

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

Injury No.: 01-096736

Employee: Mark L. Lewis
Employer: F.E. Moran
Insurer: Zurich North American
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 8, 2001
Place and County of Accident: Franklin County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge (ALJ) dated September 23, 2004. The award and decision of Administrative Law Judge Kevin Dinwiddie, as issued September 23, 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 16th day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Mark L. Lewis

Injury No. 01-096736

Employer: F. E. Moran
Add. Party: State Treasurer, as Custodian of the
Second Injury Fund
Insurer: Zurich North America
Hearing Date: 7/16/04; finally submitted 8/13/04

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: KD:df

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: 8/8/01
5. State location where accident occurred or occupational disease was contracted: Franklin County, MO
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:
Employee injured while lifting a heavy pipe.
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 and total disability due to the work injury.
15. Compensation paid to-date for temporary disability: \$58,128.32
16. Value necessary medical aid paid to date by employer/insurer? \$202,924.22
17. Value necessary medical aid not furnished by employer/insurer? n/a
18. Employee's average weekly wages: \$1,151.20
19. Weekly compensation rate: \$628.90/\$329.42
20. Method wages computation: By agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: n/a

92-3/7 weeks of temporary total disability (or temporary partial disability)
at \$628.90 per week [previously paid].....\$58,128.32

Permanent total disability benefits from Employer beginning on 5/14/03 through 7/16/04, the date of hearing, and thereafter for so long as the condition of permanent total disability continues to subsist

22. Second Injury Fund liability: No
Claim as against the Second Injury Fund is denied. See Award.

TOTAL: UNDETERMINED

23. Future requirements awarded: n/a

Said payments to begin as of date of 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:

D. Andrew Weigley

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mark L. Lewis

Injury No: 01-09636

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: F. E. Moran

Add. Party: State Treasurer, as Custodian of the
Second Injury Fund

Insurer: Zurich North America

Checked by: KD:df

The claimant, Mr. Mark L. Lewis; the employer and its insurer, F.E. Moran and Zurich North America; and the State Treasurer, as Custodian of the Second Injury Fund, appeared at hearing by and through their counsel and entered into certain stipulations and agreements as to the issues and evidence to be presented in this claim for compensation. The parties agreed that on or about the 8th day of August 2001, the claimant suffered an injury by accident arising out of and in the course of employment. The parties further agree that the two issues to be resolved at hearing are as to the nature and extent of permanent disability, and as to the liability of the Second Injury Fund for the combination of disabilities.

Mr. Lewis appeared at hearing and testified on his own behalf. The claimant further submitted the deposition testimony of Thomas F. Musich, M.D., and of Mr. James M. England, Jr. The employer and insurer submitted the deposition testimony of Barry L. Samson, M.D., and of Ms. Karen Kane.

EXHIBITS

The hearsay objection made by the Second Injury Fund as to the offer of the various settlement stipulations as contained in Claimant's Exhibit K is sustained as to the Second Injury Fund. Claimant's Exhibit K is otherwise received in evidence without other objection. The following exhibits are in evidence:

Claimant's Exhibits

- A. Deposition of Thomas F. Musich, M.D., taken on 12/9/03
- B. Deposition of Mr. James M. England, Jr., taken on 2/05/04
- C. Certified medical records of Lincoln County Medical Center
- D. Medical records of Tri-County Occupational Health Services (Dr. Pearson)
- E. Medical records of Dr. Robert C. Heim, Jr.
- F. Certified medical records of Physicians' Pain Clinic (Dr. J. Al Vellinga)
- G. Certified medical records of Faisal Albanna, M.D.
- H. Certified medical records of St. Anthony's Medical Center
- I. Certified medical records of Professional Rehabilitation Services
- J. Certified medical records of Premier Care Orthopedics
- K. Certified records of the Division of Workers' Compensation

Employer and Insurer's Exhibits

- 1. Deposition of Barry L. Samson, M.D., taken on May 12, 2004
- 2. Deposition of Karen Kane Thaler, taken on July 15, 2004

FINDINGS OF FACT AND CONCLUSION OF LAW

The claimant, 44 years old as of the date of hearing in this matter, was last employed as a sprinkler fitter, performing the installation of fire suppression systems on behalf of the named employer, F.E. Moran. The work involved the lifting of piping for overhead installation, with the assistance of lifts and ladders. Mr. Lewis would assist to carry the pipe from the truck to the installation site. The weight of the pipe would vary according to its size, and the claimant would be obliged to lift, with the assistance of another, pipe weighing as much as 200 to 300 pounds.

