

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

Injury No.: 02-056052

Employee: William Kriegel
Employer: Southwestern Bell Telephone Company
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: May 21, 2002
Place and County of Accident: City of St. Louis, 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 (ALJ) dated December 17, 2004. The award and decision of Administrative Law Judge Edwin J. Kohner, as issued December 17, 2004, is attached and incorporated by this reference.

The Commission finds that the ALJ correctly weighed and evaluated the lay and medical testimony in reaching his conclusions as to disability and causation. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522 (Mo. App. E.D. 2002); *Sullivan v. Masters Jackson Paving Co.*, 35 S.W. 3d 879 (Mo. App. S.D. 2001); *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 204 (Mo. banc 2003).

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 13th day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: William Kriegel Injury No.: 02-056052
Dependents: N/A Before the
Employer: Southwestern Bell Telephone Company **Division of Workers'**
Department of Labor and Industrial **Compensation**
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Self-Insured
Hearing Date: November 19, 2004 Checked by: EJK

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: May 21, 2002
5. State location where accident occurred or occupational disease was contracted: City of St. Louis, 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? Self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee, a telephone cable-splicing technician, suffered a low back injury when he fell down a manhole.
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: Permanent total disability
15. Compensation paid to-date for temporary disability: \$68,987.98 (May 22, 2002, through January 8, 2004)
16. Value necessary medical aid paid to date by employer/insurer? \$66,913.02

Employee: William Kriegel Injury No.: 02-056052

17. Value necessary medical aid not furnished by employer/insurer? None to date
18. Employee's average weekly wages: \$975.00
19. Weekly compensation rate: \$628.90/\$329.42
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Permanent total disability benefits from Employer beginning
December 24, 2003, for Claimant's lifetime with credit for temporary
total disability benefits paid thereafter.

Unknown

22. Second Injury Fund liability: No

TOTAL:

Unknown

23. Future requirements awarded: Pain management for the claimant's chronic low back and left leg pain by a medical provider selected by the self-insured employer

Said payments to begin December 24, 2003, 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: Elizabeth J. Ituarte

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	William Kriegel	Injury No.: 02-056052
Dependents:	N/A	Before the
Employer:	Southwestern Bell Telephone Company	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Self-Insured	Department of Labor and Industrial
Hearing Date:	November 19, 2004	Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a telephone cable-splicing technician, suffered a low back injury when he fell down a manhole. The issues for determination are (1) Future medical care, (2) Permanent disability, and (3) Second Injury Fund liability. The evidence compels an award for the claimant for future medical care and permanent total disability benefits.

At the hearing, the claimant testified in person and offered a deposition of Thomas F. Musich, M.D., and James M. England, Jr., a medical report from Bruce Schlafly, M.D., a prior workers compensation settlement, and voluminous medical records. The defense offered depositions of Wayne A. Stillings, M.D., David Kennedy, M.D., and James E. Israel.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

SUMMARY OF FACTS

This forty-eight year old claimant completed twelve years of education with some college courses. The claimant's work history primarily involved heavy labor and demolition work. From 1997 until the date of accident, the claimant worked as a cable-splicing technician for this Employer, where he lifted up to 150 pounds, climbed telephone poles, and descended manholes.

On May 21, 2002, the claimant sustained traumatic injury to his low back after losing his footing while descending a ladder inside a manhole. The ladder inside the manhole was three feet below the surface of the road. The claimant wore rubber boots, which slipped once he stepped on the top rung of the ladder. The claimant fell several feet, becoming tangled in the rungs of the ladder, injuring his low back and scraping his elbows and knees.

On June 3, 2002, an MRI revealed a degenerative disc with central protrusion at L4-5 and a degenerative

disc with right-sided protrusion at L5-S1. See Exhibit H. The claimant underwent physical therapy from June 21 through September 6, 2002. See Exhibit J. Dr. Place administered selective nerve root blocks during this period but released the claimant in September with light duty restrictions. See Exhibit I.

