

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

Injury No.: 07-114432

Employee: Andrew Lingle  
Employer: Ryder Integrated Logistics (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have heard the parties' arguments, reviewed the evidence and briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated September 28, 2010. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Preliminaries**

The administrative law judge heard this matter to consider: (1) the liability, if any, of the Second Injury Fund; and (2) employee's claim for the cost of the proceedings under § 287.560 RSMo.

The administrative law judge concluded: (1) the Second Injury Fund is liable for 42 weeks of permanent partial disability; and (2) the Second Injury Fund defending this claim without reasonable ground and employee is entitled to a total of \$1,300.00 in fees and costs under § 287.560.

The Second Injury Fund filed a timely Application for Review with the Commission alleging that: (1) the administrative law judge erred in finding the Second Injury Fund liable for employee's fees and costs; and (2) the administrative law judge applied an excessive load factor to determine the Second Injury Fund's liability for permanent partial disability.

For the reasons set forth below, the Commission reverses the conclusion of the administrative law judge that employee is entitled to an award of attorney fees and costs in this matter. All other aspects of the award of the administrative law judge are affirmed.

**Discussion**

The question is whether the administrative law judge properly assessed costs and attorney fees against the Second Injury Fund. Section 287.560 RSMo provides, in pertinent part:

All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division

Employee: Andrew Lingle

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of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

Under the foregoing section, the general rule is that costs of a proceeding before the Division or the Commission shall be paid out of the state treasury from the fund for the support of the Division. *DeLong v. Hampton Envelope Co.*, 149 S.W.3d 549, 555 (Mo. App. 2004) (citations omitted). However, as an exception to the general rule, the Division or the Commission may assess the whole cost of the proceedings upon a party who, without reasonable ground, brought, prosecuted, or defended a proceeding before the Division or Commission. *Id.* (citations omitted). The "whole cost of the proceedings" includes all amounts the innocent party expended throughout the proceeding brought, prosecuted, or defended without reasonable grounds, including attorney's fees. *Id.* (citations omitted).

We exercise our discretion under § 287.560 RSMo with great caution and only where the case for costs is clear and the offense egregious. See *Nolan v. Degussa Admixtures, Inc.*, 276 S.W.3d 332, 335 (Mo. App. 2009). We disagree with the administrative law judge's finding that the Second Injury Fund defended this claim without reasonable ground. It was employee's burden to prove all of the elements of his workers' compensation claim, and the Second Injury Fund was entitled to challenge his ability to do so at a hearing before an administrative law judge. The record fails to disclose evidence sufficient to support a finding that the Second Injury Fund acted with the type of "egregious and outrageous conduct" exemplified in cases such as *Monroe v. Wal-Mart Assocs.*, 163 S.W.3d 501, 506 (Mo. App. 2005) and *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. 2003). Specifically, there is no evidence to indicate that the Second Injury Fund's failure to attend the scheduled deposition of Dr. Musich was intentional or otherwise the result of bad faith. Likewise, we are not persuaded that the Second Injury Fund's position in this matter was without reasonable ground such that employee is entitled to his attorney's fees incurred preparing for the final hearing. When we compare the facts of *Monroe* and *Landman* to the record before us, we are not persuaded that the Second Injury Fund engaged in the type of conduct that § 287.560 is designed to prevent.

In sum, we believe the award of costs and attorney fees is improper and reverse that portion of the administrative law judge's award. All other aspects of the award are affirmed.

### **Award**

The Commission reverses that portion of the award holding the Second Injury Fund liable for costs and attorney fees under § 287.560 RSMo. Each party shall bear their own costs and shall be responsible for their own attorney fees associated with this matter.

The award and decision of Administrative Law Judge Kathleen M. Hart, dated September 28, 2010, as modified, is attached hereto, and its findings and conclusions

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are incorporated to the extent they are not inconsistent with our findings and conclusions herein.

Given at Jefferson City, State of Missouri, this 7<sup>th</sup> day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

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Secretary

Employee: Andrew Lingle

**SEPARATE OPINION**  
**CONCURRING IN PART AND DISSENTING IN PART**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed without modification. I dissent from the majority's decision to deny the award of costs and fees in this matter. I would affirm the award of the administrative law judge allowing the award of fees and costs against the Second Injury Fund.

For the foregoing reasons, I respectfully dissent from the portion of the award denying employee's fees and costs under § 287.560 RSMo.

