the employee injured his back. In Injury Number 00-178495 the employee injured his neck.
14. Nature and extent of any permanent disability: In Injury Number 99-063133 the employee settled his case with the employer-insurer for 60% permanent partial disability of the body as a whole regarding the lumbar spine. In Injury Number 00-178495 the employee settled his case with the employer-insurer for 10% permanent partial disability of the body as a whole regarding the cervical spine.
15. Compensation paid to date for temporary total disability: In Injury Number 99-063133 the employer-insurer paid \$22,116.53 in temporary total disability benefits. In Injury Number 00-178495 the employer-insurer paid \$0 in temporary total disability benefits.
16. Value necessary medical aid paid to date by employer-insurer: In Injury Number 99-063133 the employer-insurer paid \$89,570.00 in medical aid. In Injury Number 00-178495 the employer-insurer paid \$0 in medical aid.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$700.00.
19. Weekly compensation rate: In each case the parties stipulated that the employee's compensation rate for temporary total and permanent total disability is \$466.69 per week. The parties stipulated that the employee's rate for permanent partial disability is \$294.73 per week in Injury Number 99-063133 and \$314.26 in Injury Number 00-178495.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the employee 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 employee: Mark E. Moreland.

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

On August 13, 2012, the employee, Paul J. Kist, appeared in person and with his attorney, Mark E. Moreland for hearings for final awards. At the request of the parties the record was left open until September 11, 2012. Injury Number 99-063133 and Injury Number 00-178495 were consolidated for purposes of trial. The employer-insurer was not present at the trial as they had already settled their cases with the employee. Assistant Attorney General Gregg N. Johnson represented the Second Injury Fund. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS IN 99-063133:**

1. Mississippi Lime Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Federal Insurance Company.
2. On March 18, 1999, Paul J. Kist was an employee of Mississippi Lime Company and was working under the Workers' Compensation Act.
3. On March 18, 1999, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$700.00. His rate for temporary total and permanent total disability is \$466.69 per week. His rate for permanent partial disability is \$294.73 per week.
7. The employee's injury was medically causally related to the accident or occupational disease.
8. The employer-insurer paid \$89,570.00 in medical aid.
9. The employer-insurer paid \$22,116.53 in temporary disability benefits.
10. The employee has no claim for previously incurred medical bills.
11. The employee has no claim for mileage.
12. The employee has no claim for future medical care.
13. The employee had no claim for any temporary disability benefits.
14. The employee has no claim for permanent partial or permanent total disability as to the employer-insurer.

### **UNDISPUTED FACTS IN 00-178495:**

1. Mississippi Lime Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Federal Insurance Company.
2. On July 8, 2000, Paul J. Kist was an employee of Mississippi Lime Company and was working under the Workers' Compensation Act.
3. On July 8, 2000, the employee sustained an accident arising out of and in the course of his employment.

4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$700.00. His rate for temporary total and permanent total disability is \$466.69 per week. His rate for permanent partial disability is \$314.26 per week.
7. The employer-insurer paid \$0 in medical aid.
8. The employer-insurer paid \$0 in temporary disability benefits.
9. The employee has no claim for previously incurred medical bills.
10. The employee has no claim for mileage.
11. The employee has no claim for future medical care.
12. The employee had no claim for any temporary disability benefits.
13. The employee has no claim for permanent partial or permanent total disability as to the employer-insurer.

**ISSUE IN 99-063133:**

1. Liability of the Second Injury Fund for either permanent partial or permanent total disability.

**ISSUES IN 00-178495:**

1. Medical causation.
2. Liability of the Second Injury Fund for permanent partial or permanent total disability.

**EXHIBITS:**

The following exhibits were offered and admitted into evidence:

Employees Exhibits:

- A. Deposition of Thomas F. Musich, M.D.
- B. Deposition of Gary Weimholt.
- C. Stipulation for Compromise Settlement in Injury Number 78-18772.
- D. Medical records from Ste. Genevieve County Memorial Hospital/Briccio Cadiz, M.D.
- E. Medical records from Ste. Genevieve County Memorial Hospital.
- F. Medical records from Microsurgery and Brain Research Institute/ Paul H. Young, M.D.
- G. Medical records of Faisal J. Albanna, M.D.
- H. Medical record of H. Lattinville, M.D.
- I. Medical records from St. Anthony's Medical Center.
- J. Medical records from Tesson Heights Orthopaedic & Arthroscopic, P.C./R. Peter Mirkin, M.D.
- K. Medical and billing records of Charles A. Wetherington, M.D.
- L. Medical records from The Caring Corner, Inc.
- M. Medical records of Richard S. Gahn, M.D.
- N. Medical records of Steven Granberg, M.D.