On 8/8/01 Mr. Lewis was injured while working on a "retrofit" job involving sprinkler systems in place at the Labadie Power Plant. Claimant attempted to lift one of the heavier pipes with the assistance of his work partner, and was obliged to drop the pipe with the onset of lower back and leg pain after having lifted the pipe just a few inches off of the ground.

Mr. Lewis sought immediate medical attention that same day at Lincoln County Memorial Hospital. Medical records (Claimant's Exhibit C) indicate that on 8/8/01 and again on 9/01/01 the claimant treated for back and lower extremity pain.

On 8/9/01 Mr. Lewis began treating with Dr. Ronald L. Pearson (See Claimant's Exhibit D). Dr. Pearson initially prescribed bed rest, the use of heat and cold packs, and medication for complaints of acute low back pain. On 8/13/01 the claimant returned for a follow up, and was prescribed physical therapy three times a week for the next two weeks. Claimant attended eight physical therapy sessions at Professional Rehabilitation Services through early September of 2001, but had no relief of his pain complaints. On 8/21/01 Claimant had a follow up with Dr. Pearson, who ordered an MRI to rule out possible disc herniation. An MRI performed at Open MRI of St. Charles County on 8/22/01 revealed a bulging disc at L3-4, and a moderate size posterior herniation of the disk at L4-5.

Claimant was then referred to Dr. Vellinga, a pain management specialist, who on 9/13/01 performed the first of what was scheduled to be as many as three epidural steroid injections to the low back. The records of Dr. Vellinga suggest that the first injection had less than the desired result, and after a CT and consultation with the claimant on 9/19/01, claimant chose to see a neurosurgeon before considering further injection therapy (See Claimant's Exhibit F).

Mr. Lewis had an initial consultation with Dr. Robert C. Heim on 9/21/01 (Claimant's Exhibit E). Dr. Heim took a history from the claimant; reviewed an MRI and CT; performed a physical examination of Mr. Lewis; and determined that the claimant presented with a pre-existing and severe spinal stenosis at L4-5, made symptomatic by a work related accident. Dr. Heim discounted further epidural steroid as being of any potential benefit, and discussed with Mr. Lewis the possibility of having a decompressive laminectomy at L4-5.

On 9/27/01, at St. Luke's Hospital, Dr. Heim performed decompressive laminectomies and foraminotomies at L4 and L5. A discharge summary by Dr. Heim dated 9/28/01 suggests that claimant was released from the hospital on that date with "total resolution of his lower extremity pain and paresthesias".

Claimant testified at hearing that after his first back surgery, he suffered from headaches and from swelling at the incision site on his back. An operative note dated 10/11/01 indicates that on that date Dr. Heim performed a second surgery to repair a lumbar cerebrospinal fluid leak. Follow up records indicate that the claimant had a resolution of his headaches and was discharged from the hospital on 10/13/01, and was to follow up with postoperative care.

An office note dated 11/02/01 indicates that the claimant met with Dr. Heim and complained of the onset of radicular pain

and paresthesias in his right lower extremity. On 11/05/01 a lumbar myelogram and post-myelogram CT scan revealed the presence of a recurrent cerebrospinal fluid leak. Claimant elected to seek care elsewhere, and was subsequently referred to Dr. Faisal Albanna.