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John J. Hickey, Member

## AWARD

Employee: Andrew Lingle

Injury No.: 07-114432

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: Ryder Integrated Logistics (previously settled)

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

Additional Party: Second Injury Fund

Insurer: Self

Hearing Date: July 12, 2010

Checked by: KMH

### 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: October 25, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant injured his low back while lifting cases of oil in the course and scope of his employment.
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: body as a whole referable to the low back
14. Nature and extent of any permanent disability: 30% of the body as a whole referable to the low back previously paid by Employer.
15. Compensation paid to-date for temporary disability: \$12,796.80
16. Value necessary medical aid paid to date by employer/insurer? \$82,015.83

Employee: Andrew Lingle

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$319.94/\$319.94
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

120 weeks of permanent partial disability from Employer	(previously paid)
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22. Second Injury Fund liability: Yes

42 weeks of permanent partial disability from Second Injury Fund	\$13,437.48
Attorney fees and costs	\$ 1,300.00

TOTAL:	\$14,737.48
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23. Future requirements awarded: None

Said payments to begin immediately 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 the permanent disability award and \$1,300.00 in expenses in favor of the following attorney for necessary legal services rendered to the claimant:

James A. Fox

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

Employee: Andrew Lingle

Injury No.: 07-114432

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: Ryder Integrated Logistics (previously settled)

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

Additional Party: Second Injury Fund

Insurer: Self

Checked by: KMH

A hearing was held on the above captioned matter July 12, 2010. Andrew Lingle (Claimant) was represented by attorney James Fox. The Second Injury Fund (SIF) was represented by Assistant Attorney General Mike Finneran. Ryder (Employer) and Claimant settled the primary claim in this matter before trial.

Claimant alleges he sustained additional permanent disability due to the combined effects of his work related injury with his previous work injury.

### **STIPULATIONS**

The parties stipulated to the following:

1. Claimant was injured October 25, 2007, while in the course and scope of his employment for Employer.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was fully self insured.
4. Employer had notice of the injury and a claim for compensation was timely filed.
5. Claimant's average weekly wage was sufficient to entitle him to a PPD rate of \$319.94.
6. Claimant and Employer entered into a compromise lump sum settlement on October 19, 2009. The settlement was approved by the Division and represents 30% PPD to the body as a whole referable to the low back.

### **ISSUES**

The parties stipulated the issues to be resolved are the nature and extent of SIF liability and attorney fees and costs.

### **FINDINGS OF FACT**

Based upon the competent and substantial evidence, I find:

1. Claimant is a 43 year-old male who sustained a compensable injury October 25, 2007, while loading a trailer at work. Claimant's duties for Employer involved transferring auto parts from roll carts to steel cages and loading the steel cages onto tractor trailers.
2. Claimant injured his neck at work in 1994. He saw multiple medical specialists and had extensive treatment on his neck. In March 1996 he underwent a C5-6 fusion with iliac crest bone graft. He had extensive physical therapy and returned to work with no restrictions. He settled this case for 22.5% of the body referable to the cervical spine.
3. Leading up to his 2007 work injury and continuing, Claimant had ongoing problems as a result of his neck injury. The surgery relieved his arm complaints, but he has ongoing pain and permanent limitations in all ranges of motion. He is unable to lift his head to look up or work overhead. He has quit all the sports he played. He continues to take over the counter medication to relieve his neck pain.
4. On October 25, 2007, Claimant injured his low back at work when loading cases of oil onto a trailer. He saw numerous doctors, had injections, and underwent physical therapy. When conservative treatment failed, he was referred to Dr. Rutz who diagnosed a L5-S1 herniated disc with degenerative disc disease. Claimant also saw Dr. Robson who opined Claimant's work injury was the prevailing factor causing his condition. He performed a discectomy at L5-S1 with an interbody fusion and implantation of a cage June 9, 2008. Claimant had extensive physical therapy and was released from treatment without restrictions in November 2008.
5. Claimant returned to work full duty but had pain while working. He continued to work full time for Employer for the next five months until all employees were laid off due to the closing of the Chrysler plant.
6. Claimant continues to have difficulty with his low back. He has daily low back pain with some radiation into his legs. He limits his daily activities to manage his symptoms. He is unable to sleep more than a few hours because of low back pain. All his daily activities are a struggle. He can't play with his children like he used to. He can't sit for more than 30 minutes before he needs to change position. He feels he is never comfortable and has to frequently vary his position from sitting to standing or lying down. His pain has affected his ability to find other employment, and he is currently only working one day a week. He stands much of the day at work and has to take breaks to stretch.
7. On October 19, 2009, Claimant settled his back injury with Employer for 30% PPD to the body as a whole referable to the low back and left lower extremity.
8. Claimant's expert, Dr. Musich, examined him in March 2009 and issued a report. He noted Claimant had daily pain in his low back that restricts his activities and range of motion. He noted while Claimant's neck surgery relieved many of his symptoms, he continues to have neck pain with repetitive rotation, flexion and extension. Dr. Musich rated Claimant's disabilities at 30% of the lumbar spine and 25% of the cervical spine.