Dr. Kennedy examined the claimant on November 6, 2002, and noted radicular symptoms. See Exhibit E. Dr. Kennedy ordered a CT/myelogram on November 11, 2002, which demonstrated a degenerative disc at L4-5 with a central herniation causing effacement of the L5 nerve root on the right. See Exhibit E. On March 28, 2003, Dr. Kennedy and Dr. Robson performed a L4-5 laminectomy, discectomy, and fusion at L4-5. See Exhibit E. The fusion included cage, plate and pedicle screw fixation with left iliac crest bone graft harvest. Postoperative diagnosis was herniated nucleus pulposus at L4-5 with segmental instability. See Exhibit E.

The claimant underwent additional physical therapy in July and August 2003. See Exhibit E. On August 26, 2003, the claimant's last physical therapy session, the therapist noted slight changes in range of motion. See Exhibit E. The claimant's pain level was overall unchanged; Sitting and standing tolerances were very limited, and the therapist noted, "He wakes multiple times at night" and has "difficulty getting to sleep." See Exhibit E. The claimant also complained of "inner bone pain" in his left leg with rest. See Exhibit E.

On September 24, 2003, Dr. Kennedy noted several episodes of bowel incontinence over the last few months. See Exhibit E. He referred the claimant for a second CT/myelogram on November 3, 2003, revealing:

1. Expected changes from laminotomy and posterior fusion and instrumentation at L4-5.
2. Complete posterior bony fusion is demonstrated especially on the right side.
3. Relatively weak evidence for complete bony fusion posteriorly on the left and interbody.
4. Mild to moderate spinal narrowing at L3-4 just above the fusion. See Exhibits E, F.

Dr. Kennedy found the claimant to be at maximum medical improvement on December 23, 2003. See Exhibit E. Dr. Kennedy noted a fifty percent loss in range of motion in the lumbar spine with sensory loss in the left foot. See Exhibit E. Dr. Kennedy gave permanent restrictions of no lifting more than twenty pounds, and no more than occasional bending twisting and stooping. See Exhibit E.

Dr. Musich

Dr. Musich first evaluated the claimant on October 9, 2003, and observed constant low back pain radiating into the left buttock and leg with a pain level of six to ten out of a possible ten. The claimant reported pain aggravated by sitting, walking or lying or with any prolonged positioning. At that time, the claimant was taking one or two Hydrocodone tablets a day along with several Tylenol tablets daily. Dr. Musich rated the claimant at seventy percent permanent partial disability referable to the low back resulting from the May 21, 2002, injury. See Dr. Musich deposition, page 15. Dr. Musich opined that the claimant was incapable of returning to his former job as cable splicer and recommended permanent restrictions of no climbing, crawling, squatting, kneeling, and no lifting more than twenty pounds. See Dr. Musich deposition, page 15. Dr. Musich did not find significant permanent partial disability before the claimant's May 21, 2002, work injury, and he recommended vocational rehabilitation. See Dr. Musich deposition, pages 15, 16.

Dr. Musich evaluated the claimant almost six months later, on March 30, 2004. See Dr. Musich deposition, page 16. By this time, the claimant had undergone a repeat CT/myelogram, revealing an incomplete fusion on the left, and Dr. Kennedy had released the claimant with permanent restrictions. Dr. Musich reviewed the final records from Dr. Kennedy along with records concerning the 1996 low back injury for which the claimant received twelve percent permanent partial disability. Dr. Musich observed that the claimant continuously walked about his examination room with antalgic gait, trying to get more comfortable due to complaints of severe low back pain and burning radiculopathy into the left leg. See Dr. Musich deposition, page 20. At that time, the claimant complained of constant left low back, gluteal and left leg pain at a level of eight to ten out of a possible ten. See Dr. Musich deposition, page 22. Dr. Musich recorded complaints of "any prolonged sitting over ten minutes, extended periods of walking greater than 15 minutes and any heavy lifting over 20 pounds and any climbing, or walking on uneven surfaces produce severe low back pain." See Dr. Musich deposition, page 22. The claimant reported taking his Hydrocodone sparingly, along with five to ten tablets of aspirin and three to four tablets of Extra Strength Tylenol on a daily basis. Dr. Musich opined that the claimant was depressed secondary to his severe pain. On physical

examination, the claimant demonstrated a positive pyriformis test, positive Faber test, and positive left straight leg-raising test. Ultimately, Dr. Musich rated the claimant's low back at eighty percent permanent partial disability over and above his preexisting disability, and found the claimant to be permanently and totally disabled due to the May 21, 2002, injury in combination with his age, limited education and lack of transferable skills. See Dr. Musich deposition, pages 23, 24. Dr. Musich also opined that the claimant should receive treatment for his chronic pain and depression stemming from the accident of May 21, 2002. See Dr. Musich deposition, page 24.