On 11/8/01 Dr. Albanna performed an initial evaluation of Mr. Lewis, and his findings included a recurrence of right lower extremity sciatic type pain with paresthesias; headache; and a "fluent palpable fluid collection at the lower end of the incision". Dr. Albanna then scheduled the claimant for surgery for repair of the spinal fluid leakage, with further discectomy and possible lumbar interbody fusion if deemed necessary. On 11/9/01 Dr. Albanna performed the third back surgery had by Mr. Lewis, and the following excerpt from the operative note (See Claimant's Exhibit G) is illustrative of what Dr. Albanna found:

There was a considerable amount of spinal fluid leakage of the dura close to the right L4 nerve root with nerve rootlet herniation through the tear that seems to have resulted from a sharp edge on the bone poking into or rubbing against the dura. In addition to that, the left L5 nerve root was found to be thinned out with a hole at the root entry zone in the dura. There was not a whole lot of leakage from that area. Before repair of the dura, the disk at L4-L5 was inspected and was found not to be herniated. There was a very small spur formation with calcification at the right L4-L5. It was not compressing the thecal sac or the right L5 nerve root. This was left alone and a decision was made not to proceed with lateral fusion and instrumentation because of the minimal finding and because of the intact pedicles and the lack of instability as assessed intraoperatively.

Postoperatively, the claimant had resolution of his headache complaints after six days of hospital rest, and was discharged from the hospital a week after the surgery. Claimant continued to suffer from spinal fluid leak, and Dr. Albanna performed a fourth surgery on 11/26/01. On December 1 of 2002, Mr. Lewis was discharged to home, with no drainage of cerebrospinal fluid at the incision sites and without headaches.

Thereafter, while under the care of Dr. Albanna, claimant participated in further physical therapy at Professional Rehabilitation Services. Mr. Lewis testified that the physical therapy he had did nothing to alleviate his complaints, and only made them worse. In certain office notes from May and July of 2002, the office of Dr. Albanna documents a history of complaint from Mr. Lewis as to shooting pains that are described as feeling like electric shocks. The same complaints can be found in a physical therapy note dated 6/17/02.

Mr. Lewis had further diagnostic evaluation in May of 2002 (myelogram/CT) and in July of 2002 (Lumbosacral Discography/CT). Dr. Albanna reviewed the diagnostics, and encouraged the claimant to pursue therapy, rehabilitation, and work hardening as a preferred option to a lumbar interbody fusion. That recommendation notwithstanding, on 9/11/02 Dr. Albanna performed an anterior lumbar interbody fusion with cages at L3-4 and L4-5, plating and screws, and with bone grafting from the right iliac crest. Dr. Albanna notes that he chose an anterior approach as opposed to a posterior approach due to the earlier problems related to spinal fluid leakage.

Claimant had follow up visits with the office of Dr. Albanna post his fusion surgery. On 10/3/02 Dr. Albanna noted that the instrumentation was intact, and the fusion in progress. Claimant was prescribed passive modalities of physical therapy. Claimant attended nine physical therapy sessions prior to his next follow up with Dr. Albanna on 10/31/02. Claimant was noted to be progressing, and physical therapy was continued. Claimant returned to the office of Dr. Albanna on 12/12/02 and was examined by Dr. Alexander Beyzer. Claimant was scheduled for work hardening and a function capacity evaluation, with his ability to return to work to be evaluated after work hardening. A report from the physical therapist indicates that the claimant gave a good effort during his work hardening sessions, with symptoms complained of including back pain, "shocks" in the feet, hip pain, and left testicular pain and swelling.

A functional capacity evaluation dated 1/27/03 indicates that the claimant gave maximal effort; that objective signs coincided with statements of discomfort made by the claimant as to his back over the course of the testing involving truck and hip flexion; that the claimant's ability to perform day to day could not be measured since only a one day test was performed; and that given the claimant's description of his work duties, a return to work was not recommended at that time. Claimant was noted to exhibit decreased ROM of the trunk; decreased strength of hips; and decreased general endurance.

In his office note dated 1/28/03 Dr. Albanna states that he reviewed the functional capacity evaluation; took an x-ray that showed good fusion in progress; and concluded that the claimant would benefit from a second round of work hardening. Thereafter, the claimant was engaged in a second round of work hardening beginning on 2/24/03. Claimant was noted as being cooperative, and was credited with giving good effort during all four of the sessions attended. He was noted to have missed one of the five sessions scheduled due to complaints of increased pain.

On March 11 of 2003 Dr. Albanna reviewed x-rays showing a good fusion; concluded that further physical therapy and work rehabilitation would be pointless; gave the claimant an indefinite 30 pound lifting restriction; and advised that the claimant return in two months to assess maximum medical improvement.

