

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

Injury No.: 03-099559

Employee: David Maxwell
Employer: Hogan Transports, Inc.
Insurer: Zurich North American Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 25, 2003
Place and County of Accident: Crawford 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 dated May 7, 2007. The award and decision of Administrative Law Judge Jack H. Knowlan, Jr., issued May 7, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 18th day of October 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: David Maxwell

Injury No. 03-099559

Dependents: None identified

Employer: Hogan Transports, Inc.

Additional Party: Second Injury Fund

Insurer: Zurich North American Insurance Company

Hearing Date: February 14, 2007

Checked by: JK/kh

SUMMARY OF FINDINGS

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? August 25, 2003
5. State location where accident occurred or occupational disease contracted: Crawford County Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was driving a truck on Interstate 44 in Crawford County Missouri when he struck the rear of a Missouri Department of Transportation truck that was stopped in his lane of traffic.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Neck / cervical spine
14. Nature and extent of any permanent disability: 25% of the body as a whole
15. Compensation paid to date for temporary total disability: \$26,103.92
16. Value necessary medical aid paid to date by employer-insurer: \$58,573.57
17. Value necessary medical aid not furnished by employer-insurer: Undetermined
18. Employee's average weekly wage: \$916.74 (see findings)
19. Weekly compensation rate:
 - \$611.16 for temporary total disability and permanent total disability
 - \$347.05 for permanent partial disability
20. Method wages computation: 287.250.1(5) and 287.250.4
21. Amount of compensation payable:

Temporary total disability (\$611.16 per week for 38 3/7 weeks):	\$23,486.01
Permanent partial disability (\$347.05 per week for 100 weeks):	\$34,705.00
Total amount payable by employer-insurer:	\$58,191.01

22. Second Injury Fund liability: Permanent total disability benefits (see findings).
23. Future requirements awarded: Employer-insurer is directed to furnish additional or future medical aid pursuant to Section 287.140 (see findings).

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

The Compensation awarded to the 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: Joseph P. Rice

FINDINGS OF FACT AND RULINGS OF LAW

On February 14, 2007, the employee, David Maxwell, appeared in person and by his attorney, Mr. Joseph P. Rice, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Ms. Sarah Heise. The Second Injury Fund was represented at the hearing by Assistant Attorney General, Gregg Johnson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. On or about August 25, 2003, Hogan Transports, Inc. was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Zurich North American Insurance Company.
2. On or about August 25, 2003, David R. Maxwell was an employee of Hogan Transports, Inc., and was working under the provisions of the Missouri Workers' Compensation Act.
3. On or about August 25, 2003, the employee sustained an accident or that arose out of and in the course of his employment.
4. The employer had notice of the employee's August 25, 2003 accident.
5. The employee's claim for compensation was filed within the time allowed by law.
6. The employee's injury to his cervical spine and the post traumatic stress disorder with depression were medically causally related to the employee's accident.
7. The employer-insurer furnished medical aid in the amount of \$58,573.57.
8. The employer-insurer paid temporary total disability benefits in the amount of \$26,103.92. These payments covered 42 5/7 weeks that were paid in two separate time periods. The first period of temporary total disability benefits covered August 26, 2003 through May 24, 2004. The second period covered February 18, 2005 through March 15, 2005.

ISSUES

1. Average weekly wage and rate of compensation
2. Future medical aid
3. Nature and extent of disability
4. Liability of the Second Injury Fund

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical records from Missouri Baptist Hospital
- B. Medical records of Dr. Kee Park
- C. Medical records from Pemiscot Memorial Health System
- D. Medical records of Dr. Stephen Jordan
- E. Records of Health South
- F-1. Medical records of Dr. Andrew Wayne
- F-2. Claimant's intake sheet from Orthopedic and Sports Medicine

- G-1. Report of Dr. Jerome Levy
- G-2. November 17, 2005 letter from Dr. Jerome Levy
- H. Deposition of Dr. Jerome Levy
- I-1. Vocational report of Ms. Susan Shea
- I-2. Curriculum Vitae of Susan Shea
- J. Deposition of Susan Shea
- K. Accident report
- L. Photographs
- M. Comparative earnings of other truck drivers employed by Hogan Transports, Inc.
- N. Deposition of Dr. Kee Park
- O. Deposition of Dr. Andrew Wayne

Employer-Insurer's Exhibits

- 4. Deposition of June Blaine
- 5. December 29, 2006 Vocational Assessment of Ms. June Blaine

Note: Employer-insurer's exhibit's 1, 2 and 3 were duplicates of evidence offered and admitted by Employee, and were not submitted.