- O. Medical records from Metro Imaging.
- P. Medical records from South County Anesthesia.
- Q. Medical records from Metropolitan Neurology, Ltd. /R.A. Head, M.D.
- R. Medical records from Cardinal Neurosurgery & Spine, Inc. /Daniel L. Kitchens, M.D.
- S. Medical records from Jefferson Memorial Hospital.
- T. Medical records from Vista Imaging of Jefferson County.
- U. Deposition of Robert J. Bernardi, M.D.
- V. Stipulations for Compromise Settlement in Injury Numbers 99-063133 and 00-178495.

Second Injury Fund Exhibits:

- I. Deposition of Ravi Yadava, D.O.
- II. Medical report of David B. Robson, M.D.

**STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:**

**STATEMENT OF THE FINDINGS OF FACT IN BOTH CASES:**

The employee was the only witness to personally testify at trial. All other evidence was received in the form of written records, medical records or deposition testimony. Employee's counsel filed written suggestions with the Court. The Second Injury Fund chose not to file any suggestions with the Court.

**Personal History**

Mr. Kist, the employee, was 69 years at the time of the trial. He is married and has three adult children. He graduated from high school in 1961, and never attended any college or vocational classes. He worked at Mississippi Lime Company for most of his adult life. He worked there from 1963-2000. He began as a laborer and worked through other jobs due to his increasing union seniority and the need to move to less strenuous positions due to his injuries and physical problems. He moved from a laborer to an iron worker to maintenance, to an electrician and finally last worked as a crawler operator. He testified that the maintenance job was better for him as it was on the ground and he did not have to climb as much. He said he moved to an electrician job as he did not have to do as much lifting. Mr. Kist testified that his last job was as a crawler operator and he took that position as it was a sit down job. He testified that this progression of jobs took place from 1978 to 1999. He indicated that he continued to have back problems during his working career that progressively got worse with additional injuries. Mr. Kist testified that over the years he missed time from work due to his back. He stated that in general he worked with pain that was a constant 5 on a 1/10 scale until he had his last back accident where the pain moved to a 10. He also indicated that he developed problems with his left hip and leg that then ran to his foot in his last back accident. Mr. Kist testified that sometimes when he moved to a different job he was required to take a pay cut.

The employee indicated that he never worked in an office and never used a computer as part of his profession. He stated that he types with one finger and does not know about Excel or Word.

**Pre-existing Injuries**

In 1975 Mr. Kist hurt his back when working as an iron worker. He was installing pipe and lost his footing and fell injuring his back. This injury was not dealt with as a workers' compensation case. The employee testified that he did not get much treatment and never had surgery. He indicated that he had aching and pain in his back since that injury but always continued his job despite any pain or discomfort.

In 1978 Mr. Kist was injured when his left leg gave out and he fell to the ground again injuring his back. Dr. Lattinville performed L4-5 back laminectomy surgery. After surgery the employee still had problems and was advised by Dr. Lattinville to move to a lighter job. The employee lived with the problems until he built up enough seniority and bid to a maintenance job and then other jobs. The employee testified that after this accident his private life activities were affected and he took medications to deal with his physical problems.

**Accident in 99-063133**

On March 18, 1999, the employee injured his back again. He was riding a vehicle in the mine when the driver hit a rock and he and a co-worker were thrown around in the vehicle. The employee testified that the force of the accident was so great that his hard hat was damaged. Mr. Kist testified that after the accident he had terrible back pain. He said it was much worse than anything he had ever had in the past. He said it felt like his back was on fire with pain radiating into his hip and leg. During this point in the trial a break was taken as the employee started crying when he was describing the pain he had from this accident.

The employee reported the accident to his employer and began a course of medical treatment culminating with back fusion surgery. His employer sent him to Dr. Cadiz before he was referred to Dr. Mirkin. On August 13, 1999, Dr. Mirkin performed back fusion surgery at L4-L5 and L5-S1.