Dr. Musich opined that the claimant was permanently and totally disabled after his second evaluation “. . . because of his intractable low back pain, his severe sciatica, his need for ongoing narcotic analgesic medication, [and] his inability to perform the activities that he has been accustomed to over the years.” See Dr. Musich deposition, page 31. Dr. Musich opined that the claimant could not perform sedentary work due to the above-stated reasons, as well as the claimant's “need for continuous movement and lack of ability to walk or stand or sit for any extended periods of time in one position.” See Dr. Musich deposition, pages 41-42, 52. Dr. Musich testified that based on his own observation, the Employee needed to change position about every fifteen to twenty minutes. See Dr. Musich deposition, page 42. Dr. Musich testified, that although complaints of pain are subjective, “[a]ll of [the claimant's] evaluations including the invasive evaluations, the myelograms, as well as the surgical treatment all corroborates his ongoing posttraumatic complaints.” See Dr. Musich deposition, page 52.

Mr. England

Mr. England testified that the claimant moved often while seated during his evaluation, and stood and moved around about every twenty minutes. See England deposition, page 7. At the time of this evaluation in March 2004, the claimant was taking Hydrocodone only for his most severe pain, as he still had some saved from when he was seeing Dr. Kennedy, as well as aspirin or Tylenol multiple times a day. See England deposition, page 13. Mr. England noted that the claimant's primary complaints were low back pain going into the buttocks and left leg with occasional left foot numbness. The claimant also complained of inner bone pain. See England deposition, page 13. The claimant reported that he could stand and/or walk for about 15 minutes; a bag of groceries is about the heaviest item he will lift; he can sit for about twenty minutes before he prefers to change position; he can climb a few steps at a time; he drives on a limited basis, but cannot go far without needing to get out and walk. Mr. England noted that the claimant admitted being somewhat depressed over his situation. See England deposition, page 14. The claimant described a typical day as being up about every hour during the night because of pain. He described getting about three to four hours of sleep at night and dozing off during the day because of fatigue. The claimant estimated that he spends about a third of his day reclining to keep his back and leg pain bearable. See England deposition, page 20.

Mr. England administered the Wide-Range Achievement Test, at which the claimant scored post-high school reading, and eighth-grade math. See England deposition, page 18. Mr. England noted that most of the claimant's job history had been labor intensive and had involved a lot of heavy lifting, bending and twisting. The claimant has no skills useable at a sedentary level of exertion. Taking into consideration Dr. Kennedy's restrictions alone, there would be some types of entry-level service available. See England deposition, pages 17-18. Mr. England commented that because Dr. Kennedy recommended that the claimant apply for Social Security Disability benefits, the doctor may doubt the claimant's ability to sustain any type of work activity on a consistent basis. Taking into consideration Dr. Musich's restrictions, and Mr. England's own impression of the claimant, Mr. England opined that the claimant would not be able to compete successfully for employment nor could he sustain employment. See England deposition, page 21.

“[I]f you look at what Bill indicated to me he actually does on a day-to-day basis, if you take into consideration what Dr. Musich talked about as far as the positional changes, how the man actually comes across and how he appears to be functioning, I don't see, number one, how he would be able to sustain himself . . . or sustain employment on a consistent day-to day basis. . . . I don't see how he would be a dependable, reliable employee in the long run.” See England deposition, pages 21-22.

Mr. England opined that the claimant was not a viable candidate for vocational rehabilitation, and absent significant improvement in pain levels and depression, the claimant was likely to remain totally disabled from a vocational standpoint. See England deposition, pages 23-24. Mr. England testified that he was aware of entry-level jobs at Southwestern Bell, and that no light duty was available for the claimant following his release from Dr.