Second Injury Fund

- 1. June 2, 2006 deposition of employee

FINDINGS OF FACT

Based on the employee's testimony, the medical records and the other evidence admitted, I find as follows:

- David R. Maxwell ("employee") was 56-years-old at the time of the hearing. The employee had a high school education. His work history included employment at his father's service station, employment at a shoe factory (including work in a supervisory capacity), and driving trucks.
- In 1972 when the employee was 17-years-old, he was involved in a motor vehicle accident that resulted in a fusion of his cervical spine at the C4-5, C5-6 and C6-7 levels. After recovering from this injury, the employee had a significant loss of range of motion due to the three level fusion, and consequently had problems working overhead and lifting heavy weights. Otherwise, the employee was able to work full time without restrictions until the date of his accident on August 25, 2003. Prior to August 25, 2003, the employee's only limitation that impacted his ability to drive a truck was his limited ability to turn his head to the right and left.
- On August 25, 2003, the employee was driving a truck for Hogan Transports, Inc. The employee was a new driver for Hogan, and was scheduled to work as part of a team that was to be paid at the rate of \$.38 per mile. The employee's accident occurred on the first day of his third week of employment. During his first week, ending August 16, 2003, the employee did not drive the first three days due to orientation, and earned \$308.00 for three days of driving. For the week ending August 23, 2002, the employee earned \$254.00. The employee's accident occurred on August 25, 2003, at the beginning of his third week. The amount of time the employee was actually driving a truck and receiving wages as compensation for mileage driven was approximately 10 days or less than two calendar weeks.
- The employer-insurer based the employee's average weekly wage and rate of compensation for temporary total disability on comparative wages of other drivers for Hogan Transports, Inc. For sixteen weekly pay periods between May 10, 2003 and August 29, 2003, Deborah D. Copeland was paid a total of \$14,667.88, for an average weekly wage of \$916.74. It should be noted that although Ms. Copeland received a total of sixteen paychecks over sixteen weeks, two of those checks were assigned to the week of July 12, 2003, and no check was listed for the week of July 19, 2003. For the same sixteen week pay period, driver Alfonso C. Rodriquez received a total of \$13,195.88. Mr. Rodriquez's wage record is complicated by the fact that it included \$450.00 in unexplained bonus, and skips the pay period of July 5, 2003 through July 11, 2003. Mr. Rodriquez also has no earnings listed for the week of July 19, 2003 through July 25, 2003 (Employee's exhibit M).
- The employee's accident on August 25, 2003 occurred on Interstate 44 in Crawford County Missouri. The employee came over a hill and "rear-ended" a Missouri Department of Transportation Truck that was stopped in his lane. None of the "stripping crew" were injured, but the truck that the employee was driving skidded into the median and subsequently caught fire and burned.
- As a result of this accident, the employee injured his cervical spine at the C3-4 level. This was the level immediately above his pre-existing fusion from C4-5 through C6-7.
- After conservative treatment failed to relieve the employee's symptoms, Dr. Kee Park performed a C3-4 anterior cervical microdiscectomy, foraminotomy and interbody fusion on December 11, 2003 (Employee's exhibit B).
- Dr. Park's records indicate that following his surgery the employee developed problems swallowing. After 5 ½ months of extensive therapy and work conditioning, Dr. Park concluded the employee would not be able to return to driving a truck, and suggested vocational rehabilitation. On May 24, 2004 Dr. Park indicated the employee was at maximum medical improvement, and released him from his care. Dr. Park noted, however, that he had refilled the employee's prescriptions for pain medicine, and advised the employee that he would need to obtain subsequent medicine from his family doctor (Employee's exhibit B).