Mr. Lewis has never had an occasion to return to the office of Dr. Albanna after his final visit on 5/13/03. X-rays taken that date were interpreted as showing good fusion progress. Dr. Albanna concluded that claimant had reached maximum medical improvement, and opined that the claimant would not be capable of lifting more than 30 pounds on the job, and would be unable to perform any repetitive action without a half an hour of a break thereafter.

PERMANENT DISABILITY/LIABILITY OF THE SECOND INJURY FUND

Claimant is a high school graduate, and for the nineteen years prior to his low back injury he has worked out of the union hall as a sprinkler fitter. Mr. Lewis acknowledged that he has also worked as a foreman, in charge of as many as 15 people in a work crew. Prior employments included working as a pipe fitter for a year; as a pipe coverer; as a laborer; as the manager of a self-storage facility; and certain other jobs such as restaurant work. Mr. Lewis has never had a desk job; never has worked in a retail store; and has no experience with cash registers or with computers.

Claimant suffered a back injury in his youth, and certain diagnostics have been interpreted as showing an old fracture of L-4. Claimant acknowledges having had back complaints prior to his injury on 8/8/01, noting that he has had occasional chiropractic treatment and has missed work in the past on account of back complaints. Mr. Lewis also suffered a prior neck injury, leading to an anterior cervical discectomy and fusion at C6-C7 as performed by Dr. Schoedinger on 5/20/96. Mr. Lewis testified that after his neck injury, he has had constant pain, and that looking up to install pipe aggravated his complaints, and caused him to have severe headaches. Claimant further testified that he continued to work as a sprinkler fitter despite his neck complaints, and that he did miss time from work due to those complaints. Claimant also exhibited at hearing a subtle but apparent tremor, cause unknown, that comes on perhaps as many as 20 to 40 times in a day.

Mr. Lewis testified that he suffered a prior wrist fracture, and that he has had right wrist complaints to the extent that his wrist would "lock up" and that he would be unable to use a wrench with that hand. Claimant also claims that he has a carpal tunnel syndrome worse in the right as opposed to his left hand. In 1996 Mr. Lewis suffered an injury to the distal joint of his right ring finger, and complains of numbness in the tip of that finger.

Subsequent to his release from care for his low back injury, Mr. Lewis complains of constant low back pain that is at times severe in nature. Mr. Lewis further notes that he suffers from what he describes as "electric shocks" of varying intensity, from bad to slight, within his feet, toes and the sides of his legs, and further notes that these shocks come on as many as ten to twenty times in a day. Claimant relates that such each such shock may be as much as five seconds or so in duration. On cross-examination on behalf of the Second Injury Fund, Mr. Lewis related that his back pain is aggravated by prolonged sitting, standing, and by repetitive use. Mr. Lewis further related that as many as 20 to 40 times in a week he will lay down for a period of minutes to hours at a time to relieve himself of back pain.

Mr. Lewis relates that he has not worked since his back injury; has not sought work; and doubts that his pain complaints would enable him to maintain a job. Claimant acknowledges that he is not currently on medication, and that he has a driver's license and is able to drive. Claimant relates that a typical day involves performing stretching exercises; reading; watching television; and performing such chores as mowing in low gear on a riding mower and washing windows.

There is no dispute among the various treating and evaluating physicians as to the causal connection between the claimant's complaints of ill-being in the low back and his work injury on 8/8/01, leading to a series of five surgeries to the low back, the last of which was the two level fusion performed by Dr. Albanna. Dr. Samson, testifying on behalf of the employer and insurer, acknowledges that it is his belief that claimant suffered that type of lumbar strain and resulting symptoms that suggest the work injury was a substantial factor as to the need for all of the surgeries had by Mr. Lewis as to his low back (Employer and Insurer's Exhibit No. 1, at p. 10).

Furthermore, the restrictions recommended by the doctors, following what by all accounts was a successful fusion of the low back at L3-4 and L4-5, are fairly consistent with one another. Doctors Albanna and Samson conclude that the claimant be best advised to limit his lifting to under thirty pounds (Dr. Musich suggests a 25 pound restriction), and all three would proscribe repeated movements such as bending, stooping, and lifting.