Kennedy with permanent restrictions. See England deposition, page 42.

Dr. Kennedy

Dr. Kennedy testified, that although he did not provide a rating in this matter, he did not believe the claimant was permanently and totally disabled. See Dr. Kennedy deposition, page 20. On the other hand, Dr. Kennedy testified that he talked with the claimant about Social Security disability, and advised him that he may be successful in his application as “many people who seek it under similar circumstances do.” See Dr. Kennedy deposition, pages 22-23. Dr. Kennedy testified that the claimant had fifty percent range of motion in his lumbar spine as of December 23, 2003, the same amount of restriction of range of motion that he had prior to surgery. See Dr. Kennedy deposition, pages 23-24. Dr. Kennedy testified that the claimant was a motivated patient and eager to return to work throughout his course of treatment. See Dr. Kennedy deposition, page 25. Dr. Kennedy testified that when he released the claimant, the claimant had persistent pain in the lower lumbar area, and explained this to mean “essentially continuous and having been continuous since the onset of the injury.” See Dr. Kennedy deposition, page 25. Dr. Kennedy testified about the result of the fusion:

“Well, I think it helped his leg pain, but not all of his leg symptoms. And I think structurally, whereas before he had considerable disc space collapse, particularly in the upright position, I think that the fusion eliminated that; however, I think there was also a degree of nerve and ---or I should say muscle and ligamentous injury in association with the original injury that really did not respond to the fusion. And it was our hope that the therapy program that we placed him in would improve that. I don’t think that the soft tissue component, that is the muscle and ligament component, was necessarily improved very much at the end of the day.” See Dr. Kennedy deposition, pages 25-26.

Dr. Kennedy testified that when the claimant first presented with “50 percent limitation of lumbar motion and the continuous persistent pain,” the claimant was not fit to work. When asked why the doctor’s opinion changed with regard to the claimant’s ability to work after surgery, even though the claimant still had fifty percent loss of motion and persistent pain, Dr. Kennedy testified “the restrictions that we are placing on him are fairly comprehensive . . . [s]o I don’t think he was eligible to return to anything resembling his normal activity.” See Dr. Kennedy deposition, page 27. Dr. Kennedy testified that his opinion regarding the claimant’s ability to work would be affected if the claimant were unable to sleep more than an hour at a time. “Yes, I think if he were excessively fatigued during work hours he’d probably fall asleep and get fired.” See Dr. Kennedy deposition, page 27. Dr. Kennedy testified that if one of his patients were unable to sleep more than two or three hours at night and were obliged to sleep on and off during the day in different positions, that person would be unable to work. See Dr. Kennedy deposition, pages 27-28.

Mr. Israel

Mr. Israel did not evaluate the claimant in person. Mr. Israel opined, “Mr. Kriegel’s exertional guidelines permit him to engage in many light, sedentary and light jobs in the labor market. However, he is presently challenged by the nonexertional factor, pain management.” See Israel deposition, page 23. Mr. Israel testified that the claimant was “significantly disadvantaged” when considering his “age, education, current skills, and overall physical restrictions, combined with the job opportunities within his work specifications” See Israel deposition, page 24. Mr. Israel testified that the claimant’s pain must be effectively managed before he would be employable. See Israel deposition, pages 23-27, 29, 39-44, 46-51. Ultimately, Mr. Israel testified that the claimant’s efforts to locate, apply for, obtain, adapt to, and maintain a suitable job would be at present quite challenging until his pain is effectively managed. See Israel deposition, page 50. Under these combined circumstances, [the claimant] is significantly disadvantaged to compete in the open labor market. See Israel deposition, page 24.