- In addition to his C3-4 fusion, the employee also developed post traumatic stress disorder, and received treatment from Dr. Stephen Jordan at St. Francis Medical Center. The treatment from Dr. Jordan commenced September 16, 2003, and continued until the employer-insurer stopped authorizing treatment by Dr. Jordan after the employee's April 25, 2004 visit (Employee's exhibit D).
- Although the surgery by Dr. Park helped relieve some of the employee's symptoms, the employee still has constant pain in his neck. He indicated that the pain is at the base of his skull and runs down both arms. The employee has very limited range of motion in his neck, and experiences severe pain with any type of activity that requires him to move his head or neck. The employee noted that after sitting up for an hour or two, just the weight of his head causes his neck pain to get worse, and he has to lie down to get relief. If he does not lie down, the employee gets severe headaches. On some occasions, the headache and neck pain becomes so bad that the employee gets sick at his stomach and "throws up".
- As a result of these symptoms, the employee had to move from his home in Fredericktown to Caruthersville to live with mother. Although the employee can drive for short distances, his symptoms get worse if he drives more than a few miles. The employee can cook by using small pans, and can do his laundry by taking breaks in a recliner between loads. Although the employee has made short trips to buy groceries, by the time he is finished, his pain is worse and he has to go home and rest.
- On two occasions, the employee has made efforts to see if he might be capable of working. On one occasion he rode with a friend on a mail delivery route, but after 45 minutes of "jarring" he couldn't stand it, and his neck pain was making him sick. The employee also spoke with a car dealer about selling cars because he thought he might be able to go home and rest when his pain got worse, but he was not able to get that job.
- The employee does not believe that he will be able to do any job that requires him to use his hands and arms. He noted that within 30 minutes, his arms get weak and start trembling. The employee does not believe he can do any job that requires him to sit or stand on his feet because sitting or standing very long increases his neck pain. The employee also noted that he cannot look up or down or side to side without moving his upper body.
- After he was released by Dr. Park, the employee requested additional treatment, and the employer-insurer authorized an evaluation by Dr. Andrew M. Wayne. Dr. Wayne specializes in physical medicine, rehabilitation, electrodiagnostic medicine, and practices with Orthopedic and Sports Medicine, Inc. Dr. Wayne initially saw the employee on February 18, 2005. Dr. Wayne diagnoses the employee as having cervicothoracic pain; status post remote cervical fusion C4-C7; cervical sprain/strain with C3-4 aggravation from the more recent accident with resulting C3-4 decompression and fusion; and post traumatic stress disorder and depression. Dr. Wayne recommended the employee remain off work, and prescribed a TENS unit and Valium. Dr. Wayne also gave the employee trigger point injections (Employee's exhibit F-1).
- On the issue of causation, Dr. Wayne stated "I do believe his medical treatment following this particular motor vehicle accident was a direct result of his injury occurring on August 25, 2003, and not a result of his previous fusion occurring about thirty years ago" (Employee's exhibit F-1).
- In a follow-up visit on March 10, 2005, Dr. Wayne prescribed Celebrex and kept the employee off work (Employee's exhibit F-1). By a letter dated March 15, 2005, Dr. Wayne concluded the employee had reached maximum medical improvement, but recommended he continue to use the TENS unit, utilize stretching with moist heat and take either Celebrex or other anti-inflammatory medication. Dr. Wayne did not believe the employee would be capable of safely driving his company vehicle, but thought he might be able to take part in more sedentary type work in an office setting (Employee's exhibit F-2).
- The employee's medical and vocational evidence included the reports and deposition testimony of Dr. Jerome Levy and Ms. Susan L. Shea. Dr. Levy examined the employee on September 27, 2005. Based upon his examination of the employee and his review of the medical records, Dr. Levy diagnosed the employee as having a history of a fractured cervical spine; status post fusions at C4-5, C5-6, and C6-7; status post new disectomy at C3-4; status post fusion at C3-4 with plates, screws, and bone grafts; and a cervical strain (Employee's exhibit H, page 6). Dr. Levy further concluded that the employee's August 25, 2003 accident caused the disc herniation and the resulting fusion at the C3-4 level (Employee's exhibit H, page 7). Dr. Levy assigned a 30% permanent partial disability for the employee's pre-existing three level fusion and a 30% permanent partial disability for the injury to the employee's cervical spine related to the employee's August 25, 2003 accident, for a total permanent partial disability rating of 60% (Employee's exhibit G-1).
- Dr. Levy agreed that the employee's pre-existing cervical fusion was a hindrance or an obstacle to employment or re-employment (Employee's exhibit H, page 9). He further concluded that the employee cannot function in the open labor market and is permanently and totally disabled due a combination of his pre-existing fusions and his August 25, 2003 injury to his cervical spine (Employee's exhibit H, page 10 and 13).
- On the issue of future medical treatment, Dr. Levy indicated the employee will require pain medication, and will need to be checked periodically to review the status of his fusion (Employee's exhibit H, page 12 and Employee's exhibit G-2).
- Susan Shea is a certified vocational rehabilitation counselor. Based on her interview with the employee and her review of the medical records, Ms. Shea concluded that the employee is not capable performing substantial work (Employee's exhibit I-1). Ms. Shea stated "my opinion is that he is not employable, and further, that any typical employer would not be likely consider hiring this man" (Employee's exhibit J, page8).
- In addition to the deposition of Dr. Levy and Ms. Shea, the parties also offered the depositions of Dr. Kee Park and Dr. Andrew Wayne. After reviewing his treatment records, Dr. Park gave the employee a 20% impairment rating for the C3-4 fusion. Dr. Park also discussed the restrictions he felt were appropriate for the employee. Dr. Park indicated the employee should not drive a truck, and should not lift more than 30 pounds on an occasional basis (Employee's exhibit N, page 10). Dr. Park also testified that the employee would need to continue to see a pain management specialist, and