Following the surgery, Mr. Kist continued to have lower back pain radiating down into his hip and foot on his left side. He testified that at one point he was taking 23 pills a day to deal with his pain. He indicated that he was unable to sleep on his left side and that anything touching or landing on his left hip flared up the problem. It was also after Dr. Mirkin's surgery that Mr. Kist began to experience some pain in the cervical spine. Dr. Mirkin re-examined Mr. Kist and thought the fusion was solid. As of January 30, 2002, Dr. Mirkin thought that the employee remained at maximum medical improvement. His report of October 12, 2000, indicates that the employee was at maximum medical improvement and could work with restrictions. He rated the employee as having a 20% permanent partial disability, one-half due to the March 18, 1999 incident and the other half due to his pre-existing pathology.

Because of his continuing and ongoing complaints of pain, the employee was referred to Dr. Yadava who caused physical therapy to be performed as well as aquatic therapy. This treatment did not improve Mr. Kist's pain and Dr. Yadava released him from his care. Dr. Yadava in a letter of October 17, 2000, reported that the employee was at maximum medical improvement as

of June 29, 2000, when he returned him to work with restrictions. Dr. Yadava provided a 30% permanent partial disability rating for the employee's lumbar spine. Mr. Kist then began treating with Dr. Gahn, a pain management specialist. Dr. Gahn performed epidural steroid injections in the low back. He also performed facet rhizotomies and physical therapy. This treatment lasted for a three year period but did not improve the employee's low back condition. Dr. Gahn referred the employee to Dr. Wetherington.

Ultimately, Mr. Kist began treatment with Dr. Wetherington in January of 2005. Dr. Wetherington felt that the fusion at L5-S1 was unstable. He ultimately performed a redo fusion at L4-L5 and L5-S1 on July 1, 2005. At that time in an effort to correct the pseudoarthrosis which he refers to as being at L5-L6, he performed a trans-foraminal lateral interbody fusion with insertion of a Signus PEEK interbody implant. He fastened this with Alphatec pedicle screws and rods along with a Blackstone cross link. He then harvested a bone from the employee's left iliac crest to complete the fusion. Although Mr. Kist improved immediately, subsequent to the surgery, the condition again began to deteriorate while undergoing physical therapy. He once again had low back pain and pain radiating down this time into both legs on a daily basis. He continued to treat with Dr. Wetherington and also with Dr. Gahn, the pain management specialist. He did so periodically through essentially the time of the hearing. Ms. Kist testified that he continued to have intractable low back pain with pain radiating down both legs. This affected his ability to stand in one place, climb ladders and stairs or lift objects of significant weight. He reported that he could carry perhaps a gallon of milk or light grocery items. He testified that he no longer cares for his yard or does any type of home maintenance. He testified that the pain can affect his concentration as well as his sleep. He did not think that he could work at his old job nor could he think of any other type of employment that he could do on a sustained basis. He also testified that he last worked in July of 2000 and has not worked since. Mr. Kist testified that up to the 1999 accident his back pain was manageable with some medical care from Dr. Cadiz and medications for pain.

### **Accident in 00-178495**

On July 8, 2000 Mr. Kist had another accident. The employee testified that he was released by Dr. Mirkin to return to work. He indicated that he returned to work and was restricted to only work 4 hours a day. He returned to work as a crawler operator where he operated a drill sitting in the cab of the machine. He indicated that when the machine is on there is a lot of shaking and vibration. Mr. Kist testified that after he worked for no more than 10 hours he decided that he could not do it anymore as he developed severe neck pain that radiated into both arms.

Mr. Kist was treated by Dr. Albanna who performed a cervical fusion. Thereafter, he prescribed physical therapy to Mr. Kist's cervical spine. Mr. Kist's cervical spine slowly improved. He does have limitations of range and motion, particularly to the left or when looking up. He described his cervical spine as tolerable.

The employee was examined by Dr. Musich on two separate occasions. Dr. Musich found 85% permanent partial disability of the body as a whole as a result of Mr. Kist's lumbar pathology, 25% of that referable to the 1978 injury and subsequent surgery, 60% referable to the 1999 injury

and subsequent treatment and surgeries. Dr. Musich was of the opinion that Mr. Kist should refrain from any activities that required prolonged positioning of the lumbar sacral spine or sitting or standing in one position for greater than 15 minutes. He concluded that he was most probably permanently and totally disabled due to the restrictions as well as Mr. Kist's chronic pain and advanced work age.