As to permanent disability, Mr. James M. England, Jr., the claimant's vocational expert, would agree that these limitations alone would not support a conclusion that the claimant has been rendered unemployable on the open labor market. When asked the central question as to claimant's ability to compete for employment, Mr. England responded as follows:

I felt with the combination of problems that he appeared to have, the physical problems, the emotional effect that it had on him, how he appeared to come across in an interview, I didn't feel, number one, that he would be able to go out and successfully compete with other people and actually get hired.

I think just the impression he would make would be not very favorable because of the obvious physical difficulties, as well as the emotional problems.

But I think over and above that, I really, you know, if he could actually function at the level that the doctors talked about, there probably would be some things out there that he could do. (Claimant's Exhibit B, at p.p. 15,16, emphasis added).

This frank acknowledgement by Mr. England puts squarely in issue the credibility of the complaints of Mr. Lewis. If his complaints are deemed unworthy of belief in part or in whole, then the opinion of Ms. Thaler, the Employer and Insurer's vocational expert, becomes more plausible to the effect that the claimant is employable on the open labor market. Ms. Thaler performed an analysis of the claimant's employability based on a review of the records made available to her. Ms. Thaler did not perform her own testing, nor did she have the opportunity to interview the claimant and elicit a history of complaint. Ms. Thaler concluded that

Mr. Lewis would be capable of competing for full time employment in certain customer service employments comparable to the following: automobile sales representative; service writer; desk clerk; or greeter. Ms. Thaler also listed the occupation of security guard as one that fit within claimant's limitations.

Further compounding the issue is the unusual medical history in this matter, and the unusual nature of some of the involved symptoms. For example, this is not a case involving an alleged pseudoarthrosis, which is a more common scenario in which a failed back fusion has been ineffective in stabilizing the spine and in eradicating the cause of unrelenting pain. This case, in contrast, involves an initial decompressive back surgery. Dr. Musich notes that while development of a cerebral spinal leak is a possible consequence of a laminectomy procedure, it is not a frequent complication. (Claimant's Exhibit A, at p. 22). Claimant had three surgeries to repair such leaks, followed by the fusion surgery. The only medical bearing on the quality of the fusion result (the medical of Dr. Albanna) suggests that the fusion was solid. Dr. Samson notes that claimant acknowledged that the fusion surgery resolved the shooting pain down his legs, and Dr. Musich, at page 4 of his written report, noted "Straight leg raising test is negative for true radiculopathy in either lower extremity".

The same physical complaints made by Mr. Lewis at hearing were given as a part of the history elicited by Dr. Samson prior to his examination of Mr. Lewis on 2/27/04, including complaints of constant shocks in the feet, toes, and legs. The following question and answer on the subject of those complaints was had between Dr. Samson and counsel for the Second Injury Fund:

Q: Doctor, just quickly. The symptoms and complaints that Mr. Lewis told you he had in regards to his low back that he has today. Are those something that is not unexpected based on the surgeries he's had?

A: You mean his 2004 complaints?

Q: Correct. In regard to his low back.

A: They aren't totally typical in terms of these little burnings and shocking things, but the fact of somebody that's had this amount of back surgery that has back complaints doesn't surprise me.

Q: So it's not out of the realm of possibility?

A: Correct.

Rehabilitation records indicate that the claimant was cooperative and gave good effort. The physical therapist further noted that claimant's functional level varied indirectly with his pain level, which varied from day to day.

The test for permanent total disability is whether, given the claimant's situation and condition, he is competent to compete in the open labor market. Laturno v. Carnahan, 640 S.W.2d 470, 472 (Mo.App. 1982). This test measures the worker's prospects for returning to employment. Patchin v. National Supermarkets, Inc., 738 S.W.2d 166, 167 (Mo.App. 1987). Total disability means the inability to return to any reasonable employment; it does not require that the employee be completely inactive or inert. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990). The question is whether in the ordinary course of business an employer would reasonably be expected to hire the claimant in his present physical condition, reasonably expecting him to perform the work for which he is hired. Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982).

Mr. Lewis is found to be a credible witness; his history of complaint to be consistent with the various medical and physical therapy records in evidence; and his testimony to be generally trustworthy. The testimony of Mr. Lewis as to his physical complaints can therefore be incorporated into these findings of fact by this reference.