agreed that his symptoms and need for additional treatment were related to both his current injury and his pre-existing condition (Employee's exhibit N, page 11). Dr. Park further testified that the employee's prior, multi-level fusion would have illuminated any motion at each level, and that loss of motion would have resulted in a significant limitation (Employee's exhibit N, page 12).

- At several points in his deposition, Dr. Park noted the employee's prior fusion would have caused more stress on the levels above and below the fusion, and would therefore have created a higher risk of developing injuries at the adjacent levels (Employee's exhibit N, page 8, 9, and 23). In discussing this interrelationship between his old fusion and the new injury, Dr. Park unequivocally indicated that, even though the employee's cervical spine was not very symptomatic before his August 25, 2003 accident, the pre-existing fusion was "the significant contributor" to his new injury and the resulting fusion at the C3-4 (Employee's N, page 16 and 17).
- Dr. Andrew Wayne's deposition was taken by the employer-insurer's attorney on July 1, 2006. In addition to reviewing his treatment records, Dr. Wayne offered insight into the employee's need for additional medical treatment, and how the employee's last injury and his pre-existing cervical fusions are related. Dr. Wayne reiterated that the employee will need to use a TENS unit, and the TENS will need to be checked and monitored (Employee's exhibit O, page 26). He also agreed that the employee will need to take Celebrex or other anti-inflammatories, and his liver function and other blood levels will need to be checked at least once a year (Employee's exhibit O, page 27 and 28).
- Dr. Wayne noted that the employee's need for further treatment "stemmed from combination of the pre-existing neck condition plus the subsequent injury" (Employee's exhibit O, page 14). During cross-examination by the employee's attorney, however, Dr. Wayne agreed that in his February 18, 2005 report, he had stated that "his medical treatment following his particular motor vehicle accident was a direct result of his injury occurring on August 25, 2003" (Employee's exhibit O, page 22).
- On the question of how these two injuries anatomically combined to impact the employee's current condition, Dr. Wayne confirmed the comments of Dr. Park. Dr. Wayne agreed that the prior three level fusion has resulted in the employee's cervical spine at those levels being "completely stiff", and limited the motion in the employee's neck. He further acknowledged and explained that the employee's three level fusion put additional stress on the C3-4 level and the level below the fusions, and made those levels more susceptible to injury from the August 25, 2003 accident (Employee's exhibit O, page 18 and 19).
- To counter the opinion of Ms. Susan L. Shea, the employer-insurer offered a vocational assessment and the deposition of Ms. June Blaine. Ms. Blaine is a certified rehabilitation counselor in Highland, Illinois. Based on a records review and a review of the employee's deposition, Ms. Blaine prepared a vocational assessment dated December 29, 2006. Ms. Blaine concluded that the employee was capable of working in sedentary to light capacity, and felt he was employable in the open labor market (Employer-insurer's exhibit 4, page 19 and 20).