Dr. Musich also testified that he found that Mr. Kist had sustained an accident arising out of and in the course of his employment in July of 2000. That work was a substantial factor in the cause of his condition and that Dr. Albanna's treatment was reasonable and necessary to cure and relieve the effects of the injury. That case was settled by the employer-insurer for 10% permanent partial disability of the body as a whole. The 1999 back injury was settled by the employer-insurer for 60% permanent partial disability of the body as a whole. Dr. Musich's opinion was that the employee was permanently and totally disabled due to a combination of his pre-existing low back injuries and disabilities and the injuries and disabilities from his March 18, 1999 accident.

Dr. Bernardi evaluated the employee and imposed additional restrictions in reference to Mr. Kist's low back, noting that he should avoid activities involving repetitive bending and twisting movements in his back as much as possible and should avoid prolonged squatting, stooping and crawling. Dr. Bernardi believed that Mr. Kist was permanently and totally disabled. He reported that "It appears that the accident of 3/18/1999 triggered Mr. Kist's current disability". He testified that the 1999 accident triggered the pre-existing problems in Mr. Kist's back and caused them to become significantly symptomatic.

Dr. Robson performed a records review for the Second Injury Fund on February 24, 2012. It was his opinion Mr. Kist was permanently and totally disabled following his March 18, 1999 accident. He opined that this injury alone led up to a series of events that culminated in two spinal surgeries and his inability to effectively maintain employment in the work place. He also opined that the employee's neck injuries were unrelated to any lumbar spine problem and any specific incident.

Mr. Kist was also evaluated by Mr. Weimholt who is a Vocational Rehabilitation Consultant. Based upon Dr. Musich's restrictions alone, Mr. Weimholt believed that the employee was able to perform less than a full range of sedentary, light or medium work due to his need to alter positions. He believed that considering his education and restrictions, he would have no transferable job skills to either skilled or semi-skilled work in either sedentary or light-demand level jobs. Neither did he possess any alternative skills such as computer literacy or office technology. Mr. Weimholt did not find any employment that Mr. Kist would be able to do. He concluded that he was at a total loss of access to the open labor market and was totally and vocationally disabled. He opined that the employee was permanently and totally disabled as a result of the combination of his back injuries.

**RULINGS OF LAW IN 99-063133:**

Based on a consideration of all of the evidence in this case, the Court finds that the employee is permanently and totally disabled due to combination of disabilities from the accident of March 18, 1999, and its sequela in conjunction with the employee's pre-existing conditions and their sequela. The Court also finds that the testimony of the employee and his presentation was consistent with the finding of permanent total disability in combination. The Court further finds that the medical and vocational opinions indicating that the employee is permanently and totally disabled due to a combination of disabilities from the employee's 1999 back injury and his pre-existing back injuries are more credible than any medical opinions to the contrary.

The Court finds that the employee reached maximum medical improvement as of October 12, 2000.

The employee settled his 1999 case with the employer-insurer for 60% permanent partial disability. The Court finds that the employee has a 60% permanent partial disability as a result of the 1999 accident. The employee's rate for permanent total disability is \$466.69 per week while his rate for permanent partial disability is \$294.73 per week.

The Second Injury Fund is ordered to pay permanent total disability benefits to the employee at the rate of \$466.69 per week from the date of maximum medical improvement; however the Second Injury Fund shall receive credit for the permanent partial disability settlement between the employer-insurer and the employee as provided by law.

**RULINGS OF LAW IN 00-178495:**

The Court has ruled that the employee was permanently and totally disabled as a result of the injury he sustained in 99-063133 and his pre-existing injuries. The Court finds that the Second Injury Fund has no liability in this case.

**ATTORNEY'S FEE:**

Mark E. Moreland, attorneys at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

**INTEREST:**

Interest on all sums awarded hereunder shall be paid as provided by law.

Employee: Paul J. Kist

Injury No. 99-063133 and 00-178495

Made by:

---

Gary L. Robbins  
*Administrative Law Judge*  
*Division of Workers' Compensation*