Dr. Stillings

After administering the MMPI-II, and meeting with the claimant on one occasion, Dr. Stillings opined that the claimant did not suffer from any psychiatric disorders, but did have somatoform and dependent personality; the claimant’s stressors in his life included financial stressors of his Social Security appeal and his workers compensation claim. Although Dr. Stillings testified that the claimant “made it quite clear that he has no interest in

psychiatric treatment, and he has no interest in treatment for a sleep disturbance, that he does not want to take psychotropic medications and he feels there is nothing wrong with him from a psychiatric standpoint,” Dr. Stillings also opined that the claimant’s “MMPI pattern shows somatoform features which indicate that he is likely—that it is likely that he will over-report physical symptoms such as pain complaints when under stress such as his current financial stress and to the extent closure of his legal case would be therapeutic for him.” See Dr. Stillings deposition, pages 19-20.

Dr. Stillings did not have a complete copy of the medical records, including the repeat CT/myelogram following the claimant’s surgery, but did not believe a complete set of the medical would change his opinion. See Dr. Stillings deposition, pages 28, 30. Dr. Stillings offered to produce a supplemental report if he were provided with a complete copy of the medical and compensated for his time. See Dr. Stillings deposition, pages 30, 40. Dr. Stillings opined that the claimant had the characteristic of invalidism, meaning he adopted the sick role and was dependent upon others to take care of him. See Dr. Stillings deposition, pages 36-37. Dr. Stillings did not take a history from the claimant who, if anyone, was currently caring for him. See Dr. Stillings deposition, pages 36-37. Dr. Stillings testified that he did not believe there was an organic cause for the claimant’s current complaints, and was apparently unaware that there was an incomplete low back fusion. See Dr. Stillings deposition, pages 36-37, 39, 40. Dr. Stillings testified that the MMPI as a probative tool is not perfect. See Dr. Stillings deposition, page 47.

FUTURE MEDICAL CARE

Awards may and often do include an allowance for the expense of reasonable future medical care and treatment. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo. App. W.D. 2001). Future medical care and treatment are provided for in Section 287.140.1, which states:

In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

This statute has been interpreted to mean that a claimant is entitled to compensation for care and treatment “which gives comfort [relieves] even though restoration to soundness [cure] is beyond avail.” Id. Of course, the appellant bears the burden to prove an entitlement to benefits for such care and treatment. Id. To prove an entitlement to workers’ compensation benefits for future medical care and treatment, an employee must show something more than a possibility that he will need such medical care and treatment. Id. However, the claimant is not required to present evidence demonstrating with absolute certainty a need for future medical care and treatment. Id. Rather, it is sufficient for the claimant to show his/her need for additional medical care and treatment by a “reasonable probability.” Id. “‘Probable’ means founded on reason and experience which inclines the mind to believe but leaves room for doubt.” Id. “In determining whether this standard has been met, the court should resolve all doubt in favor of the employee.” Id. “[A] claimant is not required to present evidence of specific medical treatment or procedures which will be necessary in the future in order to receive an award for future medical care.” Id. Such a requirement could “put an impossible and unrealistic burden” upon the claimant. Id. The only requirement is that the finding of a need for future medical care and treatment be shown to be reasonably probable and be founded upon reason and experience. Id.

Where future medical benefits are to be awarded, the medical care must of necessity flow from the accident, via evidence of a “medical causal relationship” between the injury from the condition and the compensable injury, before the employer is to be held responsible. Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985). Future medical may be awarded even though the claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271 (Mo.App. 1996). “The worker’s compensation act permits the allowance for the cost of future medical treatment in a permanent partial disability award.” Sharp v. New Mac Electric Cooperative, 92 S.W.3d 351, 354 (Mo. App. S.D. 2003). There is no requirement for a claimant to prove specific medical treatment will be required in order for payment of future medical expenses to be made available. Id. What is required is proof there is a “reasonable probability” that additional medical care will be needed to treat the work-related injury. Id.

In this case, Dr. Kennedy reported that the claimant had persistent pain in December 2003 but offered no further treatment recommendations. See Dr. Kennedy deposition, page 17, 25. Dr. Musich recommended additional treatment for chronic low back pain and depression stemming from the May 21, 2002 injury. See Dr. Musich deposition, page 24. The claimant testified that he uses his narcotic pain medication, hydrocodone, sparingly, because he wants to make it last. The evidence compels a finding that ongoing pain management for the claimant’s chronic low back and left leg pain is required due to the accident, and the claimant is awarded future

medical care for ongoing pain management for the claimant's chronic low back and left leg pain by a medical provider to be selected by the self-insured employer.