APPLICABLE LAW

- **287.250.1** Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:
 - (1) If the wages are fixed by the week, the amount so fixed shall be the average weekly wage;
 - (2) If the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;
 - (3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;
 - (4) If the wages were fixed by the day, hour or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivisions, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision;
 - (5) If the employee has been employed less than two calendar weeks immediately preceding the injury, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury, except if the employer has agreed to a certain hourly wage, then the hourly wage agreed upon multiplied by the number of weekly hours scheduled shall be the employee's average weekly wage;
 - (6) If the hourly wage has not been fixed or cannot be ascertained, or the employee earned no wage, the wage for the purpose of calculating compensation shall be taken to the usual wage for similar services where such services are rendered by paid employees of the employer or any other employer;
 - (7) In computing the average weekly wage pursuant to subdivisions (1) to (6) of this subsection, an employee shall be considered to have been actually employed for only those weeks in which labor is actually performed by the employee for the employer and wages are actually paid by the employer as compensation for such labor.
- **287.250.4** If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the Division or the Commission may determine the average weekly wage in such manner and by such method as, in the opinion of the Division or Commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.
- **287.140.1** 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.

- The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is “possible” that the claimant will need future medical treatment. *Modlin v Sunmark, Inc.*, 699 S.W. 2d 5, 7 (Mo.App.1995). The cases establish, however, that it is not necessary for the claimant to present “conclusive evidence” of the need for future medical treatment. *Sifferman v Sears Roebuck and Company*, 906 S.W. 2d 823, 838 (Mo. App.1995). To the contrary, numerous cases have made it clear that in order to meet their burden, claimants are required to show by a “reasonable probability” that they will need future medical treatment. *Dean v St. Lukes Hospital*, 936 S.W. 2d 601 (Mo.App.1997). In addition, employees must establish through competent medical evidence that the medical care requested, “flows from the accident” before the employer is responsible. *Landers v Chrysler Corporation*, 963 S.W. 2d 275, (Mo.App.1997).
- Temporary total disability benefits are intended to cover the healing period, and are not warranted beyond the point in which the employee is capable of returning to work. Temporary total disability benefits are not intended to compensate the employee after his condition has reached the point where further progress is not expected. *Brookman v Henry Transportation* 924 S.W.2d 286 (Mo.App.1996). See also *Williams v Pillsbury Company* 694 S.W.2d 488, 489 (Mo.App.1985). The pivotal question in determining whether an employee is totally disabled is whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in his present physical condition. *Brookman Id.* at 290.
- Section 287.020.7 RSMo. provides as follows:

The term “total disability” as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

- The phrase “the inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the “inability to return to any reasonable or normal employment”. *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).
- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the “Second Injury Fund” hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

- Under Section 287.220.1 RSMo., the Second Injury Fund has no liability and the employer is responsible for full, permanent total disability benefits if the last injury “considered alone and of itself” results in permanent total disability. *Roller v Treasurer of the State of Missouri*, 935 S.W.2d 739 (Mo.App.1996) and *Maas v Treasurer of the State of Missouri*, 964 S.W.2d 541 (Mo.App.1998).
- The Second Injury is not liable for a disability where the employee had an asymptomatic pre-existing congenital deformity (a Kilppel-Fiel deformity) that was not an actual and measurable disability at the time of the last work injury. A pre-existing condition is not an actual and measurable disability where it does not interfere with the employee’s work duties. An employer, not the Fund, is liable where an asymptomatic pre-existing condition that did not previously interfere with work duties becomes symptomatic and results in an overall disability only after being aggravated by a work injury. *Portwood v Treasurer of the State of Missouri – Custodian of the Second Injury Fund*, Case No. WD67140, (Mo.App.W.D. April 17, 2000)

RULINGS OF LAW:

Issue 1. Average weekly wage and Rate of compensation

The employee was paid \$.38 a mile for driving a truck. Due to a three day orientation the employee only drove three days during his first week on the job, and was paid \$300.08 for those three days. There was no evidence as to the number of days

he drove during his second and only full week of employment, but the employee testified that he received \$254.00 for that week. On Monday, August 25th (the first day of what would have been his third week), the employee had his accident. There is no record of the employee receiving any compensation for that week.