He opined the combination of Claimant's disabilities is greater than their simple sum and will continue to produce a hindrance in his routine activities.

9. Claimant is credible.

## **RULINGS OF LAW**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

- 1. Claimant's low back and neck injuries combine to produce a greater overall disability than their simple sum. This is best represented by a 20% load factor.**

Claimant's prior injury was compromised with Employer and assigned a permanent partial disability percentage of 22.5% of the cervical spine. This totals 90 weeks of disability. Based on the medical evidence and Claimant's testimony, I find this percentage accurately reflects Claimant's disability prior to his 2007 work injury.

Claimant's 2007 injury was compromised with Employer for 30% of the lumbar spine, for a total of 120 weeks of compensation. Based on the medical evidence and Claimant's testimony, I find this percentage accurately reflects Claimant's disability resulting from this injury.

Each of these injuries meet the statutory thresholds as set forth in §287.220(1) RSMO (2005). This section of the law also provides for compensation from the SIF when a claimant's preexisting disabilities combine with his work injury to create a greater overall disability. From all the evidence presented, I find this combination is best represented by applying a 20% load factor. The sum of Claimant's disabilities is 210 weeks. Applying a 20% load factor yields 42 weeks. At Claimant's compensation rate, he is entitled to, and the SIF is hereby ordered to pay, \$13,437.48 in compensation.

- 2. Claimant is entitled to \$1,300.00 in attorney fees and costs.**

Section 287.560 (RSMo 2005) provides "...if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them."

I find the SIF defended this claim without reasonable ground and award the cost of the proceeding against them.

There was no dispute Claimant sustained a compensable injury by accident arising out of and in the course of his employment. Claimant's prior injury was the subject of another workers' compensation claim. There was no dispute as to the nature and extent of Claimant's disability from that injury or from his primary injury. The SIF did not deny liability and

presented no evidence to refute that Claimant’s primary or preexisting injuries were a hindrance or obstacle to employment or re-employment.

The SIF refused to enter into settlement negotiations forcing Claimant to proceed to trial. The SIF required a medical deposition which they did not attend. Claimant incurred costs associated with that deposition. Claimant’s attorney stated on the deposition record the SIF was contacted about the deposition and received a notice. Mr. Fox called the AAG’s office before beginning the deposition and was told they were aware of the deposition but would not be attending. The medical evidence necessary to prove this case was in Dr. Musich’s report, and the deposition changed nothing. The SIF spurned all efforts to resolve the case, refused to negotiate, did not appear to cross examine Claimant’s medical expert, and forced the case to a contested hearing. Even when it was apparent the only evidence to be admitted at trial established SIF liability, the SIF refused to make a settlement offer. Such behavior is not attributable to Mr. Finneran but appears to have become commonplace on behalf of the SIF and constitutes a troubling trend, if not a policy, that cannot be countenanced.

The SIF is hereby ordered to pay a total of \$1,300.00 in attorney fees and costs. This consists of \$500.00 for the deposition and \$800.00 for attorney fees. Dr. Musich testified his bill for deposition preparation and time is \$250.00 per hour, a total of \$500.00 for this case. I do not award the costs of the report itself as it appears that was prepared in an effort to resolve the case with Employer. Claimant’s attorney testified he spent four hours preparing for deposition and trial. His fee is \$200.00 per hour. I find this is a reasonable hourly fee and a reasonable amount of time to prepare for a medical deposition, attend the deposition, prepare his client for trial, attend the trial, and prepare a proposed award. In his proposed award, Claimant’s attorney requested I award additional costs for the deposition court reporter’s expenses. There is no evidence in the record establishing the court reporter expenses, and I do not award these expenses.

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

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

KATHLEEN M. HART  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*