PERMANENT DISABILITY

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). The standard for determining whether Claimant was permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. Joultzouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997). "Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

In this case, the claimant testified that he has difficulty sleeping at night, needs to lie down on the floor during periods each day, needs to change positions frequently, has difficulty with stairways, and can only walk three blocks. If he did not have those limitations, the claimant would certainly be employable in various light or sedentary employment positions in the open labor market. Both vocational experts opined that the claimant is not employable in the open labor market unless the claimant's pain is under control. See England deposition, page 24, and Israel deposition, pages 39, 40, 44. Dr. Kennedy opined that if the claimant were fatigued during the day due to lack of sleep at night, he would probably fall asleep and be fired. See Dr. Kennedy deposition, page 27.

The defense suggests that the claimant does not actually have those limitations, because the medical experts took no medical history of those limitations. However, it is not clear whether any of the experts asked the

claimant whether he had any of those restrictions. In addition, the defense argues that the claimant has not searched for employment since the accident. The evidence clearly supports a finding that the claimant cannot return to his prior occupation due to his physical restrictions enumerated by Dr. Kennedy and Dr. Musich. Under Missouri law, vocational rehabilitation is optional on the part of the employer. Had the employer placed the claimant in a vocational rehabilitation program, perhaps the claimant would be more able to pursue employment. However, without control of the claimant's pain and vocational rehabilitation, the effort would be futile according to the two vocational experts that testified. The defense experts presented equivocal testimony whether the claimant can work in a light to sedentary capacity. Although they testified that the claimant is employable without considering the effect of the claimant's pain condition, the effect of the claimant's lack of control over his pain suggests that the claimant is not employable in the open labor market. The defense experts testified about two important points supporting a finding of total disability. First, Dr. Kennedy testified that he counseled the claimant to apply for Social Security Disability, suggesting that he thought there was a good chance the claimant would prevail under the Social Security Disability standards. He testified that the claimant's symptoms prior to surgery were significantly similar to the symptoms the claimant had at the date of maximum medical improvement. Second, Mr. Israel opined that the claimant is significantly disadvantaged in obtaining employment and opined that the claimant cannot work with his current pain level. See Israel deposition, pages 39, 40, 43, 44. Therefore, based on the evidence, the claimant is unemployable in the open labor market.

Looking to the extent of disability from the last injury alone, Dr. Musich was the only expert who testified as to percentages of disability attributable to the May 21, 2002, accident, and he opined that the claimant suffered an eighty percent permanent partial disability to the low back over and above any preexisting disability. In addition, Dr. Musich opined that the claimant was permanently and totally disabled due to the accident of May 21, 2002, and the claimant's intractable low back pain and left leg pain, the age, education, lack of transferable skills, and need to constantly change position. See Dr. Musich deposition, pages 24, 41. Although the claimant had a preexisting twelve percent permanent partial disability to his low back, he had no restrictions or limitations before the 2002 accident, and none of the experts opined that the last injury alone was not so severe as to cause the claimant's unemployability alone. The testimony appears to revolve around the severity and pain from the last injury alone.

Based on the above, the last injury alone rendered the claimant permanently and totally disabled. Therefore, the claimant is awarded permanent total disability benefits from the self-insured employer beginning December 24, 2003, less any payments for temporary total disability and advances on permanency paid after December 23, 2003.

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).

2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability

and the subsequent compensable injury must equal a minimum of fifty weeks of disability to “a body as a whole” or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers’ incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, “previous disability” should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1, RSMo 1994, contains four distinct steps in calculating the compensation due an employee, and from what source:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) The employer’s liability is considered in isolation - “the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability;” (2) Next, the degree or percentage of the employee’s disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Having found that the self-insured employer bears liability for the claimant’s permanent total disability, the Second Injury Fund has no liability in this case.

Date: _____

Made by: _____

EDWIN J. KOHNER
Administrative Law Judge
Division of Workers’ Compensation

A true copy: Attest:

Gary J. Estenson
Acting Director
Division of Workers’ Compensation