Subsections (1) – (3) of Section 287.250.1 are not applicable since the employee's wages were not fixed by the week, month or year. Section 287.250.1(4) applies to employees whose wages were fixed by the day, hour or by the output of the employee. If "output" is construed to include miles driven then subsection (4) would apply since the employee was paid based on how many miles he drove. Section 287.250.1(5), however, creates an exception for employees who have been employed less than two calendar weeks immediately preceding the injury. At first glance this subsection does not appear to be applicable since the employee was employed for fifteen days (Monday, August 11, 2003 through the date of his accident on Monday, August 25, 2003). There are two other provisions, however, that change this initial impression. The last sentence of Section 287.250.1(4) provides "if the employee commenced employment on a day other than the beginning of the calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision". The second provision is set forth under Section 287.250.1(7) as follows: "in computing the average weekly wage pursuant to subdivisions (1) to (6) of this subsection, an employee shall be considered to have been actually employed for only those weeks in which labor is actually performed by the employee for the employer and wages are actually paid by the employer as compensation for such labor".

Applying these two provisions, I find that since the employee did not start driving a truck and receiving wages until after three days of orientation, his employment for purposes of determining his average weekly wage did not commence until he started driving the truck on August 14, 2003. Therefore, since the employee commenced employment on a day other than the beginning of a calendar week, the employee's first calendar week of August 11, 2003 through August 17, 2003, and his wages earned that week shall be excluded from computing his average weekly wage. Given the exclusion of his first calendar week, the employee was employed for less than two calendar weeks (August 18, 2003 through August 25, 2003), and his average weekly wage should be determined under the provisions of Section 287.250.1(5).

Section 287.250.1(5) provides that for employees who have been employed for less than two calendar weeks immediately preceding the injury, "the employee's average weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury,..." It should be noted that this provision is not limited to any specific time period such as the thirteen weeks specified in 287.250.1(4).

The employer-insurer provided sixteen weeks of earnings for two other drivers for Hogan Transports, Inc. Deborah D. Copeland earned sixteen paychecks totaling \$14,667.88. Alfonso C. Rodriguez earned a total of \$13,195.88, but his wage record skips one pay period and includes unexplained bonuses totaling \$450.00 (Employee's exhibit M).

Given the missing pay record and the inclusion of bonuses that may or may not have been applicable to the employee's job, I find that the wage record of Deborah D. Copeland is the best evidence of the "average weekly wage prevailing in the same or similar employment at the time of the injury". I therefore find that, pursuant to Section 287.250.1(5), the employee's average weekly wage was \$916.74. I further find that the employee's rate of compensation is \$611.16 for temporary total disability and permanent total disability, and \$347.05 for permanent partial disability.

It should be noted that even if it is determined that 287.250.1(5) is not applicable because the employee was employed for more than two calendar weeks, the same result would be reached by applying 287.250.4. This "catch all" or "safety net" provision provides that if the average weekly wage cannot fairly and justly be determined under subsections (1) to (3), "the Division or Commission may determine the average weekly wage in such manner and by such methods as, in the opinion of the Division or the Commission, based upon the exceptional facts presented, fairly determines such employee's average weekly wage". The evidence in this case demonstrates that the best method to fairly determine the employee's average weekly wage is to rely on the comparative earnings of driver Debra D. Copeland, as reflected in employee's exhibit M. It is also significant to note that the employer-insurer initially calculated the employee's average weekly wage and paid the employee's temporary total disability based on the comparative earnings of Debra Copeland (Employee's exhibit M).

Issue 2. Future Medical

The employee has requested an award of future medical aid. All the doctors agree that the employee will need pain management related treatment for his neck. The evidence also supports a finding that the employee may need further treatment for post traumatic stress disorder. The only argument that the employer-insurer has been able to make against an award of future medical aid is based on the statement by Dr. Wayne and Dr. Park that the employee's need for treatment is related to both the August 25, 2003 accident and the employee's pre-existing cervical fusion.

This position ignores both the applicable legal standard and the facts. Under Section 287.140 the employer is responsible for all medical aid necessary to cure or relieve the employee from the effects of his injury. The law does not require that the employee's accident be the sole or exclusive cause of the employee's injury and need for treatment. Under the version of Section 287.020 that was in effect at the time of the employee's accident, it is sufficient if the accident was "a substantial factor" in causing the employee's injury and need for treatment.