Dr. Musich performed a disability evaluation of Mr. Lewis on May 30, 2003. Dr. Musich concluded that claimant suffered a permanent partial disability equivalent to 70% of the man as a whole as a result of the work injury on 8/8/01, and further concluded that the claimant suffered a permanent and total disability as a result of the combination of the low back injury and a prior disability to the cervical spine. Dr. Musich notes that the claimant complained of chronic cervical pain, decreased mobility and muscular fasciculations for the paracervical musculature since 1996. Dr. Musich notes, "Mr. Lewis denies any significant symptoms or upper extremity radiculopathy", and further notes, "Spurling maneuver does not demonstrate any significant upper extremity radiculopathy". Dr. Musich found palpable paracervical muscle spasm and trigger points, and acknowledged that there was no evidence of peripheral neuropathy in either upper extremity (See report of Dr. Musich dated 5/30/03, Exhibit 2 to Claimant's Exhibit A). In the course of offering a rating of disability referable to the cervical spine, Dr. Musich offers no opinion as to functional restrictions relative to the cervical spine.

The testimony of Mr. Lewis persuades that the history of cervical fusion surgery by Dr. Schoedinger in May of 1996 notwithstanding, claimant was able to return to his occupation as a sprinkler fitter, a heavy category of employment, without medical restriction. His testimony further persuades that until his low back injury in August of 2001, he was able to fulfill all of the requirements of sprinkler fitter on a daily basis.

In the course of rendering his opinion as a vocational expert, Mr. England was asked and opined as follows:

Q: Okay. And you reviewed Dr. Musich's report. Did you have the opportunity to review Dr. Musich's deposition?

A: No.

Q: Okay. But you relied on Dr. Musich's restrictions in part in forming your opinion of his employability?

A: Correct.

Q: And in your opinion is there any job that Mr. Lewis could do with his low back injury and its sequela, along with his age, education, transferable skills that any of his preexisting conditions would prevent him from doing? Do you want me to ask that again?

A: Yes.

Q: Is there any job that you can think of that Mr. Lewis would be capable of obtaining and keeping in the open labor market based on just his low back and its symptoms and all the other sequela from that low back injury?

A: Not that I can think of, no.

Q: And so in your opinion would the low back injury and its sequela in and of itself render Mr. Lewis unemployable in the open labor market?

A: I think that based on my understanding of what it's done to him, I think that's probably true. (Claimant's Exhibit B, at pages 25, 26)

Mr. England acknowledges that he relied on Dr. Musich's restrictions in part in forming his opinion as to employability. In the absence of any restrictions offered by Dr. Musich as to the cervical spine, it would follow that the only restrictions from Dr. Musich considered by Mr. England in reaching his conclusions relate only as to the use of the low back following the injury on 8/8/01.

The opinion of Mr. England is as to the effect of the 8/8/01 injury on the ability of Mr. Lewis to compete for employment on the open labor market is supported by the testimony of Mr. Lewis at hearing as to his low back complaints, and by the substantial weight of the evidence in the record as a whole.

The testimony of Dr. Musich persuades that the claimant's current physical condition renders him unemployable. The testimony of Mr. Lewis as to his physical complaints, in conjunction with the testimony of Mr. England, persuades that the last injury alone, the low back injury suffered on 8/8/01, resulted in a permanent and total disability.

Dr. Albanna found the claimant to have reached maximum medical improvement on or about 5/13/03. The employer/insurer are to provide the applicable permanent total disability rate of compensation, stipulated at hearing to be \$628.90 per week, beginning on 5/14/03 and to the date of hearing in this matter, and thereafter for so long as the condition of permanent total disability continues to subsist.

Second Injury Fund Liability under Section 287.220.1 RSMo is premised on a finding that the last injury did not by itself result in a permanent total disability. The Second Injury Fund has no liability in a case where the employer is found liable for permanent total disability benefits. Roller v. Treasurer of the State of Missouri, 935 S.W. 2d 739 (Mo App. S.D. 1996). The claim as against the Second Injury Fund must be denied.

This award is subject to a lien in favor of D. Andrew Weigley, Attorney at Law, in the amount of 25% thereof for necessary legal services rendered.

This award is subject to interest as provided by law.

Date: _____

Made by: _____

KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Renee T. Slusher

Director

Division of Workers' Compensation