The facts in this case unequivocally support a finding that the employee's August 25, 2003 accident was a substantial factor

in causing his ongoing need for treatment. Other than a severely restricted range of motion and problems working overhead, the employee was doing very well before his accident, and was functioning without any form of medical treatment. Although the employee's underlying three level fusion was also "a substantial factor" in causing the severity of his injury and his need for additional treatment, that fact does not relieve the employer-insurer from its responsibilities under Section 287.140 to furnish additional medical treatment. It is also significant to note that the employer-insurer's expert, Dr. Wayne, stated in his initial letter that the employee's medical treatment was "a direct result of his injury occurring on August 25, 2003". The employer-insurer has already paid over \$58,000.00 in medical expenses, and has offered no medical or other evidence to explain why it should no longer be responsible for treating the same symptoms the employee has been experiencing since August 25, 2003.

Based on this evidence, the employer-insurer is directed to furnish additional medical aid pursuant to Section 287.140. The employer-insurer's obligation shall include all causally related treatment that is necessary to cure and relieve the employee from the effects of his August 25, 2003 accident, including treatment related to his cervical spine and the previously diagnosed post traumatic stress disorder.

Issue 3. Nature and Extent of Disability

Temporary Total Disability:

The employee has requested an award of temporary total disability covering the gap in treatment between the date he was last seen by Dr. Park and the date of his first visit with Dr. Wayne. The employer-insurer paid the employee's temporary total disability benefits through the date he was released by Dr. Park on May 24, 2004, and also paid temporary total disability while he was being treated by Dr. Wayne from February 18, 2005 through March 15, 2005.

Hind sight clearly indicates the employee has been totally disabled since August 25, 2003, and did not reach maximum medical improvement or the end of his healing period until he was released by Dr. Wayne. During Dr. Park's deposition he acknowledged that he released the employee from a surgical perspective, and did not construe his release to mean the employee did not need further pain management. The records of Dr. Wayne establish that Dr. Wayne did provide further treatment in the form of trigger point injections, medication and a TENS unit. The employer-insurer has offered no reasonable basis to explain why the employee was entitled to temporary total disability before and after the "gap", but should not be entitled to temporary total disability while he was waiting for the employer-insurer to agree to authorize additional treatment.

Based on the employee's testimony and the records of Dr. Wayne, I find that the employee was temporarily totally disabled from May 25, 2004 through February 17, 2005 for a total for 38 3/7 weeks. The employer-insurer is therefore directed to pay to the employee the sum of \$611.16 per week for 38 3/7 weeks, for a total award of temporary total disability equal to \$23,486.01.

Both the employee and the employer-insurer raised the possibility that they might be entitled to a debit or credit on the amount of temporary total disability previously paid based on a possible temporary total disability rate adjustment. Based on the finding that the employer-insurer's initial decision to use the comparable earnings of Deborah D. Copeland to determine the average weekly wage of the employee was correct, there is no significant difference between the temporary total disability rate used by the employer-insurer and the rate adopted by the Court. I therefore find that the temporary total disability rate used by the employer-insurer was substantially correct, and neither party is entitled to a temporary total disability rate adjustment.

Permanent Partial Disability:

The testimony of the employee and the medical records confirm that the employee has suffered a significant disability as a result of his August 25, 2003 truck accident. The ratings for the most recent cervical injury range from 20% by Dr. Park to 30% by Dr. Levy. No rating was provided for the post traumatic stress disorder. Based on this evidence, I find that the employee had a 25% permanent partial disability of his body as a whole due to the August 25, 2003 accident and the resulting injury to the employee's neck. The employer-insurer is therefore directed to pay to the employee the sum of \$347.05 per week for 100 weeks for a total award of permanent partial disability equal to \$34,705.00.

The total amount payable by the employer-insurer for temporary total disability and permanent partial disability is equal to \$58,191.01.

Issue 4. Liability of the Second Injury Fund

The most significant fact about the employee's current physical condition is that five of his seven cervical vertebrae are now fused. This objective finding, together with the employee's credible testimony regarding the significant level of pain he has in his neck strongly supports a finding that the employee is no longer capable of maintaining employment in the open labor market. Based on this evidence, and the credible opinions of Dr. Levy and Ms. Susan Shea, I find that the employee is permanently and totally disabled.

The Second Injury Fund argues that under the recent decision of the Western District Court of Appeals in *Portwood v Treasurer of the State of Missouri – Custodian of the Second Injury Fund*, Case No. WD 67140, the Second Injury Fund should not be liable for permanent total disability benefits. The Fund asserts that the employee's pre-existing condition was basically asymptomatic and did not become symptomatic and interfere with the employee's ability to work until after it was aggravated by the August 25, 2003 work injury.

The *Portwood* decision is consistent with previous case law, and will help protect the Fund in cases where the employee's pre-existing conditions were not symptomatic or disabling. The facts in this case, however, are substantially different from the facts in *Portwood*. In *Portwood*, the employee's pre-existing Kippel-Feil deformity in his cervical spine was congenital, and prior to the primary injury to the employee's shoulder, the pre-existing condition was "unknown, undiagnosed and asymptomatic".

In contrast, the employee's pre-existing condition in this case was a three level cervical fusion that was made necessary by a motor vehicle accident that fractured the employee's cervical spine. As a result of this three level fusion, the employee had no motion at the C4-5, C5-6 and C6-7 levels, with a corresponding decrease in his range of motion. Consequently, the employee had difficulty working overhead and lifting heavy objects. The employee also noted that it did have an effect on his ability to look his right and to his left while working as a truck driver.

Based on this distinction, I find that the holding in the *Portwood* case does not preclude a finding that the Second Injury Fund is liable for permanent total disability benefits.

This conclusion is also supported by the medical testimony regarding the interrelationship between the pre-existing fusions and the last injury. Although the last truck accident was clearly a substantial factor in causing a new injury to the employee's C3-4, both Dr. Park and Dr. Wayne offered convincing testimony that the last injury would not have been nearly as severe if the employee had not had the prior fusions. Anatomically, the doctors made it clear that the employee's current level of symptoms and disability are the result of both the pre-existing condition and the last injury.

Based on this medical evidence, I find that the last accident alone would not have rendered the employee permanently and totally disabled without the pre-existing three level fusion.

Based on the medical evidence and the testimony of the employee, I further find that the employee had pre-existing disability to his cervical spine equal to 25% of his body as a whole. I also find that the pre-existing condition was a hindrance or obstacle to the employee's employment or re-employment.

The testimony of Dr. Jerome Levy also supports a finding that the employee's pre-existing disability to his cervical spine and his last injury to his cervical spine combined synergistically and caused the employee to be permanently and totally disabled. The medical records and testimony by Dr. Park and Dr. Wayne establish that the employee reached his maximum level of medical improvement and the end of the healing period on March 15, 2005. Prior to that date, the employee was still receiving active treatment and was temporarily and totally disabled. After that date, the employee was permanently and totally disabled due to a combination of his pre-existing and primary injuries.

The employer-insurer's liability for permanent partial disability would therefore have commenced on March 16, 2005, and would have continued for 100 weeks through February 13, 2007. Since the employee's permanent total disability rate of \$611.16 is higher than his permanent partial disability rate of \$347.05, the Second Injury Fund is liable for the difference between these two rates during the time period covered by the employer-insurer's permanent partial disability payments. The difference between the permanent total disability rate and the permanent partial disability rate is \$264.11 per week. The Second Injury Fund is therefore directed to pay to the employee the sum of \$264.11 per week commencing on March 16, 2005 and continuing through February 13, 2007, for a total of \$26,411.00. Since the full amount of this total accrued prior to the date of the award, the Second Injury Fund shall make a lump sum payment for this amount.

In addition to the difference between the permanent total disability rate and the permanent partial disability rate, the Second Injury Fund is also liable for the full amount of permanent total disability benefits commencing on February 14, 2007. The Second Injury Fund is therefore directed to pay to the employee the sum of \$611.16 per week commencing on February 14, 2007, and said weekly benefits shall be payable for the lifetime of the employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is restored to his regular work or its equivalent as provided in Section 287.200.2.

ATTORNEY'S FEE

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

INTEREST

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

Date: _____

Made by:

Jack H. Knowlan, Jr.
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Patricia "Pat" Secrest
Director
Division of Workers' Compensation